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Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

ASFA SUBMISSION ON THE INQUIRY INTO THE SAME-SEX RELATIONSHIPS (EQUAL TREATMENT IN COMMONWEALTH LAWS – SUPERANNUATION) BILL 2008

The Association of Superannuation Funds of Australia Ltd (ASFA) is pleased to make this submission to the Legal and Constitutional Affairs Committee inquiry into the provisions of the above Bill.

ASFA is a non-profit, non-political national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. Our members, which include corporate, public sector, industry and retail superannuation funds, account for more than 5.7 million member accounts and over 80% of superannuation savings.

ASFA's long standing policy position is that it supports superannuation and taxation legislation which does not discriminate against same sex partners. Accordingly it supports the principles sought to be implemented in practice by the Bill.

Background

Prior to 30 June 2004 it was only possible for a superannuation fund to provide a death benefit to a spouse (of an opposite gender), child and any other person financially dependent on the fund member. Same sex partners were required to establish financial dependency in order to obtain a death benefit, or receive a benefit tax free after a superannuation entitlement was paid to the estate of the fund member. Higher rates of tax applied to payments through the estate of the member to persons who were not a spouse, child or financial dependent.

The interdependency provisions introduced in 2004 expanded the eligible beneficiaries to include those in an interdependency relationship. Interdependency can be established if two persons:

- Have a close personal relationship;
- Live together;
- 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.

The interdependency provisions are permissive in that they allow but do not require superannuation funds to provide death benefits to interdependents. If such payments are made they are given the same concessional tax treatment that is given to payments to a spouse, child or financial dependent.

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 deed. In a number of cases this occurred automatically in that the fund trust deed defined potential recipients in terms of those eligible to

receive death benefits in the Superannuation Industry (Supervision) Act. For most superannuation funds, namely those which are accumulation rather than defined benefit, this had no cost implications. The main implication was that there was a wider range of potential beneficiaries with the overall benefit available to be paid not varying in amount.

On the other hand, the widening of potential beneficiaries of death benefits does have cost implications for defined benefit funds that pay reversionary pensions. That said, a number of State public sector defined benefit funds (most of which are closed to new members) now pay reversionary pensions to same sex spouses as a result of specific State or territory government decisions and legislative change. While this has had some cost implications for the government sponsors of such funds there have been no marked increases in the number or cost of reversionary pensions in such schemes.

ASFA is not aware of any private sector defined benefit schemes which have broadened their rules to provide for reversionary pensions for interdependents. The cost of such a change would be a concern to the employer sponsors of such funds.

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 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.

In fact most people that die do not have a superannuation account balance or insured benefit through superannuation at the time of their death. More specifically, in 2006-07 there were around 140,000 deaths in Australia but only 36,000 death benefits paid by superannuation funds. This is partly because the relatively old (where the incidence of death is higher) are less likely to have had superannuation in the first place, or have spent what superannuation they did have by the time they die. For those who are disabled or in ill health the incidence of superannuation also is lower than for the population as a whole and/or a superannuation benefit is taken prior to death. As well, the incidence of life insurance cover through superannuation tends to be very low for those not in the paid labour force, which includes many of those aged over 65 or who are ill.

According to APRA statistics, in 2006-07 death benefit payments totalled \$1,786 million with \$645 million of this attributable to insurance payments. Average death benefit payments were \$220,000 in corporate superannuation funds, but only \$44,000 in industry funds, and \$53,000 in retail funds. The average death benefit paid in public sector funds was around \$50,000 but a number of such funds in addition pay pensions to a surviving spouse and or infant children of the deceased. Of course, some death benefit payments are substantially higher than these average amounts, particularly when the insured amount is for a younger person or where additional units have been paid.

The remainder of this submission addresses the specific points identified in the referral of the Bill by the Senate to the Committee.

The definition of 'couple relationship'

ASFA sees no particular practical difficulty in trustees applying the proposed definition of couple relationship. Funds are very experienced in applying relevant criteria for establishing whether a de facto marriage was in place for a man and a woman. The same criteria should be able to be used when the parties to a couple are of the same gender. Administrative burdens on funds may in fact be reduced given that there will be fewer individuals seeking to qualify for a death benefit under the more problematic interdependency provisions where different and additional criteria have to be satisfied. If same sex couples make up around 0.3% of the adult population (see the next section of this submission) then each year around 80 death benefit claims on superannuation would involve same sex couples. If the proportion were 0.5%, the number of cases processed per year by all funds would be only around 160. Even if the administrative burden of processing claims under de facto spouse criteria were higher than for processing interdependency claims there would be little increase in aggregate administration costs for the sector.

Empirical evidence on the number of de facto and interdependent relationships

The Australian Bureau of Statistics does not collect annual data on the number of people in de facto relationships, including same sex couples. However, 2006 Census data indicate that in that year there were 1.2 million people living in de facto relationships, including 49,000 in same sex couples. The ABS has noted that there may have been some under-reporting by same sex couples of such relationships. De facto relationships accounted for 15% of the population who were living in partnered relationships (Australian Social Trends, Cat No 4102.0, 2007). The proportion in de facto relationships is up from 12.4% in 2001 and 10.1% in 1996.

More detailed data have been published for 2001 (Year Book Australia, 2005 Cat No 1301.0). The 2001 census identified 11,000 male same sex couples and 9,000 female same sex couples in Australia, 40,000 individuals in total. The proportion of families without children was higher for same sex couples, at 95% of male same sex couples and 81% of female same sex couples, compared to 43% for opposite sex couples.

This suggests that the incidence of same sex partners in Australia was around 0.3% of the adult population. Comparable international data are not generally available, but his figure is lower than census data for the Netherlands which indicate that the proportion of same sex couples living together in that country is around 0.5% of the male population aged 20 to 69 and around 0.33% of the female population. The figures for Australia could be lower due to under-reporting but there may also be other factors contributing to the different reported figures.

ASFA is not aware of any published figures on the incidence of interdependency not involving same sex partners. The Victorian register of relationships became operational very recently, the ACT register does not permit the registration of non-conjugal relationships (amongst other things specifically prohibiting registration of relationships between relatives), and the Tasmanian figures that have been published do not split between same sex couples and other registrable relationships. However, only just over 100 relationships have been registered in total in Tasmania over the last five years. Few if any of these are likely to have been other than same sex couples.

Feedback from ASFA members suggests that a substantial proportion of individuals making claims or qualifying under the interdependency provisions have been parents of young adults who have died prematurely, often as a result of an accident or suicide. It would be unusual for such parents to register or seek to register an interdependency relationship prior to the death of a child. However, establishing that such a relationship existed after the death occurred can lead to significant tax benefits for the parents. While a parent would be likely to inherit a superannuation benefit, including any insured element (often significant for those in their 20s) through the estate, tax would be payable unless interdependency can be established.

The anecdotal reports are consistent with demographic data. In 2001 29.9% of persons aged 20 to 29 years were living with their parents (Australian Social Trends, 2005, Cat No 4102.0), with around 800,000 possible cases of interdependency. However, death rates for this age group are low, limiting the actual number of interdependency claims.

ASFA is not aware of any recorded cases where interdependency for receipt of a superannuation benefit has been established for two elderly sisters living together and providing mutual support.

Should the definition of 'couple relationship' be amended to incorporate other interdependent relationships?

ASFA does not consider that it would be of assistance to expand the definition of couple relationship to include other interdependent relationships. The characteristics of such interdependent relationships do not fit at all well within the term 'couple relationship'. A parent would find it unhelpful and perhaps even disturbing to have to establish that they are in a 'couple relationship' with an adult child still living at home even if the definition of couple relationship were expanded to cover such circumstances.

The definition of 'child' and 'child of a couple relationship'

Currently the Superannuation Industry (Supervision) Act does not recognise a child of a same sex couple as the child of both members of the couple in the same way that it does of a married couple or an opposite sex de facto couple. The SIS Act recognises the child's relationship with the biological mother or father. However, it does not necessarily recognise the child's relationship with the mother's or father's same sex partner unless the child is financially dependent on that partner. The Bill attempts to bring about a greater equivalence of the treatment of such a relationship by including as a person's child any child who is a product of the person's relationship as part of a couple with another person.

The concept of a child being the product of a relationship is not defined in the Bill. However, the Explanatory Memorandum makes it clear that at the very least there must be a temporal link between the child being conceived into the relationship and the relationship being in place. A child from a person's previous relationship will not be considered to be a child of the person's new partner unless the child is a step child or adopted child.

While some greater certainty as to what the product of a relationship means in the context of a same sex couple relationship would be of assistance to trustees, in practice this is unlikely to be much of a problem. Based on the number of likely death benefit claims involving same sex couples, the incidence of such couples with infant children in the household, and the incidence of such children being the product of a previous relationship, there may only be a handful of such cases arising each year across the entire sector. A trustee should generally be able to rely on a statutory declaration from the biological parent or birth parent of the child as to whether the child was a product of the couple relationship. If another party seeking to claim all or part of the death benefit disputed that the child was a product of the relevant couple relationship then the trustee could make further enquiries as to the circumstances in which the child was born.

Most claims involving children of married couples or de facto couples of opposite gender are dealt with by trustees without requiring genetic testing to determine whether a child is a product of the relevant relationship. If doubt arises then further inquiries are made but this is the exception rather than the rule.

In summary, ASFA considers that the Bill should be passed as it currently is drafted.

ASFA hopes these comments are of assistance to the Committee. If the Committee has any questions in regard to the material above or any other matter we would be pleased to respond either in writing or at a Committee hearing.

Yours sincerely

Ross Clare
Acting Director of Policy and Industry Practice