

## Submission to the Inquiry into the Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008

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The Australian Federation of AIDS Organisations (AFAO) is the peak body for Australia's community sector response to the HIV/AIDS epidemic. AFAO is charged with representing the views of our members: the AIDS Councils in each state and territory, the National Association of People Living with HIV/AIDS, the Australian Illicit and Injecting Drug Users League, and Scarlet Alliance, the national organisation representing sex workers. AFAO provides HIV policy advice to the Commonwealth Government, advocates for our member organisations, develops and formulates policy on HIV/AIDS issues, and promotes medical and social research into HIV/AIDS and its effects.

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People with HIV/AIDS are significantly affected by discrimination against same-sex couples. Men with a history of homosexual contact continue to make up the majority (approximately 85%) of those diagnosed with HIV infection in Australia.<sup>1</sup> Many of these live in couple relationships, and sometimes they are also parents. Of the 982 HIV positive Australians who completed the *HIV Futures 5* survey, 82% identified as gay or bisexual men. Almost half of those people reported currently being in a relationship, and named their partner as their primary source of social support<sup>2</sup>. Notably, when asked to rank the most important issue relating to relationship rights, the 1313 respondents to the Gay and Lesbian Rights Lobby's 2007 survey ranked 'legal rights' as most important.<sup>3</sup>

In 2006-07, there were 27 000 same-sex couples living in Australia<sup>4</sup>, and 58 federal laws that actively discriminated against them in relation to financial and work-related entitlements<sup>5</sup>. Not only do those laws breach numerous international instruments to which Australia has voluntarily agreed to comply<sup>6</sup>, they significantly impact the lives of tens of thousands of Australians: adults and children. Sometimes an individual bears the brunt of one of those laws, creating an impact that is specific and severe. Otherwise, the combined effect of those 58 discriminatory laws exacerbates the

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<sup>1</sup> National Centre in HIV Epidemiology and Clinical Research, *HIV/AIDS, viral hepatitis and sexually transmissible infections in Australia Annual Surveillance Report 2007*, National Centre in HIV Epidemiology and Clinical Research, The University of New South Wales; Australian Institute of Health and Welfare Sydney, 2007.

<sup>2</sup> J Grierson, R Thorpe and M Pitts, *HIV Futures 5: Life as we know it*, monograph series number 60, The Australian Research Centre in Sex, Health and Society, Latrobe University, Melbourne, 2006.

<sup>3</sup> Ben Bavinton, Laurie Berg, Vicki Harding and David Scamell, *All love is equal: Isn't it – the recognition of same sex relationships under federal law*, Gay and Lesbian Rights Lobby, Sydney, 2007, p.5.

<sup>4</sup> Australian Bureau of Statistics, "4442.0 - Family Characteristics and Transitions, Australia, 2006-07" at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/4442.0>

<sup>5</sup> Human Rights and Equal Opportunities Commission, *National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, HREOC, Sydney, 2007.

<sup>6</sup> Including the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights, and International Labour Organisation Discrimination (Employment and Occupation) Convention 1958 (ILO 111).

homophobia and social exclusion experienced by many, which in turn negatively impacts the health and wellbeing of individuals and the communities in which they live. Numerous reports have revealed poor health indicators resulting from the social exclusion of same-sex attracted people, for example, markedly higher levels of depression<sup>7</sup>, and drug and alcohol abuse<sup>8</sup>.

AFAO applauds the intention of the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws— Superannuation) Bill*, and the Government's attempts to expedite the passing of the bill as a means to avoid the delays anticipated when the omnibus bill is considered later this year. It is vital that the Bill's benefits are passed on to those directly affected as soon as possible.

This Bill aims to regulate a very specific set of circumstances; the payment of reversionary superannuation benefits upon the death of a Commonwealth superannuation scheme member, and the related taxation treatment of superannuation benefits: a process similar to that already undertaken by every Australian state and territory in relation to their own superannuation schemes. Despite the limited scope of this bill, it is important as superannuation is now a vital component in many Australians' attempts to gain financial security for themselves and their families.

In theory, there is bipartisan agreement for the removal of discrimination against same-sex partners and their children, so that they may be treated in the same way as married and heterosexual de-facto partners, and their children. In fact, the Bill's associated second reading speeches reflect something of a tussle over which political party has historically exerted greatest commitment to the removal of discrimination against same-sex attracted people. Despite that, some members' concerns have delayed passing of the Bill and resulted in its referral to your inquiry. This submission will now address the key concerns outlined by the numerous members of parliament addressing the Senate during the second reading of the bill on 28 May 2008.

- **Allegations that this is the Government's attempt to sneak in 'gay marriage' and other associated controversial practices**

Much to the frustration of many same-sex attracted people and their advocate organisations, this allegation seems extremely unlikely given the Government's tightly held and frequently repeated policy position against gay marriage. Instead, the structure proposed by the bill would appear to allow equitable treatment to same-sex couples, while keeping marriage as an elite union of heterosexual couples.

- **Use of the term 'couple relationship'**

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<sup>7</sup> M.Pitts, A.Smith, A.Mitchell, S.Patel, *Private Lives: A Report on the Health and Wellbeing of GLBTI Australians*, Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne, 2006, p.31.

<sup>8</sup> Attorney General's Department of NSW, *You Shouldn't Have to Hide to Be Safe: A Report on Homophobic Hostilities and Violence Against Gay Men and Lesbians in NSW*, NSW Government, Sydney, 2003, p.43.

Several members of the Opposition argued against the use of the term 'couple relationship' to define those to whom the superannuation provisions may apply, arguing it devalues the traditional status of marriage. This is a furphy as the existing superannuation provisions already include both married people and those in de-facto relationships under the term 'marital relationship': marriage is not the exclusive criteria for eligibility. As the Attorney-General has argued, in this case "removing discrimination is about making sure that same-sex couples are recognised for all practical purposes and have the same entitlements as opposite-sex de facto couples"<sup>9</sup>.

Similarly, the 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.

- **Use of the term 'interdependency relationship'**

The 1 July 1994 amendment to the *Superannuation Industry (Supervision) Act* which allowed 'interdependency' relationships to be classified 'dependant', facilitated people in same-sex relationships being able to leave their private super death benefits to their partner. While this amendment was a welcome improvement, its limitations have clearly revealed themselves. Under migration law and defence force instructions<sup>10</sup>, a same-sex couple seeking to qualify as an interdependency relationship must prove similar relationship characteristics as an opposite-sex couple, but under superannuation law, the 'interdependency' criteria shifts the focus towards a *carer* relationship, meaning some same-sex couples will be excluded from superannuation benefits available to an opposite-sex couple in the same circumstances.

Unlike heterosexual de-facto couples who must meet the criteria of a 'spouse', a same-sex partner can only be conferred a death benefit after superannuation trustees have considered numerous highly intrusive factors relating to their relationship. This invasive and overly-complicated process is not the appropriate mechanism for bringing equality to same-sex couples. 'Interdependency' should be reserved for non-couples.

In fact, the relegation of same-sex couples to a separate category that includes other interdependent people who are not members of a 'couple' (eg. two elderly friends or siblings living with, and caring for, each other) is of itself highly problematic. Not only does it fail to represent the reality of same-sex couples, it is marginalising and stigmatising. It fails to acknowledge the depth and sincerity of same-sex relationships, and suggests there is something intrinsically different (or lesser) between opposite-sex and same-

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<sup>9</sup> Same-Sex Relationships (Equal Treatment In Commonwealth Laws-Superannuation) Bill 2008: Second Reading, 28 May 2008, at [http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?ID=2839337&TABLE=HANSARD](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=2839337&TABLE=HANSARD)

<sup>10</sup> the other two areas of law that have employed the use of a 'interdependency relationship' definition

sex couple relationships: a factor which is not born out by research. Same-sex relationships are of equal value and importance to relationships between two people of the opposite sex.

The issue of interdependency and how to best recognise caring relationships has appropriately been referred to a separate inquiry by the House of Representatives Standing Committee on Family, Community, Housing and Youth.

- **Comments relating to children**

AFAO applauds the bill's inclusion of children of same-sex relationships. As HREOC argued:

same-sex families do exist. And the Inquiry does not accept that one set of parents should have to struggle harder than another set of parents to protect the best interests of their child, purely on the basis of their sexuality. Laws that perpetuate such inequalities are unjust and should be changed. They are also contrary to international human rights law.<sup>11</sup>

- **Date of commencement**

Referral to the Senate Standing Committee has delayed the proposed legislation's commencement, with resulting disadvantage for those affected by the legislation in the interim. To address that unfortunate situation, AFAO asks the government to backdate the effective date of this legislation, ideally to the date of announcement, as is sometimes done with tax and superannuation related laws. Such action would have a minimal impact on the scheme's costing but significant impact on the small number of those covered by the bill who experience the death of a spouse or parent in the interim.

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<sup>11</sup> Human Rights and Equal Opportunities Commission, *National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, HREOC, Sydney, 2007, Chapter 5 at [http://www.hreoc.gov.au/human\\_rights/samesex/report/Ch\\_5.html](http://www.hreoc.gov.au/human_rights/samesex/report/Ch_5.html)