



**SUBMISSION TO THE SENATE STANDING COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS**

**INQUIRY INTO THE SAME-SEX RELATIONSHIPS
(EQUAL TREATMENT IN COMMONWEALTH LAWS –
GENERAL LAW REFORM) BILL 2008**

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Executive Summary

ACL supports the basic intent of the Government's same-sex law reforms but believes that the Government's aim of ending unreasonable discrimination based on a couple's sexuality can be achieved without redefining parenthood and children as this bill unfortunately does.

ACL's concerns are primarily centred on the illogical and highly problematic proposed definition of a child as the product of a same-sex relationship. Such a definition is nonsensical. Furthermore the types of parenting arrangements that this bill seeks to legitimise are highly controversial and the Australian public has not been given the opportunity it deserves to debate these issues in any meaningful way.

There are better ways of recognising those in parental roles who are not a child's biological or adoptive parents, such as a test of substantial dependency. This would provide a sound basis for policy which meet the needs of adults and children (and which recognises the caring position of other adults who are not parents) in such circumstances but without normalising same-sex parenting.

Without such amendments, ACL believes the bill should not proceed.

Lack of time for meaningful consultation

Late on Friday 5th September, ACL received an email inviting us to make a submission to this inquiry, giving a deadline of Monday 15th September. This gives a mere six days to analyse and comment on a significant and highly complex piece of legislation whose explanatory memorandum alone runs to over 200 pages.

Such a short deadline undermines the purpose of consultation and effectively disenfranchises the Australian community from the opportunity to participate in the discussion of very significant legislation with far-reaching social consequences. Few interested groups or individuals will be able to comment within the time available (and it is possible that many will not even find out about the inquiry until after the closing date for submissions). The compressed timescale of this inquiry means that the Australian community has not been provided with a meaningful opportunity to influence this legislation.

Marriage and family life

ACL is pleased that the bill equates a same-sex relationship with a de facto heterosexual relationship, rather than equating it with marriage, as the recent superannuation bill did. The Attorney-General is right to note in his second reading speech that:

...the policy of both sides of parliament on marriage is very clear. It reflects the widely held view in the community that marriage is between a man and a woman. And it is defined as such in Commonwealth legislation. This in turn reflects the traditional view of marriage that has been built up over many centuries.¹

However, we cannot agree with the Attorney-General's comment later in the same speech that, "This legislation in no way, shape or form diminishes, alters or undermines the institution of marriage."²

Marriage and family are two sides of the same coin. In the "traditional view of marriage that has built up over many centuries," marriage was the unique relationship that created a new family. Indeed as recently as 1948, the UN *Universal Declaration on Human Rights* gave expression to such a link in its statement that 'men and women...have the right to marry and to found a family.'³ It was the marital union which led to the conception and nurture of children, providing them with the different role models and parenting styles of a mother and father.

Whilst large numbers of children are now born to unmarried parents, it remains the case that the majority of parents still link marriage with founding a family: in 2006, the Australian Bureau of Statistics reported that 67% of births were to parents in a registered marriage⁴.

Amending the definition of parenthood in an attempt to give joint recognition to the biological parent of a child and his / her partner as a non-biological equal 'parent' *does* have the potential to undermine marriage by further eroding the link between marriage and the foundation of family.

It is therefore important that extreme care is taken to remove unreasonable discrimination based on sexuality without fundamentally altering definitions of parenthood in the process.

¹ *Hansard*, House of Representatives, Thursday 4th September 2008.

² *Hansard*, House of Representatives, Thursday 4th September 2008.

³ *Universal Declaration of Human Rights*, article 16, United Nations, 1948.

⁴ *Births Australia 2006*, Australian Bureau of Statistics, catalogue number 3301.0

Sadly the drafters of this bill have not demonstrated the delicacy required. Rather than simply addressing discrimination, this bill's effect will be much greater: its passage will further normalise the highly abnormal situation of same-sex parenting.

Both major parties have rightly discerned that it is of significant importance to the Australian community that marriage should continue to be upheld as a relationship between one man and one woman, voluntarily entered into for life. Given the strength of this sentiment, it is quite surprising that the Government expects the same community to happily accept sweeping reforms that legitimise same-sex parenting. No wonder the inquiry's consultation period was kept short!

How does the bill legitimise same-sex parenting?

ACL of course recognises that some Australian children do grow up in the care of a same-sex couple. Similarly other children (whose needs are not recognised in this bill) grow up in the care of grandparents or other carers who are in a significant parenting role even though they are not the child's parents.

Some children (possibly the majority) in same-sex households were actually conceived and born into a previous heterosexual relationship which has since dissolved. They already have a mother and a father, though now they only live with one of their parents. Their mother or father's homosexual partner is thus in a position akin to a step-parent. Such a child is not a 'product of the relationship' between the new couple and therefore the same-sex partner is (quite appropriately) not treated as a parent under this legislation, though we note that the bill does amend the definition of step-parent to include de facto partners (whether heterosexual or homosexual).

Some same-sex couples determine that they wish to bring a child into their relationship. A lesbian couple may use a sperm donor so that one woman can become pregnant, or may ask a male friend to father the child. A gay couple would need the services of a surrogate mother, be she an unknown woman or a female friend, who would become pregnant using sperm from one partner, carry the child to term, and then relinquish it to the care of the male couple. (It should be noted that surrogacy is a rare event in Australia and public debate on this highly complex situation is not settled as will be discussed further below.)

The current bill seems primarily designed to help this small group of homosexual couples (already a small minority of the Australian population) to achieve equal recognition as a legal parent for the partner who is not biologically related to the child.

The legal recognition that a child may have two mothers (but no father) or two fathers (but no mother) certainly does serve an agenda that seeks to normalise same-sex parenting. The fundamental societal and legal presumption that a child is the offspring of one woman and one man is gone. Same-sex parenting of a child from birth may be a relatively rare scenario but to grant almost full legal recognition in this way will entrench it as socially desirable – after all it is upheld in law.

The bill assumes homosexual parenting is equal to heterosexual parenting

The Government's desire to grant parenting rights to both partners in a homosexual couple seems to indicate that it believes homosexual parenting is equivalent to heterosexual parenting: that it has accepted the gay lobby's claim that what matters is that a child is loved and that its family construct is unimportant.

ACL does not dispute that a homosexual couple may dearly love a child in their care. However, we believe that the family environment is very significant in a child's development and that it is in a child's best interest to be raised by its own mother and father. Though the circumstances of life mean that some children are raised by only one parent (due to death, desertion or divorce), and some are raised by homosexual parents, ACL contends that these circumstances are less than ideal as they do not provide the different and complementary care of a mother and a father.

David Popenoe, Professor of Sociology at Rutgers University in New Jersey summarises the current knowledge on this topic in the following statement:

Based on accumulated social research, there can now be little doubt that successful and well-adjusted children in modern societies are most likely to come from two-parent families consisting of a biological mother and father⁵.

However loving and well-motivated a same-sex couple may be, they cannot provide the love of both a father and a mother which a child both needs and deserves. Deliberately creating a child to be placed in a situation where it will lack either a mother or a father is irresponsible and the state should not be complicit in such an action, either by allowing access to reproductive or surrogacy services for such couples, or by granting both partners equal recognition as parents.

⁵ David Popenoe, 'Can the nuclear family be revived?' *Society*, no 36, pp28-30

Admittedly, owing to previous policy decisions and court judgments, Australia now faces a situation in which a very small number of children are born into homosexual households each year. We accept that Government policy should include a mechanism to recognise those children and their relationships with the adults who nurture them. However, Government policy should not serve to normalise this situation and therefore encourage more homosexual couples to raise children, who will be denied their birthright of their mother and father.

The bill pre-empts a national debate on surrogacy

In its revised definition of parenthood, the bill pre-empts a national debate on surrogacy. The explanatory memorandum notes that the bill will enable children conceived through surrogacy arrangements (whether the commissioning parents are a heterosexual or homosexual couple) to be recognised. It thus provides legal recognition for commissioning parents in surrogacy arrangements, yet the Government has not sought to open any national debate on surrogacy and there is no regulatory framework to underpin such a move.

Surrogacy is a complex legal and ethical area but no consideration appears to have been given to this. Is it in a child's best interests to be conceived and born into a situation in which s/he has up to six potential parents (the egg donor, the sperm donor, the surrogate and her partner, and the commissioning couple)? What genetic bewilderment might the child suffer as a result? What does surrogacy do to the surrogate herself – can emotional manipulation, coercion or exploitation be successfully avoided? Can the commissioning couple truly view the child as their joint responsibility or is it more likely that the unrelated party will disown the child if the couple splits?

Legal questions that remain unresolved include the status of surrogacy agreements (are they enforceable?), the position of the adults if one party seeks to withdraw from the surrogacy arrangement, and the legal parentage of the child if the parties dispute custody. Terrible legal cases have been fought through the courts in Australia and overseas over such issues, always to the detriment of all concerned, and it is surprising that this bill should address surrogacy without giving due consideration to the wider issues it raises.

The bill defines a child as a 'product' of a same-sex relationship

It is unclear whether all children (even those born to a heterosexual couple) are to be redefined as 'product of the relationship' or only those children born as a result of a same-

sex couple's decision that one partner will father or conceive a child which both partners will then raise.

The explanatory memorandum seems to suggest that the existing definition of child will be maintained for children conceived in the normal way to a heterosexual couple (the vast majority of Australian children) but that a new definition, 'product of the relationship' will be used to expand the classes of children for the purposes of the acts to be amended.

However, the same explanatory memorandum then seems to suggest, in Example 6, that children born to heterosexual parents are 'products of the relationship' after all. This would mean that children born in the normal way to a mother and a father would be redefined as being the biological child of at least one person in the relationship (rather than both) or the birth child of a woman in the relationship, apparently removing the concept that a child is biologically linked to both its father and its mother. Is there now to be a dual definition of a child born to a heterosexual couple? If so, does the Government think it likely that most Australian parents will be happy to see their own parenting relationships redefined to accommodate the needs of a minority group within a minority group?

The bill clearly adds a new definition of child to cover children born as the result of a same-sex couple's decision to that one of them will become a parent so that both can raise a child. In doing so, it gives implicit endorsement to the methods used to conceive such a child and the family construct in which s/he will grow up.

We assume that 'product' in this context is another term for 'offspring' (unless children are being commodified as products – which we do not think is the Government's intention). However, the simple fact remains that a same-sex couple simply cannot produce offspring and it requires an Orwellian degree of 'doublethink'⁶ to pretend that they can: such biological nonsense should not be written into federal law unless one of the world's most stable democracies is now content for the law to be 'an ass.'⁷

One of the consequences of the choice to be in a same-sex relationship is that such a couple can only provide half of the genetic material needed to conceive a child. The couple is, by its very nature, infertile. As individuals, members of the couple may be fertile and one partner may be able to use artificial means that result in the conception of a child. But this

⁶ Double think is, "The power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them...to deny the existence of objective reality and all the while to take account of the reality which one denies..." George Orwell, *Nineteen Eighty-Four*. Martin Secker & Warburg Ltd, London, 1949, pp 220

⁷ Charles Dickens, *Oliver Twist*, 1838

child is not the product of the same-sex relationship: s/he is the offspring of a father and a mother who provided the necessary DNA.

Such a child may, however, be nurtured by this same-sex couple. S/he is not a 'product of their relationship' but these two gay men or lesbian women will be of great significance to the child as s/he grows up under their care. There are, therefore, good reasons to recognise in law the important role that both partners play in the child's life but this must not be done in a way that pretends that both partners are parents when they are not.

Improving the bill

ACL believes that there is a better way to recognise a partner in a homosexual relationship who is not biologically related to a child but nonetheless cares for and supports that child. This method recognises that such a situation is a reality for some homosexual couples and some children but does not normalise same-sex parenting in the process.

Rather than trying to make a square peg fit a round hole, as the current definition of child does in trying to force a parental link to an unrelated adult, the bill should instead focus on recognising those adults who are substantially responsible for the nurture of a child and on whom the child is substantially dependent.

Such a definition already exists within the Judges' Pension Act and ought to be applicable to other federal laws. Adopting nurture and dependence as the basis of policy would avoid the legal fiction that is currently being perpetrated in this bill, would avoid implicitly endorsing same-sex parenting, and would provide recognition for a much larger group of non-parent carers such as grandparents and stepparents. Rather than redefining parenthood to encompass people who are not in fact parents, the dependency test would focus on whether or not a child had been brought up in that adult's household and was substantially dependent on that adult.

Same-sex parenting is an exception to the normal legal and social expectation that a child has a mother and a father. The dependency test is an exceptional measure to address this exceptional circumstance. Another method would be to treat the unrelated adult as a partner of a parent, much as step-parents are treated.

If the Government's purpose is to end unreasonable discrimination based on sexuality then the dependency test would achieve that goal in relation to children in same-sex households, without resulting in the social engineering that is embedded in the current bill.

Conclusion

The Australian Christian Lobby supports the basic intent of the Government's same-sex law reform bill but is strongly believes its aims should and can be achieved without redefining parenthood and children.

ACL holds grave concerns about the implicit assumptions in the bill that homosexual couples should have access to children through surrogacy and ART arrangements when this debate is by no means settled within Australian society and under Australian law.

The definition of a child proposed in this bill is based on biological nonsense as a same-sex relationship cannot produce children. Such biological fiction should not be written into Commonwealth legislation, particularly when the Government's aims can be achieved by applying by other means. Bizarre social engineering is completely unnecessary to achieve the aims of the bill.

If there is a need to clarify which adults are responsible for a child, a dependency test could be used. This would retain the recognition that children should be given every opportunity in life to have both a mother and a father. Whilst some children through life's circumstances will find themselves without either a mother or a father, that should be seen as the tragic exception not the desirable rule.

ACL recommends that the bill should not proceed in its current form.

ACL National Office

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