Submission

on the

Same-Sex Relationship (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008

to the

Senate Legal and Constitutional Affairs Committee

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TABLE OF CONTENTS

1. Introduction 1

2. General reform? 1

3. The uniqueness of marriage 1

   3.1 Marriage provides the best environment for raising children. 2

   3.2 Marriage is the institution which benefits both men and women 2

   3.3 Same-sex relationships are not equal to marriage 3

4. Definition of “de facto partner” 4

5. Support for State and Territory relationship registers 4

   5.1 Marriage ‘lite’ 5

   5.2 Same-sex unions 6

6. ‘De facto relationships’ 6

7. Adultery and polygamy recognised and rewarded 7

8. Displacing the spouse 7

9. Children as “the product of a couple relationship” 8

10. Step-child 9

11. Endnotes 10

1. Introduction

The Senate Legal and Constitutional Affairs Committee is inquiring into the provisions of the *Same-Sex Relationship (Equal Treatment in Commonwealth Laws-General Reform) Bill 2008.*

The Committee has invited written submissions which are due by 15 September 2008. The Committee is due to report by 30 September 2008.

2. General reform?

The Bill would amend 68 Commonwealth statutes by introducing into each of these statutes new provisions dealing with parents and children and with de facto relationships.

Curiously the Bill does not seek to amend the principal law dealing with parents and children – the *Family Law Act 1975*. The result if, this Bill were to pass in its current form, would be that various persons would be a "parent" of a child under 68 specific Commonwealth statutes while having no parental rights or responsibilities under the Family Law Act 1975 or the Child Support Act 1988.

This, to say the least, is an odd way of proceeding. If it is the intention of the government to amend the *Family Law Act 1975* to incorporate the new definition of a "child" which would, by means of the Bill, be incorporated into 68 discrete Commonwealth laws then an amending bill for that purpose should be introduced and debated to a conclusion first.

The Bill would create equivalent legal status for the purpose of virtually all Commonwealth law other than the Marriage Act 1961 for marriages and de facto relationships. De facto relationships would be defined in such a way as to include same-sex relationships, adulterous relationships and polygamous relationships.

This Bill would extend to persons in a de facto relationships the same benefits and responsibilities as given to married couples. In some circumstances a partner in a de facto relationship, including a same-sex relationship would gain access to a benefit at the expense of the spouse of that person's de facto partner.

To treat de facto, same-sex, adulterous and polygamous relationships as having the same legal and social status as marriage would be to undermine marriage.

3. The uniqueness of marriage

Testimony opposing a civil unions bill was given to the Maryland House of Delegates by Mr Peter Sprigg of the Family Research Council. In his testimony he persuasively put the case against extending the benefits given to marriage to same-sex relationships.

"Society does not give 'benefits' to marriage because individuals want them or would be helped by them. Society gives 'benefits' to marriage because marriage gives benefits to society. Therefore, when those who are not married, such as people in homosexual or cohabiting relationships, seek to receive such public 'benefits', they bear the burden of proof. They must show that such relationships benefit society (not just themselves) in the same way and to the same degree that the authentic, natural institution of marriage between a man and a woman does. This is a burden they cannot meet. Only the union of a man and a woman can result in the natural reproduction that is essential literally to continue the human race. And research clearly demonstrates that married men and women - and

children raised by their married, biological mother and father - are happier, healthier, and more prosperous than people in any other living situation. These are the true 'benefits of marriage'.

"The legal and financial 'benefits' of marriage are not an entitlement for every citizen regardless of lifestyle. They give an incentive to enter into the socially beneficial relationship of authentic marriage, and give protection to the social institution of marriage. Awarding such benefits to the unmarried makes no more sense than giving veterans' benefits to people who never served in the military."[1]

There are good reasons for society, and therefore, also for the law, to distinguish marriage from other possible relationships, including heterosexual cohabitation and same-sex relationships, and to privilege marriage over such relationships by bestowing particular benefits only on married couples.

Marriage, as defined in the *Marriage Act 1961* at section 5 means "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life".

There are two key reasons for distinguishing marriage from other relationships and granting it a privileged status in comparison to other relationships. Firstly, Marriage provides the best environment for raising children. Secondly, marriage regulates the relationships between men and women in a way that benefits both men and women and society itself.

3.1 Marriage provides the best environment for raising children.

A large body of social science research confirms the near universal belief, across times and cultures, that marriage is the best environment for raising children.

Children flourish best, on a range of indicators, (including educational outcomes, school misbehaviour, smoking, illegal drugs, and alcohol consumption, sexual activity and teen pregnancy, illegal activities and psychological outcomes), when they are raised by a mother and a father in a publicly committed, lifelong relationship.[2]

A few examples of particular research findings illustrate this general conclusion.

Three- and four-year-old children with two biological parents are three times less likely than those in any other type of families to have emotional or behavioural problems such as attention deficit disorder or autism.[3]

Girls whose fathers left the family early (before age 5) were five times more likely in the U.S. and three times more likely in New Zealand to become pregnant as a teenager compared to girls from traditional families.[4]

Male adolescents in all types of families without a biological father (mother only, mother and step-father, and other) were more likely to be incarcerated than teens from two-parent homes, even when demographic information was included in analyses. Youths who had never lived with their father had the highest odds of being arrested.[5]

Children's well being is adversely affected by being deprived of either a mother or a father. Fathers and mothers make different contributions to a child's upbringing. Neither can adequately substitute for the other.[6]

3.2 Marriage is the institution which benefits both men and women

Marriage socialises men in important ways. Societies with significant numbers of unmarried men often have significant social problems.

"*Married men drink less, fight less, and are less likely to engage in criminal activity than their single peers. Married husbands and fathers are significantly more involved and affectionate with their wives and children than men in cohabiting relationships (with and without children). The norms, status rewards, and social support offered to men by marriage all combine to help men walk down the path to adult responsibility*."[7]

Women also benefit significantly from marriage, including better mental health outcomes. "*When a range of types of mental disorders are considered, marriage reduces the risk of mental disorders for both men and women*." [8]

These social benefits for children, men and women are sufficient grounds for society and the law to encourage marriage by granting it a unique legal status and bestowing particular benefits only on married couples.

There is no valid reason to extend any similar, let alone identical, benefit to same-sex relationships. These relationships are of no interest to society and those who enter into them do not enter into a "union" equivalent to marriage. The parties to such relationships should take care of their own future financial needs and have no just claim on Commonwealth pensions.

3.3 Same-sex relationships are not equal to marriage

No matter how intense they may appear to be, same-sex relationships cannot be considered the equivalent of marriage. They confer none of the unique benefits of marriage and family on Australian society.

Both male homosexual and lesbian relationships are significantly more unstable than marriage, with lesbian relationships breaking up within the first 8 years at *over three times* the rate of marriages.[9]

Same-sex relationships are naturally sterile. Same-sex relationships are not capable of producing children. Society has no valid interest in encouraging those in such relationships to procure children through adoption, reproductive technologies or surrogacy, because these processes necessarily involve a third party biological parent. Whatever means are used to procure a child, the child is intentionally deprived of a genuine parental relationship with either a father or a mother.

A key Australian study has shown significant detrimental outcomes from homosexual parenting. Dr Sotirios Sarantakos, Associate Professor of Sociology at Charles Sturt University, Wagga Wagga, NSW, undertook a number of studies on heterosexual and homosexual couples. In 1996 he published a paper, *Children in three contexts*, where he explored the relationship between family environment and behaviour of primary school children living in three family contexts - married heterosexual couples, cohabiting heterosexual couples and homosexual partners.[10]

The major finding of the study was that family type did make a significant difference to the children's school achievements. Children in families where their biological parents were married to each other scored best of the three groups in language ability (7.7), mathematics (7.9) and sport (8.9). Children of cohabiting male-female couple families generally did next best in these areas (6.8, 7.0 and 8.3), while children of homosexual partners scored lowest (5.5, 5.5, 5.9). In class behaviour more children of homosexual partners were reported to be timid and reserved, unwilling to work in a team or talk about family life and holidays. In general they felt "uncomfortable when having to work with students of a sex different from the parent they lived with". Sex identity was reported by teachers to be a problem area for some children of homosexual families. Sarantakos cautiously concludes that "married couples seem to offer the best environment for a child's social and educational development".

Advocates of parenting by homosexual partners frequently claim that about 50 studies have been done "proving" no difference in outcome between children raised by married couples or by homosexual

partners. Any social science study depends for its validity on following rigorous statistical and research procedures. Dr Robert Lerner and Dr Althea Nagai, experts in quantitative analysis, after dissecting each of 49 of such studies found at least one fatal research flaw in each study.[11] These studies are therefore no basis for good science or good public policy.

Professor Lynn D Wardle shows even from those studies which conclude in favour of homosexual parenting that there is data showing that homosexual parenting may be harmful.[12] There is a greater incidence of homosexual orientation in the children raised by homosexual partners with resulting problems including suicidal behaviour, promiscuity, etc. There is also a greater incidence of anxiety, sadness, hostility, defensiveness and inhibitions (some of these especially among boys of lesbian mothers).

In the light of this research data there is no compelling reason for any benefit currently given to married couples to be extended to two men or two women in a same-sex relationship. The parties to such relationships should take care of their own future financial needs and have no just claim on Commonwealth pensions.

Recommendation 1:

As there is no compelling reason to extend to same-sex relationships the benefits or responsibilities given by Commonwealth law to married couples the Bill should not be supported.

4. Definition of "de facto partner"

Clause 1 of Part 1 of Schedule 2 of the Bill would add a new Section 22A to the Acts Interpretation Act 1901. This section would provide a new definition of "de facto partner" which would then be incorporated into most of the other 67 statutes which would be amended by this Bill.

22A References to de facto partners

For the purposes of a provision of an Act that is a provision in which de facto partner has the meaning given by this Act, a person is the de facto partner of another person (whether of the same-sex or a different sex) if:

(a) the person is in a registered relationship with the other person under section 22B; or

(b) the person is in a de facto relationship with the other person under section 22C.

5. Support for State and Territory relationship registers

New Section 22B of the *Acts Interpretation Act 1901* would provide that "For the purposes of paragraph 22A(a), a person is in a registered relationship with another person if the relationship between the persons is registered under a prescribed law of a State or Territory as a prescribed kind of relationship."

Tasmania's *Relationship Act 2003*, Victoria's *Relationships Act 2008* and the Australian Capital Territory's *Civil Partnerships Act 2008* each provide for the registration of relationships including both unmarried male-female couples and same-sex couples.

The Australian Constitution gives the power to legislate with respect to *marriage* to the Commonwealth Parliament.[13] However, the legal significance of marriage is that it is a legally

recognised relationship between a man and a woman, entered by a formal legal procedure, which creates a legally recognised status for the purpose of granting certain rights and benefits.

The State and Territory laws providing for the registration of relationships have created a similar legally recognised relationship, to be known as a "registered relationship" or "civil partnership", in direct competition with *marriage* as defined under Commonwealth law.

Furthermore, provision for registration of non-marital couple relationships by the registrars of births deaths and marriages creates an expectation that such registered relationships would be given additional legal rights and benefits of marriage, including those affecting children such as access to adoption and IVF services.

Legislation to provide for legal registration of non-marital couple relationships for the purpose of granting them marital rights and benefits is not justice; it is injustice. The concepts of equality and justice are often confused. Only the similar treatment of similar situations promotes justice, and it is this principle that created the common law.[14] Insistence on treating different situations equally does not promote justice.

5.1 Marriage 'lite'

Provision for unmarried male-female couples to register their relationships has introduced into State or Territory law a legally recognised "marriage lite" – granting the benefits of marriage without the obligations.

Marriage celebrants are required, under the Marriage Act 1961, to remind a man and woman about to be married that the relationship they are about to enter is "to the exclusion of all others".[15] This exclusive nature of marriage originally derives from the biblical commandment: "You shall not commit adultery."[16] Adultery represents a fundamental breach of marital vows.

Most Australian married couples expect faithfulness from each other. The very public separation of Shane and Simone Warne over famous spin bowler Shane's repeated infidelities is indicative of that expectation.[17]

The Australian Marriage Act 1961 also requires a civil celebrant at a wedding to say: "I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter … for life."[18] This is an enduring promise - for life. Not all marriages endure, but most first marriages do last until the death of one party.[19]

In contrast, registered relationships and civil partnerships do not require any enduring commitment.

For example in Victoria, to be a registrable relationship the law only requires that "one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other".[20]

Registered relationships are inherently temporary and can be terminated at will by either party through simply serving a termination notice on the other party and waiting 90 days.[21] Consequently, registered relationships do not foster endurance. Instead they cultivate a culture of transience that would undermine the ideal of lifelong commitment in marriage.

While it would not be permitted to register a relationship if either of the persons is in another "registrable relationship"[22] or married, no ongoing commitment to exclusivity is required.

Given the detrimental impact of laws providing for registered relationships and civil partnerships on the status of marriage it is inappropriate that the Commonwealth Parliament which has responsibility

for upholding and preserving marriage give any further status to such relationships through a Commonwealth law.

5.2 Same-sex unions

Provision for same-sex couples to register their relationships mimics marriage by granting them the benefits of marriage – but without the obligations.

Registration of same-sex partners, like the registration of unmarried male-female partners, involves no commitment for the relationship to be either exclusive or enduring. While some homosexual partners remain together for lengthy periods, most are relatively brief. Dr James Dobson, of Focus on the Family, has said: "Studies show that homosexual men in particular have a difficult time honouring even the most basic commitments of 'marriage'. A recent study conducted in the Netherlands ... found that the average homosexual relationship lasts only 1.5 years and that gay men have an average of eight sexual partners per year outside of their "primary" relationship..."[23]

Registration of same-sex relationships strikes at the foundations of society by ignoring the most fundamental reason for marriage: to safeguard our future as a nation. Every society that wants to continue - whether secular or religious - must encourage the bearing and raising of children as good future citizens. Every society therefore has a vital interest in protecting the family as the basic social unit of society and marriage as the heart of the family. Relationship registers undermine the special status of marriage and the natural family and thereby place at risk the future of the society.

Research shows that marriage is the most enduring of human sexual relationships - more stable than male-female cohabitation and far more stable than homosexual cohabitation. Children raised by their married parents do better than those raised by cohabiting parents, who do better than children raised by same-sex partners. Children brought up in non-marriage contexts have higher rates of physical and mental health problems, child abuse, criminality, drug abuse and poor academic performance.

> ***Recommendation 2:***
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> ***As the Bill would give recognition in Commonwealth law to "registered relationships" or "civil partnerships" established in competition to marriage under State or Territory laws it should not be supported.***

6. 'De facto relationships'

Proposed new Section 22C of the Acts Interpretation Act 1901 would introduce a new definition of 'de facto relationship' into Commonwealth law.

The definition would impart a significant element of uncertainty into the law. It proposes a list of eight attributes or factors to be "taken into account" in determining whether two people who are not legally married to one another and are not related by family "have a relationship as a couple living together on a genuine domestic basis". No particular finding is necessary or conclusive on any one of any combination of these eight factors in making this determination.

These factors include "the nature and extent of their common residence". The provision that no factor is necessary suggests that a de facto relationship could be found to exist even if the two persons have no common residence. This could apply even in circumstances other than those suggested in new section 22C (4) of temporary absence or illness or infirmity.

7. Adultery and polygamy recognised and rewarded

Proposed new Section 22C (5) would provide that "a de facto relationship can exist even if one of the persons is legally married to someone else or is in a registered relationship with someone else or is in another de facto relationship."

This proposed provision is a direct assault on marriage. Marriage by law in Australia[24] is "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life".

This provision would bestow an official legal status on an adulterous relationship as a "de facto relationship". It would make a married man and his mistress (or homosexual lover) "de facto partners". It would not be necessary for the married man to have actually deserted or separated from his wife for this recognition to be given. He may only see the mistress once each week but their relationship could still have sufficient of the eight factors to be taken into account in determining that a de facto relationship exists. For example, they may have a sexual relationship and a public reputation (say among the man's drinking companions) as lovers.

This adulterous relationship would be treated as having an equivalent legal status to marriage under 68 Commonwealth laws.

The provision would also give legal status to polygamy. A man may only be married to one woman under the *Marriage Act 1961*. However, this Bill would allow him to have one or more additional "wives" living with him. Each of these "wives" would have a legal status under Commonwealth law as "de facto partners" of the man. Their legal status under each of the 68 Commonwealth laws would be equivalent to that of the woman to whom the man is actually married.

The same situation would also apply to the classic "bigamist" with two "wives" in different towns neither of whom knows about the other one.

8. Displacing the spouse

In several of the statutes that would be amended by the Bill the spouse would actually lose rights and benefits as these would be bestowed on the current mistress, boyfriend or homosexual lover if the decision maker is persuaded that he or she was "living with" the married person "immediately before his or her death"[25].

Marriage by law in Australia is meant to be exclusive and for life. Unless and until a marriage is dissolved by divorce under the provisions of the *Family Law Act 1975* it is wrong for the law to displace the spouse by bestowing spousal benefits on a mistress or boyfriend or homosexual lover.

Curiously the provisions for High Court and other judges would allow the Attorney-General to split the benefits between multiple surviving spouses and de facto partners.[26] No guidance is given to the Attorney-General as to whether as principal law officer of the Commonwealth he or she has a duty to uphold marriage by ensuring the spouse – to whom the deceased judge made solemn promises under law – is given the full benefit to which he or she is entitled. It is open to the Attorney-General to deprive the surviving spouse of his or her due in favour of surviving mistresses, boyfriends or homosexual lovers.

> ***Recommendation 3:***
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> ***If the Bill were to proceed it should be amended by deleting from Clause 1 of Part 1 of Schedule 2 proposed new subsection 22C (5) and substituting for it a new subsection 22C (5) providing that "A de facto relationship cannot exist if one of the persons is legally married to someone else."***

9. Children as "the product of a couple relationship"

The Bill would introduce a radical change into the definition of a "child" in Commonwealth law.

This change is to add (see for example Clause 4 of Part 2 of Schedule 2) the following provision dealing with the definition of a child to the various statutes being amended:

> ***child:*** *without limiting who is a child of a person … someone is the child of a person if he or she is the product of a relationship the person has or had as a couple with another person (whether of the same-sex or a different sex). For this purpose, someone cannot be the product of a relationship unless he or she is the biological child of at least one of the persons in the relationship or was born to a woman in the relationship.*

Clause 22 of the Explanatory Memorandum provides that "Consent to the procreation of a child is not an express requirement in the key definition of 'child'. This is because the term 'product of the relationship' implies an element of joint endeavour. The use of the term 'product of the relationship' allows all the circumstances of a particular case to be considered, which means that a unilateral action by one party would not be likely to fall within the definition of the 'product of the relationship'."

The Explanatory Memorandum goes on to give a series of scenarios to illustrate the range of circumstances in which someone would be the child of a person under this definition.

These scenarios make it clear that the proposed change would effectively give legal approval to a range of socially undesirable means of bringing a child into existence – namely the conception of a child by artificial insemination, IVF or surrogacy, including in the context of a same-sex relationship where it is intended to deliberately deny the child the right to know and be raised by either a father or a mother.

As detailed above (Section 3.3) children do best when raised by a mum and dad who are married to one another. The Commonwealth should not be doing anything to encourage or give apparent approval to means of bringing children into existence that deny them their fundamental right expressed in Principle 6 of the *Declaration on the Rights of the Child*[27] which states that:

"The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother."

In relation to surrogacy, as specified in example 3 and Clause 27, the Bill would give parental status under many Commonwealth laws to commissioning parents who acquire a child pursuant to a surrogacy arrangement without any regard as to whether such an arrangement is lawful under the relevant State or Territory law.

Indeed this provision would apply regardless of whether the surrogacy arrangement was commercial or altruistic, (commercial surrogacy is illegal in nearly all Australian jurisdictions and altruistic surrogacy is illegal in Queensland) in which one partner in the couple relationship is a biological parent of the child. This could apply to two males in a same-sex relationship if either of them provided sperm for the conception of the child. It could also apply in circumstances where although surrogacy was lawful (such as in the ACT) the birth mother had decided, after the birth of the child, to withhold consent from the making of a parenting order in favour of the commissioning parents. The commissioning parents could still be held to be 'parents' of the child under some Commonwealth laws notwithstanding that they had no legal standing as parents under the relevant State or Territory law.

These provisions are ill-thought out, likely to give rise to confusion and contrary to the best interest of children.

Recommendation 4:

The new definition of a child as the product of a relationship is not in the best interests of children should not be supported.

10. Step-child

In current law a person only becomes a step-parent of a child by marrying a parent of the child.

Section 3 of the Family law Act 1975 provides that:

> **"step-parent"** , in relation to a child, means a person who:
>
> (a) is not a parent of the child; and
>
> (b) is or has been married to a parent of the child; and
>
> (c) treats, or at any time during the marriage treated, the child as a member of the family formed with the parent.

Section 3 also includes a "step-parent" within the definition of "relative" for the purposes of Part VII of the *Family Law Act*. Paragraph 60B (2) (b) for example, provides that one of the principles underlying Part VII is that children have contact and communication with "relatives".

This Bill would introduce a legal novelty by which a person could become a step-parent of a child merely by having a de facto relationship with a parent of the child.

For example, Clause 42 of Schedule 6 would introduce a new definition of step-child to the *Social Security Act 1991* as follows:

> "**step-child**": without limiting who is a step-child of a person for the purposes of this Act, someone who is a child of a partner of the person is the step-child of the person, if he or she would be the person's step-child except that the person is not legally married to the partner.

In combination with the novel definition of a child as a product of a relationship this new definition of step-parent potentially gives rise to a child collecting numerous "step-parents". For example, if a woman has a child by artificial insemination while she is in a relationship with another woman, that woman would be a "parent" of the child. If the relationship between the two women breaks up and the second woman who is not a biological parent of the child, and did not give birth to the child, enters into a new relationship, her new partner will become a "step-parent" of the child. The new partner's status as a "step-parent" would survive the breakup of the new relationship.

It seems extraordinary that a person would be recognised as having a permanent legal relationship with a child because they once had a relationship with a person who had a relationship with a biological parent of the child at the time the child was conceived.

Given that both male-female de facto relationships and same-sex relationships break up more frequently than marriage this provision is ill-thought out and against the best interests of children. It is one thing for a child to acquire a new legal relationship with an unrelated adult through the marriage of his or her parent to that unrelated adult, it is quite another thing to encumber the child with perhaps numerous "step-parents" as his or her "parents" enter into new sexual relationships, some of which may be of relatively short duration.

Once again it is curious that this Bill is introducing this novel definition of "step-child" ahead of any consideration being given to whether this definition would also be introduced into the *Family Law Act 1975* which is the principal Commonwealth statute governing the relationships between parents, including step-parents, and children.

Recommendation 5:

The new definition of "step-child" is not in the best interests of children and should not be supported.

11. Endnotes

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16. Exodus 20:14 and Deuteronomy 5:18.

17. “Shane tore our family apart”, *New Idea*, 30 July 2005, pp 10-15.

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20. *Relationships Act 2008,* Section 5.

21. *Relationships Act 2008*, Section 15, cf. Tasmanian *Relationships Act 2003*, s 15.

22. *Relationships Act 2008*, Section 6.

23. *Family News From Dr James Dobson*, September 2003, p 5, citing a study by Xiridou, Maria *et al.*, “The Contribution of Steady and Casual Partnerships to the Incidence of HIV Infection Among Homosexual Men in Amsterdam,” *AIDS*, 17 (2003): 1029-38.

24. *Marriage Act 1961*, Section 5.

25. Cf. Clause 8 of Schedule 4.

26. Clauses 54 and 58 of Schedule 2.

27. http://www.unhchr.ch/html/menu3/b/25.htm