



## Same-Sex Relationships (Equal Treatment in Commonwealth Laws— Superannuation) Bill 2008

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## Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008

**Date introduced:** 28 May 2008

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** Sections 1-3 on Royal Assent, Schedules 1-3 and 5 on a date fixed by proclamation or 6 months after the date of Royal Assent – whichever is the earliest. The Bill specified that Schedule 4 was to commence on 1 July 2008, however the Bill had not passed through Parliament on that date. See further discussion on commencement issues below.

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

This Bill seeks to amend the following Acts governing Commonwealth superannuation schemes and Commonwealth regulation of superannuation, in order to increase coverage of same-sex couples and their children in superannuation and related matters:

- *Parliamentary Contributory Superannuation Act 1948*
- *Superannuation Act 1922*
- *Superannuation Act 1976*
- *Federal Magistrates Act 1999*
- *Judges Pensions Act 1968*
- *Law Officers Act 1964*
- *Defence Force Retirement and Death Benefits Act 1973*
- *Defence Forces Retirement Benefits Act 1948*
- *Retirement Savings Accounts Act 1997*
- *Small Superannuation Accounts Act 1995*
- *Superannuation (Government Co-contributions for Low Income Earners) Act 2003*

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- *Superannuation Industry (Supervision) Act 1993*
- *Income Tax (Transitional Provisions) Act 1997, and*
- *Governor-General Act 1974.*

## Background

This Bill is the first element in a wider set of changes seeking to end discriminatory treatment of same-sex couples in all Commonwealth laws. The Senate Committee enquiring into this Bill has combined consideration of this Bill with its consideration of the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 and the Evidence Amendment Bill 2008. All three Bills include provisions designed to treat same-sex relationships in a similar manner to married and de facto relationships.<sup>1</sup> The Government has recently introduced a further Bill: the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill, intended for passage within the Spring sittings.<sup>2</sup>

In May 2007 the Human Rights and Equal Opportunity Commission (HREOC) published a significant report: *Same Sex: Same Entitlements* ('the Report' or 'the HREOC Report').<sup>3</sup> This Report identified 58 Federal laws that breached the human rights of members of same-sex couples, and in some cases the rights of children. Chapter 13 of the Report listed a number of areas of superannuation law that denied same-sex couples equal treatment in the payment of benefits; as enjoyed by opposite-sex couples.<sup>4</sup>

The general response to the HREOC Report was positive, with some indications showing public support for the Report's recommendations that these areas of inequality should be dealt with.<sup>5</sup> The former government did not make a formal response to the Report prior to

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1. See generally the Senate Legal and Constitutional Affairs Committee web-site: [http://www.aph.gov.au/senate/committee/legcon\\_ctte/inquiries.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/inquiries.htm) accessed 18 August 2008.
  2. The schedule of 'Legislation Proposed for Introduction in the 2008 Spring Sittings' can be found at [http://www.dpvc.gov.au/parliamentary/docs/proposed\\_legislation.pdf](http://www.dpvc.gov.au/parliamentary/docs/proposed_legislation.pdf) and the Minister's Press Release on the topic can be found at: [http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases\\_2008\\_SecondQuarter\\_30April2008-RuddGovernmentmovesonsame-sexdiscrimination](http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_SecondQuarter_30April2008-RuddGovernmentmovesonsame-sexdiscrimination) both accessed on 18 August 2008.
  3. The Human Rights and Equal Opportunity Commission, *Same Sex: Same Entitlements – National Inquiry into Discrimination against People in Same Sex Relationships: Financial and Work Related Entitlements and Benefits*, Canberra, May 2007, in particular p. 10.
  4. *ibid.*, pp. 283 ff.
  5. For example, Misha Schubert, 'Public backs gay unions, equality', *The Age*, 21 June 2007, p. 3; AAP, 'No justice for gays' *The Australian*, 22 June 2007, p. 9; Rachel Nickless, 'Same-Sex couples, 2nd-class citizens', *Australian Financial Review*, 22 June 2007, p. 30.

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the 2007 election.<sup>6</sup> During the election campaign Mr Turnbull affirmed a pledge that the Coalition would extend Commonwealth employee superannuation death benefits to same-sex couples.<sup>7</sup>

In 2004 the Coalition Government made changes to superannuation law which had introduced the concept of ‘interdependency’, a category which, in many cases, covers same-sex couples.<sup>8</sup> The then Prime Minister, the Hon. John Howard, commented that this innovation had been undertaken at the same time as the decision to explicitly exclude same-sex couples from the *Marriage Act 1961*.<sup>9</sup> The Coalition Government rejected the then Opposition’s attempts to provide greater superannuation coverage to some same-sex couples through an amendment to the [Judges Pensions Amendment Bill 2007](#), saying it was inappropriate to deal with one defined benefits scheme in isolation. Further background on the Coalition’s position and the interdependency provisions are provided below.

For some time the ALP has had policies favouring the liberalisation of laws with respect to same-sex couples, and, on the release of the HREOC Report, the then Shadow Attorney General, Senator the Hon. Joe Ludwig, committed a Labor government to ending all forms of discrimination in federal legislation including discrimination in the payment of superannuation entitlements.<sup>10</sup>

Throughout the life of the 41<sup>st</sup> Parliament there were various calls for the surviving partner of a same-sex couple to have the same rights as the surviving partner of an opposite-sex couple in relation to the payment of superannuation benefits in the event of death.<sup>11</sup>

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- 6 Patricia Karvelas, ‘Cabinet leaves Howard to decide on rights’, *The Australian*, 28 August 2007, p. 4.
  - 7 ABC News, ‘Turnbull pledges death benefits for some same-sex couples’, 7 Nov 2007, <http://www.abc.net.au/news/stories/2007/11/07/2084770.htm> accessed 18 August 2008.
  - 8 The Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004 (Cth), Schedule 2.
  - 9 John Howard, Press Conference Transcript, 27 May 2004, ‘We will firstly amend the Marriage Act, to insert into the Act the commonly accepted definition of a marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life ... Separately we will be legislating ... to expand the definition of dependent for the purposes of paying superannuation death benefits.’
  - 10 Senator Joe Ludwig, ‘Labor welcomes Human Rights and Equal Opportunities Report on same-sex entitlements’, *media release*, 21 June 2007.
  - 11 For example - Nicola Roxon MP & Anthony Albanese MP, ‘Government refuses to introduce Superannuation Bill’, *media release*, Canberra, 2 June 2004; Senator Lyn Allison, ‘Democrats fight on for same-sex couples’, *media release*, Canberra, 9 December 2005; Senator Kerry Nettle, ‘Why hesitate on gay law reform?’, *media release*, Canberra, 23 October 2006; Tanya Plibersek, ‘The discrimination that makes a lie of equality’, *Sydney*

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After the 2007 election the Attorney-General's Department undertook an audit of Commonwealth laws to identify provisions that discriminate against people in relationships (taking account of the HREOC report). The focus of the Commission's report had been on financial and work-related legislation that discriminates against same-sex couples and their children. The Department's audit also covered other areas of life in Australia.

The audit confirmed the findings of the HREOC Report – identifying further federal legislation that discriminates against same-sex couples and their children, particularly in the areas of taxation, social security, superannuation, workplace laws and education assistance.<sup>12</sup>

The introduction of this Bill was announced in a press release by the Attorney-General the Hon. Robert McClelland MP on 30 April 2008,<sup>13</sup> and it was presented in the context of further changes seeking to end the discriminatory treatment of members of same-sex couples in all Commonwealth laws.<sup>14</sup>

### Committee consideration and commencement

On June 18 the Bill was referred to the Senate Legal and Constitutional Affairs Committee for consideration. The motion debated was put by the Opposition and contained no specific date for reporting, instead requiring that the Committee should not report until there had been an opportunity to consider all legislation relating to the HREOC Report. This proposition was amended by the Opposition to include a reporting date of 30 September 2008, or when the related legislation had been examined – whichever was the earlier.

The debate regarding the Bill's referral was impassioned, with strong contributions from both sides of both chambers. In the House of Representatives several members of the Coalition spoke in the belief that the Committee inquiry could be conducted in time for the proposed commencement date of 1 July 2008. For instance Mr Georgiou commented:

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*Morning Herald*, 21 March 2007, p. 13; Senator Joe Ludwig, 'Labour welcomes Human Rights and Equal Opportunity Report on Same Sex Entitlements', *media release*, Canberra, 21 June 2007; Phillip Coorey and Sherrill Nixon, 'Turnbull takes on mission for gay and lesbian rights', *Sydney Morning Herald*, 13 August 2007, p. 7.

12. The Hon. Robert McClelland MP, Attorney General, Answer in writing to Question No. 34, House of Representatives, *Debates*, 13 May 2008, p. 2620.
13. Mr McClelland, 'Rudd Government moves on discrimination', *media release*, Canberra, 022/2008, 30 April 2008.
14. See for instance references to the broader agenda in Mr McClelland's Second Reading Speech, House of Representatives, *Debates*, 4 June 2008, p. 5.

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The amendments proposed in this bill have been prioritised due to the time-critical nature of the reforms that will allow reversionary death benefits to be paid to same – sex partners and their children where they presently have no entitlement.<sup>15</sup>

He expressed the hope the Committee would undertake its review ‘expeditiously’ so that the ‘reform can be implemented as planned on 1 July 2008.’<sup>16</sup> The Hon. Mr Pyne also expressed the hope that the inquiry could be conducted before that date.<sup>17</sup>

The Hon. Mr Turnbull suggested that, irrespective of the Committee’s reporting date, the Government could choose to backdate the legislation

We know the tax laws and laws relating to superannuation are routinely—in fact, almost invariably—made effective as of the date of announcement....There is no reason why referral to a committee should defer the granting of the benefits that both sides of this House are committed to in terms of substance and in terms of the overall objective.<sup>18</sup>

He went on to argue that the Government could choose the commencement date, suggesting ‘budget night, the day after the election or whatever date you choose’, and also pointing out they could make it from when he, Mr Turnbull, announced the now Opposition’s support for such laws. He said it was a matter for the Government because it was entirely a government liability.<sup>19</sup> The Attorney-General responded to these calls:

I note that there is a suggestion for backdating. But the problem is that when you are talking about reversionary benefits you are usually talking about a fortnightly or monthly contribution; that is, a contribution that is in lieu of income and sustains the person. If there is a gap—particularly a substantial gap—there are complications as to how that individual is to sustain themselves and their family until the legislation is passed. There are complications. I appreciate the numbers in the Senate, but I would implore those opposite to prevail upon their senators to conduct their inquiry as expeditiously as possible.<sup>20</sup>

Senator Ludwig elaborated further on problems with backdating the commencement:

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15. Mr Petro Georgiou, MP, Second Reading Speech Debate, House of Representatives, *Debates*, 4 June 2008, p. 4501.

16. *ibid.*

17. The Hon. Mr Christopher Pyne, MP, Second Reading Speech Debate, House of Representatives, *Debates*, 4 June 2008, p. 4416.

18. The Hon. Mr Malcolm Turnbull, MP, Second Reading Speech Debate, House of Representatives, *Debates*, 4 June 2008, p. 4506.

19. *ibid.*

20. Mr Robert McClelland, Second Reading Speech Debate, House of Representatives, *Debates*, 4 June 2008, p. 4416.

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There are of course significant legal and practical difficulties with backdating. The opposition might say, ‘Let’s just backdate it.’ Well, superannuation trustees are required to make payments under the law as it stands, not under what it might be in the future. If payments were to be made now, either to certain beneficiaries or to a deceased’s legal estate, it would be very difficult to unwind those payments at a future date when the law changed.<sup>21</sup>

### Position of significant interest groups/press commentary

There was considerable editorial comment welcoming the introduction of this Bill.<sup>22</sup> Press comment noted that the amendments in this Bill were but the first step in ending discrimination against members of same-sex couples.<sup>23</sup> Business groups are reported as supporting the Bill.<sup>24</sup>

The Association of Superannuation Funds of Australia (ASFA) has adopted a principle of supporting superannuation and tax legislation which does not discriminate against partners of any gender.<sup>25</sup> ASFA has put in a submission to the Senate Inquiry exploring various issues, including the urgency of the need to cover non-interdependent same-sex couple (see discussion of interdependence below) and providing statistical information on the various relationship types believed to be covered (or not covered) by superannuation funds. They conclude that ‘the Bill should be passed as it currently is drafted.’<sup>26</sup> The ASFA position is reported as similar to that of the Australian Institute of Superannuation Trustees.<sup>27</sup>

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21. Senator Ludwig, Senate, *Debates*, 18 June 2008, p. 2636.
  22. ‘Equality for gay couples long overdue’, *The Advertiser*, 1 May 2008, p. 18; ‘Laws a recognition that attitudes have changed’, *West Australian*, 1 May 2008, p. 20; ‘Overdue move towards equality’, *The Sydney Morning Herald*, 1 May 2008, p. 12; ‘Gay rights a critical first step in ending discrimination’, *The Age*, 2 May 2008, p. 14.
  23. *ibid.*, and Nicola Berkovic and Chris Merritt, ‘Reforms for gays are ‘incomplete’’, *The Australian*, 1 May 2008, p. 4.
  24. David Crowe and Rachel Nickless, ‘Key support on laws’, *Australian Financial Review*, 1 May 2008, p. 7.
  25. ASFA, *Policy Principles*, June 2007, Principle 19.3.
  26. Submission no. 28, Senate Legal and Constitutional Affairs Committee Inquiry into the Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008 (Senate Inquiry), [http://www.aph.gov.au/senate/committee/legcon\\_ctte/same\\_sex\\_entitlements/submissions/sub\\_28.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/sub_28.pdf) accessed on 18 August 2008.
  27. *Financial Standard*, ‘ASFA supports same sex super bill’, 1 August 2008, <http://www.financialstandard.com.au/news/view/23661/>.

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The Australian Christian Lobby (ACL) has been reported as noting that the Bill would need to be scrutinised to ensure that it did not undermine the institution of marriage, while at the same time considering there was a case to remove discrimination in many laws, especially where children were being disadvantaged by current laws.<sup>28</sup> A subsequent media release from ACL has discussed concerns over the definitions being used and expressed a desire to maintain the current, more explicit, references to marriage and also an interest in examining the merits of addressing discrimination in superannuation laws against those in other types of interdependent relationships.<sup>29</sup>

The Australian Human Rights Commissioner, Mr Graeme Innes, welcomed the introduction of this Bill.<sup>30</sup> A significant number of submissions have been received by the Senate Inquiry from organisations and general members of the public. These have to some extent been divided between those supporting the Bill on the grounds of equity/human rights and justice (largely from same-sex lobby groups, academics, human rights organisations and members of the general public) and those opposing the Bill on the grounds that it promotes same-sex relationships and, arguably, demotes the significance of heterosexual marriage. These submissions have also expressed concern regarding the drafting of the Bill and the need to provide coverage of interdependent relationships (largely from church groups, groups identifying as ‘pro-family’ and members of the general public). Finally there are submissions to the Inquiry which reject the Bill and its principles entirely.<sup>31</sup>

### Coalition/Minor Party policy position/commitments

#### Coalition

In his Second Reading Speech on the Bill Mr Pyne gave a detailed historical and current account of the Liberal Party’s support for the rights of same-sex partners, concluding that reform in this area ‘would have come no matter the outcome of the election’.<sup>32</sup> Dr Nelson

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28. Misha Schubert, ‘Law reforms for gay couples,’ *The Age*, 30 April 2008, <http://www.theage.com.au/articles/2008/04/29/1209234861987.html> accessed on 5 June 2008.
  29. Australian Christian Lobby, ‘More thought needed in framing same-sex super law changes,’ *media release*, 4 June 2008, [http://www.acl.org.au/pdfs/load\\_pdf\\_public.pdf?pdf\\_id=1103&from=NATIONAL](http://www.acl.org.au/pdfs/load_pdf_public.pdf?pdf_id=1103&from=NATIONAL) accessed on 5 June 2008.
  30. Human Rights and Equal Opportunity Commission, ‘Superannuation Bill a great step forward in ending discrimination against couples,’ *media release*, Canberra, 28 May 2008.
  31. See the range of submissions on the Committee’s web-site: [http://www.aph.gov.au/senate/committee/legcon\\_ctte/same\\_sex\\_entitlements/submissions/sublist.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/sublist.htm) accessed on 25 August 2008.
  32. Mr Chris Pyne, Second Reading Speech Debate, House of Representatives, *Debates*, 4 June 2008, p. 4485.

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touched on similar issues, commenting that '[t]he Liberal Party yields to no-one in its historic commitment to reform in this area.'<sup>33</sup> During the 2007 election, and subsequently, the Coalition has indicated a willingness to give same-sex couples certain economic recognition.<sup>34</sup> There have, however, been tensions between members of the Coalition who support such amendments more vigorously<sup>35</sup> and members who are not unambiguously warm towards the principles behind the Bill's proposed amendments.<sup>36</sup> Dr Nelson, who has been described as being supportive of 'gay rights',<sup>37</sup> earlier commented with respect to the Bill:

we will carefully scrutinise the proposals that are being put up by the Government. And if they are affordable and reasonable, we will certainly be providing support to them.

...However, we must live in a country where you do not pay a dollar more in tax nor receive a dollar less in support from your country and welfare, by virtue of your sexuality...We will carefully examine the proposals that are being put up by the Government. And if they are affordable and if they are reasonably achievable, then they will enjoy our support....<sup>38</sup>

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33. Dr Brendan Nelson, Second Reading Speech Debate, House of Representatives, *Debates*, 4 June 2008, p. 4479.
34. 'Turnbull pledges death benefits for some same-sex couples' *ABC News*, 7 November 2007, <http://www.abc.net.au/news/stories/2007/11/07/2084770.htm>, accessed on 2 June 2008; AAP, 'Nelson backs gay reforms', 2 December 2007, <http://www.smh.com.au/news/National/Nelson-backs-gay-reforms/2007/12/02/1196530462124.html>, accessed on 2 June 2008; also Gerard McManus, 'Nelson support for gay couples', *Herald Sun*, 3 December 2007. For a report of more far-reaching support within the Coalition see Renato Castello, 'Young Liberals win same-sex support', *Sunday Mail Adelaide*, p. 35, 20 April 2008.
35. Notably Dr Nelson and Messrs Pyne, Georgiou and Turnbull.
36. For comment on these tensions see Misha Schubert, 'Coalition delays same-sex couple laws', *The Age*, 4 June 2008. A similar tension has existed elsewhere within the Coalition, see, for instance reports on the passage of similar legislation in Victoria: Paul Austin and David Rood, 'Victoria to recognise gay couples: Historic vote splits Coalition leaders', *The Age*, 13 March 2008, p. 3.
37. See for instance both Glenn Milne, 'Gays get Nelson's support', and Gerard McManus, 'Nelson support for gay couples', *Sunday Herald Sun*, 3 December 2007, pp. 4 and 8 respectively.
38. Dr Brendan Nelson, Leader of the Opposition, Interview with Jane Cowan, ABC Radio Program AM, 30 April 2008.

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The proposition that the Coalition's support was conditional on concepts of 'reasonableness' and 'affordability' was commented on in the press.<sup>39</sup>

In the Second Reading Debates there were many Coalition speakers who were concerned at the effects of the legislation. Mr Katter, speaking as an independent, represented a more emphatic end of this spectrum, speaking vehemently against the Bill and refusing to support the Coalition's proposed amendment because it gave countenance to same-sex relationships.<sup>40</sup> Common themes of concern were the undermining of the status of marriage, the position of children under the Bill and the need to incorporate interdependent relationships into the legislation. Examples of such comments come from Mr Roberts, who said 'nothing should be done by the parliament to make it likely that more children will be raised by same-sex couples'<sup>41</sup> and the Hon Danna Vale, who expressed concern that 'by this legislation, the Government actually proposes to grant equality of treatment between same-sex couples and married couples.'<sup>42</sup> Mr Morrison endorsed John Howard's statement that

Marriage, as we understand it in our society, is about children, raising them, providing for the survival of the species, and I think if the same status is given in our society to gay unions as are given to traditional marriage we will weaken that bedrock institution.<sup>43</sup>

The Hon. Kevin Andrews quoted Kingsley Davis, a demographer who writes:

The genius of marriage is that, through it, the society normally holds biological parents responsible for each other and for their offspring. By identifying children with their parents and by penalising people who do not have stable relationships, the social system powerfully motivates individuals to settle into a sexual union and take care of ensuing offspring.<sup>44</sup>

Despite these statements, which might be seen as antagonistic to giving superannuation benefits to same-sex couples, most of these speakers endorsed the principles behind the legislation, i.e. that equal access to superannuation entitlements should be given to all 'couples' of whatever sexual orientation. The concerns regarding the downgrading of marriage were largely focussed on drafting issues.

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39. David Crow and Rachel Nickless, 'Opposition Leader Brendan Nelson backed the move in principle but wanted to weigh up the cost.' *Australian Financial Review*, 1 May 2008, p. 7.

40. Mr Katter, House of Representatives, *Debates*, 4 June 2008, pp. 4516 ff, and the vote at p. 4524.

41. Mr Roberts, House of Representatives, *Debates*, 4 June 2008, p. 4490.

42. Ms Vale, House of Representatives, *Debates*, 4 June 2008, p. 4496.

43. Mr Morrison, House of Representatives, *Debates*, 4 June 2008, p. 4507.

44. Mr Andrews, House of Representatives, *Debates*, 4 June 2008, p. 4516.

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## The Minor Parties

The Greens strongly support the proposed changes and would go further than other parliamentary parties as they also support same-sex marriage and would extend the provisions of this Bill to make it compulsory for all superannuation funds to recognise same-sex relationships.<sup>45</sup> The Democrats had earlier introduced a Private Member's Bill to implement the recommendations of the HREOC Report (the Same-sex: Same Entitlements Bill 2007).<sup>46</sup> Senators Murray and Bartlett, before their departure from the Parliament, made active contributions to the debate on referral of this Bill to Committee.<sup>47</sup>

Family First specifies its support for heterosexual relationships in its statement on 'Family' and is recorded by the Australian Christian Lobby as being opposed to laws which give particular recognition to same-sex couples: 'Family First will not give same-sex couples any special rights not available to other Australians.' The web-site goes on to comment 'Marriage is the ideal – it is the best form of relationship society can aspire to – and Family First is passionate about protecting marriage, strengthening marriage and promoting marriage.'<sup>48</sup> In South Australia the Family First party has supported amendments to superannuation legislation to include 'interdependent relationships'.<sup>49</sup> Neither Senator Fielding nor Senator Xenophon spoke on the occasion of the Bill's referral to the Senate Committee, with Senator Fielding voting in support of a longer

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45. Australian Greens, 'Sexuality and Gender Identity', Australian Greens Policy Statement, March 2007, and Senator Kerry Nettle, 'Greens welcome law reform', *media release*, 30 April 2008.
  46. Introduced into the Senate by Senator Allison on 14 August 2007. An inquiry into the Bill's provisions was tabled in the Senate on 20 September 2007 and Australian Democrats, 'Rights of Gay, Lesbian, Bisexual, Transgender & Intersex people, Australian Democrats Action Plan, GLBTI Rights, Attorney General & Justice, *Policy Statement*, 24 August 2007.
  47. Senator Murray accused the Opposition of a 'procedural filibuster' and suggested members of the Opposition with 'homophobic tendencies' had dominated the decisions taken to refer the Bill. (Senate, *Debates*, 18 June 2008, p. 2646). Senator Bartlett detailed a lengthy history of reviews and considerations of this matter over the years and also considered how quickly Senate inquiries have been undertaken, concluding that the reporting time-frame was 'unconscionable' and was due to the Opposition 'pandering to bigots' (Senate, *Debates*, 17 June 2008, pp. 2481 ff).
  48. These quotes are contained in a Family First response to questions posed by the Australian Christian Lobby as part of the 'National Church Life Survey,' reported at <http://australiavotes.org> accessed on 2 June 2008.
  49. The Bill under discussion was the South Australian Statutes Amendment (Equal Superannuation Entitlements For Same Sex Couples) Bill (2003), and for a transcript of a speech in which a Member of the Party (the Hon. A.L. Evans) supports the amendments see: [http://www.familyfirst.org.au/sa/ps\\_equal\\_super\\_same\\_sex\\_couples.php](http://www.familyfirst.org.au/sa/ps_equal_super_same_sex_couples.php)

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reference. Senator Fielding is reported to be considering his position, while Senator Xenophon is reported as being broadly in support of the Bill's intentions.<sup>50</sup>

### Issues, pros and cons

This Bill deals with significant areas of discrimination in the tax treatment and payment of superannuation benefits for members of same-sex couples, and the children of these individuals.

The HREOC Report details the range of areas in which same-sex couples face difficulties in having their relationships recognised with consequential financial impacts that can be quite negative, particularly in the field of superannuation. The Report comments:

Same-sex couples and families get fewer leave entitlements, less workers' compensation, fewer tax concessions, fewer veterans' entitlements, fewer health care subsidies, less superannuation and pay more for residential aged care than opposite-sex couples in the same circumstances.

Same-sex couples are denied these basic financial and work-related entitlements because they are excluded from the definitions describing a couple in ... federal laws.... Federal law after federal law defines a 'partner' or a 'member of a couple' or a 'spouse' or a 'de facto spouse' as a person of the opposite sex.

Further, children in same-sex families may suffer because one or both of their parents are denied the financial and work-related entitlements which are intended to help families live better.<sup>51</sup>

The Report goes on to quote a couple from Adelaide who told the inquiry:

We are an average suburban family. We are working hard and contributing to our community. We don't want special treatment - just what others can expect from their legal and social community. Our rights are denied simply because of who we love. We just want equality.<sup>52</sup>

The Bill proposes to address this discrepancy in the treatment of couples in the area of superannuation. While there have been concerns raised regarding the impact of the Bill, there would seem to be an underlying unanimity amongst most participants in the debate that there should be no exclusion of same-sex couples from the various benefits of the superannuation system.

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50. Dan Harrison, 'Hurdles linger for same-sex bill', *The Age*, 5 September 2008, <http://www.theage.com.au/national/hurdles-linger-for-samesex-couple-bills-20080904-49y2.html> accessed 6 September 2008.

51. HREOC Report, op. cit., p. 1.

52. *ibid.* p. 3.

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### Undermining Marriage?

Despite the seemingly broad based support for the inclusion of same-sex couples into superannuation benefits, the question ‘Does the Bill undermine marriage?’ is nevertheless posed by some.<sup>53</sup> The question appears to stem from a concern that the Bill may not preserve the particular position of significance given to marriage.

There is a sense in which, at various points in history, marriage has been given a uniquely privileged economic position. If the status of marriage derives from the unique or exclusive nature of its privileged economic position then the Bill could be seen to lower the status of marriage by distributing these privileges more broadly, rendering them no longer unique to marriage. (It should be noted this is a process which is already well underway through the recognition of de facto relationships.) However not everyone regards marriage as deriving its significance from its economic position.

It can be argued that marriage is a multi-faceted state with significance in the moral or religious sphere as well as the legal or economic sphere. As a result of this multi-faceted existence a change to the unique treatment of a married person in one sphere need not affect the significance of marriage in another sphere. Arguably there are elements of the married state that are outside the reach of the Bill’s provisions: with the result that the moral or religious status of marriage can not be affected by giving non married couples access to economic benefits which used to be exclusively enjoyed by married couples.

A submission from the Australian Federation of AIDS Organisations reflects on this issue in a different manner:

...[T]he leader of the Opposition argued against ‘marriage’ being reduced to one among several classes of permanent domestic relationships in Australia. Well, to put it bluntly, marriage is one among several classes of permanent domestic relationships in Australia. This bill does not ‘reduce’ marriage to that status. The bill does not seek to prioritise different categories of intimate couple relationships; neither insisting ‘marriage’ remains at the top of a hierarchy nor be reduced to an equal or lesser footing.<sup>54</sup>

The Uniting Church of Australia also offers a perspective on these questions:

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53. Mr Morrison provides an example of this position. He comments ‘There are moral absolutes that protect our society which should never be compromised...’ and further that he ‘cannot stand idly by and allow this march to undermine marriage to get out of the barracks.’ House of Representatives, *Debates*, 4 June 2008, p. 4507. See also the Second Reading Speeches of Mr Roberts, Mrs Vale, Mr Andrews and Mr Katter.

54. Submission No. 7, p. 3.  
[http://www.aph.gov.au/senate/committee/legcon\\_ctte/same\\_sex\\_entitlements/submissions/s\\_ub07.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/s_ub07.pdf) .

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The understanding of marriage as a heterosexual religious and social institution should not be used as a platform from which to discriminate against same-sex couples in areas where unmarried heterosexual couples, legally recognised by the State as having a relationship equivalent to that of a marriage, are able to access financial entitlements, and superannuation benefits.<sup>55</sup>

### Interdependent Relationships

Ironically there is a certain symmetry between the questions being raised by different parties to the debates on this Bill. The Coalition has suggested that rather than covering only same-sex relationships, the Bill should also cover interdependent relationships. There have been objections to this on the grounds that it lessens the status of same-sex relationships. Thus the question ‘Does the Bill undermine marriage?’ has parallels with (if interdependence were incorporated) ‘Would the Bill undermine same-sex relationships?’

Certainly HREOC has indicated a view that to extend superannuation coverage under this suite of legislation is inappropriate:

Coverage for interdependent relationships is bad policy - firstly because it diminishes the regard in which a same-sex relationship is held, and secondly, because the broader group of people in interdependent relationships is much harder to define.<sup>56</sup>

There is an argument that it belittles the nature of same-sex relationships and their closeness to a ‘conjugal’ type of relationship to class them with the broader category of interdependent relationships. The same issue is raised with the interaction of marriage and other relationships. Both involve considering whether the recognition of a broader category of relationships undermines the status of the potentially privileged relationships.

As mentioned above, the Coalition Government introduced the concept of ‘interdependency’ into superannuation law in 2004. This is a category which, in many cases, covers same-sex couples.<sup>57</sup>

Many superannuation funds have included interdependents in their fund rules as potential beneficiaries of death benefits. Sometimes this has been done by changes to the fund’s

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55. Submission No. 6, p. 4.  
[http://www.aph.gov.au/senate/committee/legcon\\_ctte/same\\_sex\\_entitlements/submissions/sub06.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/sub06.pdf) .

56. HREOC, ‘Delaying Same Sex Bill will unnecessarily continue discrimination and distress’, *media release*, 4 June 2008,  
[http://www.humanrights.gov.au/about/media/media\\_releases/2008/65\\_08.html](http://www.humanrights.gov.au/about/media/media_releases/2008/65_08.html) accessed 19 June, 2008.

57. The change was made in the Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004 (Cth), Schedule 2, which modified the Superannuation Industry (Supervision) Act 1993.

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trust deed. In a number of cases this occurred automatically in that the fund's trust deed defined potential recipients in terms of those eligible to receive death benefits in the *Superannuation Industry (Supervision) Act 1993* (SIS Act).

An interdependency relationship is one where two people:

- have a close personal relationship, and
- they live together, and
- one or each of them provides the other with financial support, and
- one or each of them provides the other with domestic support and personal care.<sup>58</sup>

Those in such a relationship are classed as 'death-benefit dependents' in relation to the deceased superannuation benefits and can also access taxation concessions.<sup>59</sup> The classic example of an interdependency relationship is given as two sisters living together and supporting each other but not satisfying the criteria for a 'couple relationship'.

There is a critique of the interdependency provisions that identifies an inequality of treatment for same-sex couples who must establish interdependency on the death of one of the partners as compared with the treatment of opposite-sex relationships.<sup>60</sup> The HEROC report also argued that the application of the interdependency provisions in relation to accessing superannuation death benefits entailed unequal treatment of surviving partners of same and opposite-sex couples.<sup>61</sup>

The fact that all four categories itemised above must generally be satisfied is identified as problematic. A traditional understanding of a 'relationship' would generally allow for a couple to live apart for a time, or to financially independent of each other, but this would create difficulties with satisfying the cumulative criteria. There is apparently some scope in the relevant Regulations for the criteria of 'domestic support and personal care' to be less significant when the other three criteria are established,<sup>62</sup> however one commentator

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58. Section 10A Superannuation Industry (Supervision) Act 1993 and section 302-200 Income Tax Assessment Act 1997.

59. Section 302-195 Income Tax Assessment Act 1997.

60. Miranda Stewart, 'Are you two interdependent – Family, property and same-sex couples in Australia's superannuation regime', *Sydney Law Review*, vol. 28(3), Sydney, September 2006, pp. 437–476.

61. The Human Rights and Equal Opportunity Commission, op. cit., pp. 63 and following.

62. Regulations have been made under the Income Tax Assessment Acts, Regulation 302-200.02, as cited by Miranda Stewart, 'Tax and same sex couples: Still waiting for a fair go', *Taxation in Australia*, vol. 42, No. 9, April 2008, p. 531 and p. 534.

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points out that it may therefore be more difficult for the ‘happy and healthy’ to establish an interdependency relationship than those who are not.<sup>63</sup>

There has been some confusion in the debates on this topic because the question of recognition for interdependent relationships has been equated with treating same-sex couple as interdependent couples. There is no need for the recognition of interdependency to mean that same-sex couples are treated the same as interdependent couples. It may be important to give recognition to interdependent relationships, and for this to happen sooner rather than later, but this does not mean that same-sex relationships need to operate under the same definitions.

Interdependent relationships may face the same need for recognition (see the discussion of the timing issues above), however, as HREOC have identified, it may be that the breadth of relationship that satisfy the interdependency criteria need to have the additional bureaucratic parameters imposed, whereas the nature of same-sex relationships as being akin to a ‘conjugal’ relationship may obviate the need for the additional criteria.<sup>64</sup>

ASFA have an interesting submission to the Senate Inquiry which includes ‘Empirical evidence on the number of de facto and interdependent relationships’. This identifies that very few interdependency relationships have been established for the purposes of superannuation, in particular ‘ASFA is not aware of an recorded cases where interdependency for receipt of a superannuation benefit has been established for two elderly sisters living together and providing mutual support.’<sup>65</sup>

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63 Miranda Stewart, ‘Tax and same sex couples: Still waiting for a fair go’, *ibid.*, p. 531.

64. Wayne Morgan uses this term ‘conjugal’ in his submission to the Senate Inquiry, pointing out that ‘[t]he reality of social life in modern Australia is that same-sex couples form conjugal relationships in the same way that heterosexual couples do.’ Submission no. j59, p. 6,  
[http://www.aph.gov.au/senate/committee/legcon\\_ctte/same\\_sex\\_entitlements/submissions/s\\_ubj59.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/s_ubj59.pdf) accessed on 3 September 2008.

65. Association of Superannuation Funds of Australia Limited, Submission no. 28, to the Senate Inquiry, p. 3,  
[http://www.aph.gov.au/senate/committee/legcon\\_ctte/same\\_sex\\_entitlements/submissions/s\\_ub\\_28.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/s_ub_28.pdf), accessed on 3 September 2008.

In practice the main groups to benefit from the interdependency provisions have been same sex partners and the parents of children who were living at home prior to their death. While the Explanatory Memorandum and other documentation for the interdependency provisions refer to other possible beneficiaries, such beneficiaries are likely to be very rare in actual practice. For instance, while it may not be unusual for two elderly sisters to be living together, it would very unusual both for one of them to have significant superannuation and not have the other sister financially dependent on them. Much more common would be that both elderly sisters would have no superannuation. Equally, individuals with a disability or illness who are being cared for by another very rarely have a superannuation balance that

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Wayne Morgan and Miranda Stewart, both leading academics in the area, have argued that recognition of interdependent relationships is a legitimate and important issue to consider, however members of same-sex relationships do not ‘fit’ the interdependence criteria and they should be treated in a distinct manner. There is no need for the recognition of forms of interdependency to render the recognition of same-sex relationships more complex.

### Drafting Issues

The debates on the Bill have focussed heavily on the language used in the Bill. There are also more specific concerns regarding the Bill’s operation and the matters covered in the accompanying material.

#### Couple Relationship

A recurring objection to the drafting is its reliance on the term ‘couple relationship’ which encompasses same-sex couples, de facto couples and married couples. The replacement of the term ‘marital relationship’ by the term ‘couple relationship’ is used in a number of contexts as an ‘umbrella phrase’ circumventing the use of the narrower ‘marital relationship’. This has disturbed a number of contributors to the debate on the Bill. While the drafting technique used seems legitimate from a technical perspective it may be that this ‘language issue’ has broader ramifications. A consensus position could possibly be found by a redraft in which the references to a ‘couple relationship’ are modified so that both terms are used (i.e. marital and couple relationships). This need not change the technical effect of the Bill.<sup>66</sup> Professor Parkison has provided draft material to the Senate Inquiry in which he explores a possible redraft that would reintroduce the reference to ‘marital relationships’ and also use the term ‘couple relationships’.

#### Registered Relationships

The Bill introduces into the definition of a couple relationship a reliance on the concept of a registered relationship under State or Territory law. It does this by allowing the Commonwealth to prescribe certain forms of relationship under certain prescribed State/Territory laws. At the moment Tasmania, the ACT and Victoria all have laws which allow for the registration of a same-sex relationships (Victoria’s law are likely to be operational at the end of 2008).<sup>67</sup> Tasmania’s laws allow for the registration not only of

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needs to be distributed at the time of their death. They in almost all instances will have a spouse or financial dependent to leave any superannuation benefit to, or (more commonly) not have a superannuation benefit. *ibid.*

66. Professor Parkinson has given some suggested reworking along these lines. Submission Nos 14 and 14a, Senate Inquiry, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/same\\_sex\\_entitlements/submissions/sub14.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/sub14.pdf) accessed 18 August 2008.
67. Tasmania’s *Relationship Act 2003*, the Australian Capital Territory’s *Civil Partnerships Act 2008* and Victoria’s *Relationship Act 2008* (the commencement provisions provide for a

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same-sex relationships, but also those that satisfy the criteria of an interdependent relationship. Thus a relationship registered under Tasmania's laws could be recognised as a 'couple relationship' under the provisions in this Bill if the appropriate prescriptions are made. Tasmania's laws are often held up as model legislation by the current federal administration. The ACT's Civil Partnerships Act only allows for same-sex relationships to be registered under that law, however there is also a domestic relationships law that allows for the registration of relationships and which could be prescribed if the Commonwealth Government so wished.

Several submissions to the Senate Inquiry argued that, where a relationship is or was registered it should be conclusive proof that that has been a 'relationship as a couple living together on a genuine domestic basis'.

For example, Mr Wayne Morgan is of the opinion that registered relationships should not be defined as a sub-category of de facto relationships since there has been a decision taken to formalise the relationship. If the Government decides to pursue this route, at the very least, he argues proof of registration of a relationship under a state or territory law must be conclusive proof of the existence of a de facto relationship under Commonwealth law, without the need to prove the usual criteria needed to establish a (presumptive) de facto relationship (such as cohabitation).<sup>68</sup> Ms Judy Harrison also argued that such an adjustment is desirable and would promote certainty, reduce dispute, save legal costs and court time. It is also more dignified and less intrusive.<sup>69</sup> Professor Miranda Stewart joins Mr Morgan and Ms Harrison in making such a recommendation.<sup>70</sup>

There are currently constitutional limitations on the Commonwealth's capacity to generally regulate interdependent relationships, but a referral of State power<sup>71</sup> could allow for what Mr Morgan refers to as the ideal situation whereby the Commonwealth regulates

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start date of 1 December 2008 for most provisions, or by proclamation, see further: [http://www.ocpc.vic.gov.au/CA2572B3001B894B/WebObj/A1b20080904/\\$File/A1b20080904.pdf](http://www.ocpc.vic.gov.au/CA2572B3001B894B/WebObj/A1b20080904/$File/A1b20080904.pdf) ).

68. Wayne Morgan, Submission No. j59, Senate Inquiry. Note also Submission No. 37, from Miranda Stewart, Associate Professor, Melbourne University Law School.
69. Judy Harrison, Submission No. 16, to the Senate Standing Committee on Legal and Constitutional Affairs, Inquiry Into The Family Law Amendment (De Facto Financial Matters And Other Measures) Bill 2008, p. 2, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/family\\_law/submissions/sub\\_16.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/family_law/submissions/sub_16.pdf)
70. Professor Stewart, Submission to the Senate Inquiry no. 37, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/same\\_sex\\_entitlements/submissions/sub\\_37.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/sub_37.pdf)
71. Such as has recently been done for de facto property law matters under the Family Law Act.

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all ‘intimate relationships (both conjugal and interdependent).’<sup>72</sup> He argues this would provide a ‘rational and logical basis on which to achieve national uniformity’, echoing Justice Kirby who said in another context that there needed to be recognition of all ‘intimate personal relationships’ because otherwise there would inevitably be discrimination occurring when what was needed was a broader ‘genus’ of relationship.<sup>73</sup>

A thought provoking honours thesis has also been submitted to the Senate Inquiry exploring the benefits of a more general and universal relationships register at a Commonwealth level.<sup>74</sup>

Finally Professor Stewart also argues that the legislation should allow for the recognition of relationships registered overseas in appropriate legislative frameworks.<sup>75</sup>

### Children

The approach of defining children’s eligibility to be covered by relevant superannuation provisions by reference to whether they are a ‘product’ of the relationship has struck many contributors to the debate as offensive. The term ‘product’ is traditionally associated with a manufacturing process or a commodity, although Professor Stewart also refers to the definition which relies on the concept of a product being ‘a result of an action or process’.<sup>76</sup> Professor Stewart goes on to recommend that the Explanatory Memorandum should include further examples or explanation about a requirement of consent in the non-

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72. Wayne Morgan, Submission no. j59, p. 3, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/same\\_sex\\_entitlements/submissions/ubj59.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/ubj59.pdf) accessed on 3 September 2008.
73. Justice Kirby was speaking of the legal privileges attaching to those who are not compellable in an evidentiary context. Australian Law Reform Commission Report 26, p. 291. Kirby J, in dissent on this issue, advocated either that the status quo remain (an exemption only for marital relationships) or that the category should be further broadened out to ‘intimate personal relationships’. He argued that the gradual admission of new categories was likely to discriminate arbitrarily or unfairly against ‘other’ categories not yet acknowledged.
74. Kate Whitehouse - Honours Thesis: ‘A Political Trophy or an Essential Human Right? The Federal Recognition of Same-Sex Relationships’, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/same\\_sex\\_entitlements/submissions/add01.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/add01.pdf)
75. Professor Stewart, Submission to the Senate Inquiry no. 37, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/same\\_sex\\_entitlements/submissions/sub\\_37.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/sub_37.pdf)
76. Professor Stewart refers to the Oxford English Dictionary, p. 6 of her Submission to the Senate Inquiry, *ibid*.

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biological partner and the timing of this consent, asking is it ‘at the date of conception? Or Birth?’<sup>77</sup>

The use of the term ‘product’ could be remedied by a revised approach to the drafting (‘the relevant child of the relationship’ might avoid the use of the word product, which has offended, but would rely on legislative definitions to give the phrase greater form). However both Professors Parkinson and Millbank have expressed confusion or concern as to what, exactly, the legislative drafting intends to achieve.

Professor Parkinson observes:

As a professor of law, I have very little idea what the Government intends by the language it has chosen to cover children who have a connection with a same-sex relationship. I can only offer, at best, some possible interpretations. It is at least clear from the Bill that the Government only intends to include children who have a biological connection with at least one of the partners.

While Professor Millbank has more detailed concerns:

I am deeply concerned that the new category of child as a “product of the relationship” will cause confusion and uncertainty to such an extent that it may not ultimately help the families it is intended to benefit. The definition contains a fundamental contradiction: it reflects state and territory parentage presumptions for [assisted reproductive technology] families (without however articulating them with the same precision) at the same time as it contradicts them by granting ad hoc coverage of commissioning parents in surrogacy arrangements, without actually according them parental status. Prioritising the genetic link over the legal relationship in certain circumstances runs counter to the prevailing trend and may have unintended consequences for the majority of families formed with the use of donor gametes who are not surrogacy families. In short the same definition pulls in opposite directions to achieve different aims.<sup>78</sup>

The introduction of an entirely novel legal concept seems bound to create some difficulties, if not with the drafting choices, then also with the actual concepts involved.

The pre-existing definitions which incorporate adopted children and other categories will remain, with the changes aimed to incorporate children specifically born into same-sex relationships. Professor Millbank, an expert in different forms of family, makes the suggestion that the legislation should have provisions that can be more flexible:

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77. *ibid.*

78. Professor Jenni Millbank, Submission No. 8, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/same\\_sex\\_entitlements/submissions/sub08.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/sub08.pdf) accessed on 18 August 2008.

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[Recommendation 3] Allows for these formal categories of parent to be augmented by a form of flexible purposive recognition as needed according to context.

It has always been the case that certain areas of law have broader familial categories that extend beyond legal or biological parent-child relationships. Such categories include “child of the household”, “dependant” or “loco parentis”. These definitions occur in specific contexts in which the legislative purpose is served by a broad rather than narrow approach.

Such a flexible approach is very useful to augment, rather than replace, the clear categories of parent-child relationship outlined above.<sup>79</sup>

### Trust Deed Resettlement

Another issue which has been raised by eminent academics in the field is whether the legislation should clarify that if trust deeds need to be adjusted they are not, technically speaking, being resettled (a trust deed that has adjustments made to its terms can be regarded as being ‘resettled’).

In particular Professor Stewart identifies a problem with the Explanatory Memorandum’s claim that provisions regarding the change to the SIS Act will function to ensure that the coverage of private funds is changed. In cases where the trust deeds reflect the SIS Act this will be true, but there are others where the trust deeds would need to be amended to ensure recognition of same-sex couples.

There are negative taxation implications for a trust when the amendment to it involves a ‘resettlement’. Professor Stewart summarises the situation as follows:

Case law suggests that the class of potential beneficiaries (including dependants) can be changed without causing a resettlement.<sup>80</sup> However, the Australian Tax Office has suggested that changing beneficiaries could in some circumstances trigger a resettlement.<sup>81</sup> Trustees may be understandably cautious in this situation.<sup>82</sup>

She goes on to recommend that:

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79. Professor Jenni Millbank, Submission No. 8, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/same\\_sex\\_entitlements/submissions/sub08.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/sub08.pdf) accessed on 18 August 2008.
  80. *FCT v Commercial Nominees of Australia Ltd* [2001] HCA 33 (High Court of Australia)
  81. ATO, *Creation of a New Trust - Statement of Principles* (August 2001), available at [www.ato.gov.au](http://www.ato.gov.au)
  82. Submission to the Senate Inquiry, no. 37, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/same\\_sex\\_entitlements/submissions/sub\\_37.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/same_sex_entitlements/submissions/sub_37.pdf)

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The Bill mandate amendment of trust deeds to ensure equality of recognition of the bulk of Australian same-sex couples who contribute to private superannuation trust funds. The government in the Explanatory Memorandum or other published advice, should make it clear that such amendment will not cause any resettlement of the trust funds or otherwise pose a risk to security of those funds including tax liability.<sup>83</sup>

## Financial implications

This Bill has some significant financial implications if all of its measures are passed. The following tables show the overall impact on administrative expenses and revenue over the years 2008–09 to 2011–12.

**Table 1: Impact on Commonwealth expenses \$m**

2008-09	2009-10	2010-11	2011-12
10.8	8.9	9.3	9.6

Source: Explanatory Memorandum<sup>84</sup>

**Table 2: Impact on revenue \$m**

2008-09	2009-10	2010-11	2011-12
-0.4	-0.4	-0.4	-0.4

Source: Explanatory Memorandum

In addition the Bill's measures, as a whole, may increase the Commonwealth's unfunded superannuation liability by an estimated \$112.5m.

The recent Commonwealth Budget allowed for a payment of an additional \$3.9 bn to the Future Fund.<sup>85</sup> This fund retains Commonwealth assets to meet its unfunded superannuation liability.<sup>86</sup>

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83. *ibid.*

84. Mr Robert McClelland, Attorney-General, Explanatory Memorandum to the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, 27 May 2008, (Explanatory Memorandum) p. 2.

85. The Hon. Wayne Swan MP, Treasurer, 'Second reading speech: Appropriation Bill (No. 1) 2008–09', House of Representatives, *Debates*, 13 May 2008, p. 2600.

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Detailed information on the financial implications of the Bill is in the Explanatory Memorandum.

## Key issues

### Utilising Superannuation

There are four main superannuation issues for members of same-sex couples.

#### Access to benefits

The first issue is the access that the surviving member of a same-sex couple has to their partner's Commonwealth superannuation benefits. Under current law the surviving partner cannot receive the deceased partner's lump sum or the pension benefits paid by most of the Commonwealth's civilian or military superannuation schemes.<sup>87</sup> The main legal difficulty has been that the surviving member of a same-sex couple does not meet the definition of either spouse or dependent in the relevant legislation or trust deeds for these schemes.<sup>88</sup>

#### Payment of benefits to children

The second issue is the ability of the children of the surviving partner of a same-sex couple to receive a share of the deceased partner's superannuation benefits. Under current law the dependent children of the deceased partner may receive a share of the deceased superannuation benefits if appropriate. However, the children of the surviving partner have no such access to those benefits. This becomes even more important if the surviving partner themselves is incapacitated or dying.

#### Taxation of Death Benefits

Under current law, if a person of either gender was in an interdependency relationship with their deceased partner at the time of the latter's death they may receive the relevant superannuation benefits tax free.<sup>89</sup> As discussed above, there have been criticisms of these

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86. An unfunded superannuation liability is the amount of benefits that the Commonwealth has committed to pay its public servants, but for which funds have not been put aside.

87. However, surviving partners of members of the Australian Government Employees Superannuation Trust may receive payments from that trust.

88. These schemes are the Parliamentary Superannuation Scheme, the Judges Pension Scheme, the Governor Generals Superannuation Scheme, 1922 Commonwealth Superannuation Scheme, the Commonwealth Superannuation Scheme, the Public Sector Superannuation Scheme, the Defence Force Death Benefits Scheme the Defence Force Retirement and Death Benefits Scheme and the Military Superannuation Benefits Scheme.

89. Section 302-60 Income Tax Assessment Act 1997.

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arrangements in so far as they apply to same-sex couples because it imposes administrative and practical hurdles on same-sex couples which are more onerous and difficult to satisfy than the criteria used for opposite-sex couples.

#### Ability to contribute

Under current law a member of an opposite-sex couple may make a tax deductible contribution to their spouse's superannuation account. Further, they may direct a superannuation fund trustee that up to 85 per cent of the Superannuation Guarantee contributions made on their behalf and up to 100 per cent of their own personal contributions be paid into their spouses' superannuation account after the end of each financial year. This option is not open to same-sex couples or to members of an interdependent relationship. The amendments in this Bill seek to address this issue by altering the definition of 'spouse' for superannuation purposes.<sup>90</sup>

## General approach of the Bill

The general approach of this Bill is to ensure that a surviving partner of a 'couple relationship' is entitled to benefits and to define members of a 'couple relationship' so that it includes same-sex couples along with married couples and de facto relationships.

Further, the range of children that are eligible to receive benefits under the Acts amended by this Bill is expanded to ensure that the children of surviving members of a same-sex couple are able to access any relevant benefits. The Bill does this by utilising a new definition of children who are the 'product of the relationship', which is designed to encompass children who are the result of a same-sex couple deciding to have children by artificial conception using donated gametes for one or both of the genetic parents. The Bill refers to the child having a biological connection to one of the parents or having one of the parents as the 'birth mother' (which caters for situations where the mother carries a child whose genetic material has been donated and does not come from the mother). As mentioned above, pre-existing recognition of children who are not traditionally part of the nuclear family continues (such as adopted children).

In respect of the receipt of death benefits tax free the Bill amends the definition of spouse, dependent and child to enable members of a same-sex couple and their children to be included in the definition of a 'dependent' for taxation of superannuation death benefit purposes.

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90. Under the Superannuation Guarantee regime an employer must contribute at least 9 per cent of their employee's ordinary time earnings to the employee's nominated superannuation fund account.

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## DFRB Act approach

The approach adopted for amending the *Defence Force Retirement Benefits Act 1948* (DFRB Act) is quite different. These amendments allow the administering authority, the Defence Force Retirement and Death Benefits Authority (the Authority), to grant a pension to a surviving partner of a same sex couple – they do not require that such a pension be paid. The Authority may also pay relevant benefits to the eligible surviving children of a same-sex relationship. They are not required to be paid. See further discussion on this issue in the Main Provisions.

## Other Superannuation Schemes

This Bill amends a number of Commonwealth superannuation schemes with one thing in common: Their operation is governed by an Act of Parliament. Thus changes in the way they operate must be made through legislative change.

The operation of the Public Sector Superannuation Scheme and the Military Superannuation and Benefits Scheme are governed by trust deeds. The Explanatory Memorandum states that these trust deeds will be amended so that their operation is in line with the amendments made in this Bill.<sup>91</sup>

The other civilian Commonwealth superannuation schemes are the Public Sector Superannuation Scheme – Accumulation Plan and the Australian Government Employee’s Superannuation Trust. Both these schemes are accumulation style plans that only pay a lump sum benefit. They operate largely in accordance with the provisions of the *Superannuation Industry (Supervision) Act 1993* and associated regulations. As such, surviving partners of same sex couples and the relevant children have greater access to the deceased benefits than exists for the other Commonwealth superannuation schemes. The Explanatory Memorandum notes that the rules of these particular schemes do not need additional amendment at this time for the purposes of this Bill.<sup>92</sup>

## Main provisions

### Schedule 1

**Schedule 1** amends the *Parliamentary Contributory Superannuation Act 1948* (PCS) the *Superannuation Act 1922* (1922 Act) and the *Superannuation Act 1976* (CSS Act) so that benefits may be paid to surviving members of a same-sex couple or surviving children of that couple.

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91. Explanatory Memorandum, pp. 1 and 27.

92. *op. cit.*, p. 5.

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## PCS Act

**Item 5** adds **new subsection 7** to subsection 4(1) of the PCS Act. This new subsection prescribes that a child for the purposes of this Act cannot be the product of a relationship between two persons unless that child is the biological child of at least one of the persons or is born to a woman in the relationship. This concept of a ‘birth mother’ caters for children who are the result of artificial conception involving donated gametes. The definition excludes children whose parents have come into a relationship with the child already in being, however, as noted below, such children may be incorporated under other categories.

## Comment

Initially this requirement may appear to prevent the adopted child of a beneficiary under the PCS Act from receiving a benefit that would otherwise be paid to them, as they are clearly not the ‘biological child’ of one of the partners in the relationship. However, this provision covers the definition of a child who is a ‘product of the relationship’ and is not exhaustive of the categories of children recognised. Adopted children are given recognition outside of the ‘product of the relationship’ definition: For instance in both the current **sub-paragraphs 19AA(2B)(a)** and **19AA(2)(d)** and the proposed amendments in **items 13, 15** and **17**, where an adopted child is clearly a child to whom a benefit under the PCS can be paid.

**Items 6 to 9** amend **section 4B** of the PCS Act so that a ‘couple relationship’ is defined as one where the person ordinarily lived with that other person as that other person’s partner on a permanent and *bona fide* domestic basis at that time. These criteria apply to married couples as well as de facto, and although the arrangement must have been going for three years, the Trust can utilise a discretion to recognise a shorter relationship as long as it was permanent and *bona fide*. Under the amendments no mention is made of the gender of the ‘partner’. The current section 4(B) with the proposed changes marked is at Attachment A.

**Item 10** inserts new **subparagraph 4B(4)(ba)**. The effect of this amendment is to include a relationship in the new PCS definition of a ‘couple relationship’ if that relationship is registered under a prescribed law of a state or territory.<sup>93</sup>

**Items 13 to 17** adjust the definitions of a child under the PCS Act so that children born to a partner in a ‘couple relationship’ are covered.

## 1922 Act

The Explanatory Memorandum notes that under **section 48AB** of the 1922 Act the Commissioner for Superannuation may, in certain circumstances, grant a pension to a

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93. This amendment depends on the effectiveness of new **sub-paragraph 4AB(4)(ba)** of the *Judges Pension Act 1968* as amended by **item 25** of **Schedule 2** of this Bill.

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person who would be eligible to receive such payments under **Part IV** of the CSS Act. Thus it is not necessary to make substantive amendments to the 1922 Act to ensure that surviving members of a same sex couple and relevant child dependents gain access to these payments.<sup>94</sup>

**Items 19** and **20** stipulate that amendments to the CSS Act in this schedule do not apply to those 1922 Scheme members who died before this schedule comes into force. This means that the benefits paid to a 1922 Scheme member, who dies before **Schedule 1** takes effect cannot be claimed under the new provisions.

#### CSS Act

As with the PCS Act the general approach to amendments to the CSS Act is to replace the definitions of the term ‘marital relationship’ with the term ‘couple relationship’. This latter term is defined to include same-sex relationships. The surviving member of a couple relationship has access to the deceased partner’s superannuation benefits.

The payment of benefits to child dependents of the deceased or surviving partners is provided for by expanding the definition of the term child for the purposes of the CSS Act.

For CSS Act purposes **item 21** expands the definition of the term child in relation to a person who has died. The new definition specifies that a child of the person, includes

- an adopted, ex-nuptial, foster or step child of the deceased or a ward of the deceased, or
- a child who is the product of a relationship the person has had
- and similarly recognises the child of the spouse of the deceased.
- For the purposes of the amended CSS Act the spouse of the deceased includes anyone in a couple relationship at the time of death.
- **Items 27 to 30** amend subsection 8A of the CSS Act so that a couple relationship will exist if the person ordinarily lives or lived with the deceased as their partner on a permanent and *bona fide* domestic basis at that time of death.
- **Item 31** inserts new **subparagraph 8A(4)(ba)** recognising that a couple relationship exists if that relationship was registered under a law of a state or territory.<sup>95</sup>
- **Item 33** amends **subsections 8B(2) and (3)** of the CSS Act with the effect that the surviving partner of a same-sex couple is recognised as the surviving spouse for the purposes of the CSS Act. This enables the surviving partner to access the relevant superannuation benefits.

94. Explanatory Memorandum, p. 10.

95. Again, this amendment depends on the effectiveness of an amendment to the *Judges Pension Act 1968* in **item 25** of **Schedule 2** of this Bill.

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- **Item 58** ensures that the amendments to the CSS Act in this Bill apply only to the benefits paid to a person who dies after **Schedule 1** takes effect. This means that the benefits paid to a person who dies before the commencement of this schedule cannot be claimed by the surviving member of a same-sex couple.

## Schedule 2

**Schedule 2** amends the *Federal Magistrates Act 1999* (Magistrates Act), the *Judges' Pensions Act 1968* (Judges Act) and the *Law Officers Act 1964* (Law Officers Act).

### Magistrates Act

**Item 4** inserts a new definition into **section 5** of the Magistrates Act so that a partner is a person in a relationship 'as a couple' with another person of either gender.

**Item 5** repeats the definition of a child who is the product of a relationship that was used in earlier provisions.

**Item 6** amends **Schedule 1** of this Act so that an eligible spouse is a person who was a partner in a couple relationship.

**Items 7, 8 and 9** also amends **Schedule 1** of the Magistrates Act so that a person is in a couple relationship if they had been living with the other person as the other person's partner on a permanent and bona fide domestic basis at that time; whether or not the person was legally married to the other person.

**Item 10** inserts a new sub-paragraph into **Schedule 1** of this Act so that a relationship registered under a law of a state or territory is recognised as a couple relationship. Again, this amendment depends on the effectiveness of an amendment to the *Judges Pension Act 1968* in **item 25** of this schedule.

**Item 12** uses a similar definition to the PCS Act and defines a child of the Magistrate to include the product of a relationship (between people of either gender).

**Item 13** provides that these amendments will apply only to payments made on or after the commencement of **Schedule 1** of this Bill. Thus, claims for payment in respect of the death of a Federal Magistrate that occurs before **Schedule 1** takes effect cannot be paid.

### Judges Act

**Item 14** inserts a new definition into **subsection 4(1)** of the Judges Act – that of the child of a couple relationship. The child of a couple relationship is:

- a child born of that relationship

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- a child adopted by either party in that relationship, during the period of that relationship, or
- a child that is the product of that relationship. (**Item 19** defines a child as the product of a relationship if it is the biological child of at least one of the partners in that relationship, or is born to a woman in the relationship.)
- **Item 17** defines a partner as a person in a relationship ‘as a couple’ with another person of either gender.
- **Items 22 to 24** effectively defines a couple relationship, for the purposes of the Judges Act, as a relationship where the person ordinarily lived with that other person as that other person's partner on a permanent and *bona fide* domestic basis at that time.
- **Item 25** inserts a new subparagraph into **section 4(AB)** of the Judges Act. Effectively, this amendment states that a couple relationship exists, for the purposes of this Act, where the relationship is registered under a prescribed law of a state or territory as a prescribed kind of relationship. As noted a number of other provisions in the Bill depend on this provision to define the relevant state or territory legislation.

What is a ‘prescribed law’?

- The Bill and Explanatory Memorandum do not provide details on what a ‘prescribed law’ may be, or what a ‘prescribed relationship’ under a state or territory law may entail. Various state or territory laws setting up registers of relationships and a prescribed relationship would obviously be a same-sex relationship registered under these laws. It is not clear whether the provisions made under State and Territory laws for interdependent relationships will be prescribed under this provision.
- **Item 26** amends **section 4(AB)** of the Judges Act so that evidence of a couple relationship includes having a child that is the product of that relationship.
- **Item 30** limits these amendments to the Judges Act to payments arising out of the death of a Federal Judge or Australian Building and Construction Commissioner (whether or not they are retired) that occurred on or after the commencement of **Schedule 2**.

Law Officers Act

**Section 16** of the Law Officers Act apply the provisions of the Judges Act (other than **subsection 6(3)** of that Act) to Commonwealth Solicitor-Generals appointed before 31 December 1997. Unfortunately, subsection 6(3) has been repealed and the reference in this section of the Law Officers Act has not been updated.<sup>96</sup>

**Item 31** updates the Law Officers Act to correct the above mentioned oversight.

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96. Explanatory Memorandum, p. 26.

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**Item 32** restricts the amendments made by **Schedule 2** to pensions payable on the death of a Solicitor-General who:

- was appointed before 1 January 1998, and
- dies after the commencement of **Schedule 2**.

### Schedule 3

**Schedule 3** amends the *Defence Force Retirement and Death Benefits Act 1973* (DFRDB Act) and the *Defence Forces Retirement Benefits Act 1948* (DFRB Act). The superannuation schemes governed by both these Acts are now closed to new members. The Explanatory Memorandum states that currently the Defence Forces Retirement Benefit Scheme only has recipient members – all contributing members of this scheme are now retired.<sup>97</sup>

#### DFRDB Act

**Items 1 to 3 of Schedule 3** amend the definition of a child for the purpose of the DFRDB Act in **subsection 3(1)** of that Act. These definitions incorporate a child who is the product of a relationship. To be covered by the provisions the child, by any of the definitions, must have been wholly or substantially dependent upon the DFRDB member at the time of death.

**Item 6** amends **subsection 3(1)** of the DFRDB Act to allow a person's partner for the purposes of that Act to be a person of either gender.

**Item 9** requires that a child who is the product of a relationship be the biological child of at least one of the persons in that relationship or is born to a woman in the relationship.

**Item 10** amends **section 6A** so that a couple relationship, for the purposes of the DFRDB Act is defined as a relationship where the person ordinarily lived with that other person as that other person's partner on a permanent and *bona fide* domestic basis at that time.

**Item 14** amends **section 6A** so that a relationship registered under a law of a state or territory as prescribed in the amendment at **Item 25 of Schedule 2** is a couple relationship for the purposes of the DFRDB Act.

**Item 16** amends **section 6B** so that the surviving member of a couple relationship is a spouse for the purposes of the DFRDB Act. As such they would be entitled to spouse benefits on the death of a DFRDB member.

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97. *ibid*, p. 27.

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**Item 24** restricts the application of this schedule's amendments to the DFRDB Act to benefits paid as a result of a death on or after this schedule takes effect.

DFRB Act

A different approach has been taken in amending the DFRB Act. It is arguable that the following amendments do not ensure that the surviving member of a same sex couple, or the relevant children of that relationship, receive the deceased benefits.

**Item 25** inserts **section 64AA** (amongst other sections) into the DFRB Act. This section allows the Defence force and Retirement Benefits Authority (the Authority) to grant a pension on or after the date on which **Schedule 3** commences where:

- a pension is not payable under **sections 57** or **64** of the DFRB Act
- is not payable under **Division 1** of **Part VI** of the DFRDB Act as in force on the date **Schedule 3** takes effect, but
- would have been payable to a person under **Division 1** of **Part VI** of the DFRDB Act if the deceased pensioner had been, at the time of their death, a recipient member under the DFRDB Act.

Comment

- The first point to note about this amendment is that the Authority is not required to pay a pension under these conditions. It may grant a pension, having regard to any matters prescribed in regulation and any other matters, if it is satisfied that the surviving partner of a same sex couple is in necessitous circumstances, or the grant of the pension is otherwise warranted. This discretionary approach has comparisons in the 1922 Act, see above p. 26.
- The payment of such pensions is not compulsory, although the explanatory memorandum specifies that being entitled to a pension, other than for a marital status issue, would 'warrant the grant of a pension.'<sup>98</sup>
- The second point is that the eligibility for the grant of a pension to the surviving member of a same sex couple is contingent on the deceased pensioner meeting the requirements for payment under the DFRDB Act at the time they died.
- This approach appears to be extremely complex and administratively difficult. It does not provide the same level of security for the payment of a pension to the surviving member of a same-sex couple where the deceased was a DFRB pensioner.
- The same approach is taken in the payment of a pension to surviving children of the same-sex couple. It is noticeable that the definition of a child for the purposes of the DFRB Act has not been expanded in the same way that it has been enlarged for the

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98. Explanatory Memorandum, p. 34.

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purposes of the other Acts amended by this Bill, instead relying on the definitions used in the DFRDB.

- As at the 30 June 2007 there were some 2 105 retirement and invalidity pensions paid under the DFRB Act.<sup>99</sup> In view of the comparatively low number of primary DFRB pensioners the impact of the above noted problems may not be numerically large.
- **Item 26** ensures that these amendments apply to the granting of a DFRB pension only arising from the death of a recipient DFRB scheme member occurring on or after the commencement of **Schedule 3**.

#### Schedule 4

**Schedule 4** contains amendments to the *Retirement Savings Accounts Act 1997*, *Small Superannuation Accounts Act 1995*, *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*, *Superannuation Industry (Supervision) Act 1993* and the *Income Tax (Transitional Provisions) Act 1997*.

#### Part 1

Generally, the amendments in **Part 1** expand the definitions of the terms ‘spouse’ and ‘child’ in the affected Acts. If a person is a dependant of a deceased person then they are able to receive that person’s superannuation benefits tax free.

These amendments will simplify the process of receiving a deceased person’s superannuation benefits tax free for the surviving member of a same-sex couple. They will no longer have to prove that they were in an ‘interdependent’ relationship with the deceased and provide the necessary clarification of the financial relationship between the deceased and the surviving partner. Rather, they will have to demonstrate that they were in a relationship as a couple. Generally this will entail demonstrating that they lived with the deceased on a genuine domestic basis in a relationship as a couple.

These amendments also expand the definition of the term ‘child’ for superannuation purposes. The children of a same-sex relationship will now find it easier to be classed as a dependant of the deceased and therefore qualify to receive the relevant benefits on a concessionally taxed basis.

#### Part 2

The amendments in **item 13** are transitional measures for the 2008–2009 year only. They allow a superannuation fund trustee to increase the death benefit payments under the ‘Anti Detriment’ provisions for this financial year only.

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99. The Defence Force Retirement and Death Benefits Authority, *Annual Report 2006–07*, 2007, p. 40.

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Under these ‘Anti Detriment’ rules a death benefit lump sum, paid to a trustee of a deceased estate, spouse, former spouse or a child may be increased by part of the contributions tax paid on tax-deductible contributions paid into the fund since 1 July 1988. The superannuation fund can recover any appropriate increase in the amount paid through a tax deduction.<sup>100</sup>

This applies only where the person dies as a member of a superannuation fund and where the trustees of the fund concerned agree to increase the death benefit payment. As noted above, due to the recent change in superannuation law a person may remain a member of a fund irrespective of age or attachment to the workforce, and withdraw as much or as little as they like. This will lead to increased numbers of persons remaining members of their superannuation funds until they die.

**Item 14** effectively alters the definition of ‘death benefit dependant’ in **proposed section 302-195A** *Income Tax Assessment Act 1997* for the 2008–2009 year only. These amendments assist in ensuring the tax free payment of superannuation death benefits to surviving members of a same-sex couple and the relevant children during this particular financial year.

The Explanatory Memorandum notes that forthcoming legislative amendments will implement permanent legislative changes that have the effect of the changes in this part.<sup>101</sup>

## Schedule 5

The changes in this schedule amend the *Governor-General Act 1974* (GG Act).

**Items 1, 3 and 4** amend **subsection 2B(2)** of the GG Act so that a couple relationship means, for the purposes of this Act a situation where, at a particular time, a person ordinarily lived with the deceased person as the deceased person’s partner on a permanent and *bona fide* domestic basis.

**Item 5** inserts new **subparagraph 2B(4)(ba)** into the GG Act so that a person is to be regarded as ordinarily living with a deceased person as the deceased person’s partner on a *bona fide* domestic basis at a particular time if, amongst other circumstances, their relationship was registered under a law of a state or territory as prescribed for the purposes of the amendments in **item 25** of **Schedule 2** (i.e. the amendments to the Judges’ Act discussed above).

**Item 7** ensures that a partner of a person to whom the GG Act applies is a partner of either gender. It also makes the standard amendment regarding a child being a ‘product of the relationship’.

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100. Section 295-485 *Income Tax Assessment Act 1997*.

101. Explanatory Memorandum, pp. 42 and 43.

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**Item 9** applies the above amendments to a person who is appointed as a Governor General after the commencement of this Schedule.

## Concluding comments

These amendments would remove some of the remaining inequitable arrangements facing members of a same-sex couple in the superannuation area, however the approaches to the drafting leaves open some issues. The reference to children as a ‘product of the relationship’ and the removal of the more obvious references to ‘marital relationships’ are two drafting issues that have raised comment, while the inclusion of interdependent relationships in some form of coverage is another unresolved issue. There could be greater clarity in determining the relationship laws which will be prescribed or not, and the forms of relationship that will be recognised for the purposes of these legislative provisions.

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## Attachment A: Parliamentary Contributory Superannuation Act 1948

### 4B ~~Marital~~ Couple relationship

- (1) For the purposes of this Act, a person had a ***marital couple 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~~ partner on a permanent and *bona fide* domestic basis at that time.
- (2) For the purpose of subsection (1), a person is to be regarded as ordinarily living with another person as that other person's ~~husband or wife~~ partner 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~~ partner 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~~ partner for a continuous period of less than 3 years up to that time and the Trust, 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~~ partner on a permanent and *bona fide* domestic basis at that time; whether or not the person was legally married to that other person.
- (3) For the purposes of this Act, a ~~marital~~ couple relationship is taken to have begun at the beginning of the continuous period mentioned in paragraph (2)(a) or (b).
- (4) For the purpose of subsection (2), relevant evidence includes, but is not limited to, evidence establishing any of the following:
  - (a) the person was wholly or substantially dependent on that other person at the time;
  - (b) the persons were legally married to each other at the time;
  - (c) the persons had a child who was:
    - (i) born of the relationship between the persons; or
    - (ii) adopted by the persons during the period of the relationship;
    - (iii) the product of the relationship between the persons;**

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Note: Subsection 4(7) is relevant to working out if a child is the product of the relationship for the purposes of subparagraph ©(iii)

  - (d) the persons jointly owned a home which was their usual residence.
- (5) For the purposes of this section, a person is taken to be living with another person if the Trust is satisfied that the person would have been living with that other person except for a period of:
  - (a) temporary absence; or
  - (b) absence because of the person's illness or infirmity.

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