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Australian Government  
Attorney-General's Department

Classification, Human Rights and  
Copyright Division

08/18046

1 August 2008

Mr Peter Hallahan  
Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
Parliament House  
Canberra ACT 2600

Dear Mr Hallahan

Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008

I refer to your invitation of 1 July 2008 to the Attorney-General's Department to make a submission to the Parliamentary inquiry into the Same-Sex Relationship (Equal Treatment in Commonwealth Laws - Superannuation) Bill 2008. This submission considers some of the key drafting approaches taken in the Bill. Officers of the Department are also available to appear before the Committee should this assist.

*Definition of 'child' in the Bill*

2. The intention in amending the definition of 'child' is to remove discrimination against children who are being raised in same-sex families. For these families, the common law definition of 'child' will not recognise a child's relationship with the lesbian partner of a child's mother or the gay partner of a child's father. Specific legislative action is therefore required in order to expand the common law meaning of 'child' to recognise these relationships.

3. Under common law and parenting presumptions in Commonwealth, State and Territory laws, the birth mother and biological father of a child are taken to be the child's parents. Some laws cover a situation where a woman undergoes an Artificial Reproduction Technology process using a donated ovum or sperm. However, there is no consistency within Australia as to whether a woman and her same-sex partner or a man and his same-sex partner would be recognised as the parents of a child. For example, only some jurisdictions, Western Australia, the Australian Capital Territory and the Northern Territory, presume the lesbian partner of the birth mother of an ART child to be the child's parent. I note that similar legislation has been enacted in NSW but is yet to be proclaimed.

4. The approach to defining 'child' under the Bill does not rely upon inconsistent State and Territory parenting presumption laws. To rely upon inconsistent State and Territory laws would result in children being treated differently under a Commonwealth law depending in which State or Territory they were conceived or born in.

5. In order to ensure that a child who is being raised by a same-sex family is considered to be a 'child' for the purposes of relevant laws a clear link between the child and the partner of the child's parent is required. This has been achieved by expanding the definition of 'child' to include a child who is the product of a relationship the person had as a couple with another person (regardless of whether they are the same or different sexes). In addition, a child cannot be the product of the relationship unless they are the biological child of at least one of the persons or was born to a woman in the relationship.
6. The definition is inclusive and therefore children who currently satisfy the definition of 'child' will not be affected by the extension of the definition. For example, if adopted children are already considered to be children for the purposes of a law they will continue to be considered as such.
7. The phrase 'product of a relationship the person had as a couple with another person' was used to make it clear the legislation was not referring simply to the common law meaning of children of a relationship which, as noted above, would not recognise a child's relationship to the partner of her parent in a same-sex relationship. The phrase does other work. For example, the phrase makes it clear that children of previous relationships are not included as such children are the product of a previous relationship.
8. The phrase requires that the child be the product of a particular relationship in the sense of being the result of a joint undertaking by both parties to bring a child into their relationship. Where both parties agree to the procedure that brings the child into their relationship and to the raising of the child, the child will be the product of their relationship. While the consent of the non-biological partner to his or her partner having a child is not an express requirement of the definition, the phrase 'product of a relationship' implies an element of joint undertaking which reflects a degree of mutual agreement to the surrogacy or IVF procedure. The phrase allows all the circumstances of a particular case to be considered. This is particularly appropriate in the context of a superannuation reversionary benefit where a reversionary benefit only becomes payable upon the death of a member and where ascertaining the intention of the partners perhaps several decades ago would be difficult. Examples of how this definition works are given in the Explanatory Memorandum.
9. The definition is non-discriminatory and applies equally to children of either same-sex or opposite-sex relationships. In order to ensure that the definition can not operate in a discriminatory way, children biologically linked to both parents also satisfy this definition.
10. A child will also be a 'product of a relationship' where they were born as a result of a surrogacy arrangement as long as there is a biological link with at least one of the people in the couple relationship. It will not cover situations where there is no biological link between the child and the commissioning parents. At present there is no consistent State or Territory approach to the recognition of surrogacy arrangements in Australia. The States and Territories are considering developing a more harmonised approach to surrogacy issues.

#### *References to 'couple relationship'*

11. Under the legislation as it currently stands, both unmarried opposite-sex de facto couples and married couples are entitled to reversionary benefits if they are considered to be in a 'marital relationship'. An example, may be found in the *Judges' Pensions Act 1968* which provides in

subsections 4AB(I) and (2):

- (1) For the purposes of this Act, a person had a marital relationship with another person at a particular time if the person ordinarily lived with that other person as that other person's husband or wife on a permanent and bona fide domestic basis at that time.
- (2) For the purposes of subsection (1), a person is to be regarded as ordinarily living with another person as that other person's husband or wife on a permanent and bona fide domestic basis at a particular time only if:
  - (a) the person had been living with that other person as that other person's husband or wife for a continuous period of at least 3 years up to that time; or
  - (b) the person had been living with that other person as that other person's husband or wife for a continuous period of less than 3 years up to that time and the Attorney-General, having regard to any relevant evidence, is of the opinion that the person ordinarily lived with that other person as that other person's husband or wife on a permanent and bona fide domestic basis at that time;whether or not the person was legally married to that other person.

12. The Bill will replace references in section 4AB to 'marital relationship' with references to 'couple relationship' in order to recognise same sex couples. Similarly, the Bill will replace references to 'husband or wife' with references to 'partners'.

13. It would be technically difficult to ensure that current rights to reversionary benefits were not disturbed if the Bill provided that only de facto couples had to meet the new criteria of being in a 'couple relationship' and living as 'partners' and leaving married couples as a separate marital relationship. Distinct treatment of different matters in legislation would create an inference that the distinction is material to the application of the legislation.

14. The effect of this amendment is to ensure that the definition of a relationship, for the purpose of the payment of death benefits, includes a same-sex relationship as well as an opposite-sex relationship. The inclusion of same-sex relationships within this new concept of couple relationships is not intended to change the treatment of married or opposite-sex de facto couples. It removes same-sex discrimination but does not change or re-define any other indicia of a relationship.

15. The approach in the Bill seeks to minimise the risk of potentially disadvantaging either group by treating them distinctly. Creating two groups would leave it open for a court to conclude that different tests were intended and could create the potential for marital status discrimination to be introduced.

#### *Retrospective commencement of the Bill*

16. The Bill amends various Commonwealth Acts to eliminate discrimination against same-sex partners and their children in the provision of reversionary superannuation benefits upon the death of a scheme member, and in related tax treatment of superannuation benefits.

17. The Government intended that the amendments would commence on 1 July 2008. It has been suggested that the amendments (if passed by the Parliament) could operate retrospectively from 1 July 2008.

18. In the case of the Australian Government defined benefit superannuation schemes retrospectivity raises a number of issues which would need to be closely considered.

19. First, it would be anomalous were a person to both receive the member's superannuation death benefit because he or she was the beneficiary of the member's estate and then after the operation of the retrospective provision came into effect, the same person might become entitled to another benefit payment because he or she was the member's same-sex partner. Whilst the Government could seek to recover the payment previously paid to the estate, this would be difficult and likely to cause financial hardship where the now recognised partner was only one of a number of recipients of the proceeds of the member's estate.

20. Second, where a pre-existing beneficiary is already being paid a pension, retrospectivity could result in an additional beneficiary being recognised. In these circumstances, it may be necessary to reduce the existing beneficiary's future pension payments to take account of the pension now having to be shared between two beneficiaries. Again such a situation could cause financial hardship to the existing recipient of the member's benefit. In addition, this outcome may not have been in accordance with the deceased member's wishes as they may have made separate financial arrangements for their same-sex partner knowing that their opposite-sex partner would receive their superannuation benefit.

21. From a legal perspective, the retrospective operation of the Bill and the amendments to the relevant Trust Deeds would give rise to significant legal complications. Those complications could only be addressed by the enactment of complex transitional and consequential amendments. Provision would also need to be made for the Commonwealth to provide just terms in respect of any acquisition of property affected by the retrospective application of the amendments to ensure that the Bill did not involve an impermissible acquisition of property for the purposes of s 51 (xxxi) of the Constitution.

#### *Relationship registers*

22. The Bill will enable prescribed relationships registered under prescribed State laws to be evidence of the existence of a same-sex relationship when considering who may be entitled to death or pension benefits. Regulations for this purpose will be made under the Judges' Pensions Act which is administered by the Attorney-General. For ease of administration these regulations are made to apply to the other Commonwealth schemes amended by the Bill.

23. I trust that this submission is of assistance to the Committee. The action officer for this matter is Peter Thomson who can be contacted on (02) 6250 6039.

Yours sincerely

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