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# Official Committee Hansard

## SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL  
AFFAIRS

**Reference: Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008**

TUESDAY, 5 AUGUST 2008

SYDNEY

BY AUTHORITY OF THE SENATE



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**SENATE STANDING COMMITTEE ON  
LEGAL AND CONSTITUTIONAL AFFAIRS**

**Tuesday, 5 August 2008**

**Members:** Senator Crossin (*Chair*), Senator Barnett (*Deputy Chair*), Senators Farrell, Feeney, Fisher, Hanson-Young, Marshall and Trood

**Participating members:** Senators Abetz, Adams, Arbib, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Collins, Coonan, Cormann, Eggleston, Ellison, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Heffernan, Hogg, Humphries, Hurlley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

**Senators in attendance:** Senators Brandis, Crossin, Feeney, Fisher, Hanson-Young, Marshall, Payne, Pratt and Trood

**Terms of reference for the inquiry:**

To inquire into and report on: Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008

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**Committee met at 9.08 am**

**CHAIR (Senator Crossin)**—Thank you everybody and welcome. I declare open this meeting of the Senate Standing Committee on Legal and Constitutional Affairs. The committee is inquiring into the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 and the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008. The submissions that are being considered today have been authorised for publication and are available on the committee's website.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. The committee prefers all evidence to be given in public, but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to give evidence in camera. I remind witnesses that if they object to answering a question they should state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera, and such a request may of course also be made at any other time.

Before we start, I do want to officially welcome Senator Hanson-Young, Senator Pratt and Senator Feeney, not only to the Senate but also to their first meeting of the Senate's legal and constitutional affairs committee. It is nice to have the three of you here. I just want to explain how the program will run today, for the benefit of both witnesses and senators. The first three sets of witnesses today are giving evidence in relation to both of the bills we are considering. At the end of the hearings, it is our intention for Hansard to produce a separate transcript in relation to each bill, so they need to be able to unravel exactly what we are saying today. So when we start I wanted to ask if you could speak briefly in relation to the first bill and then we will have questions; and then, after that, we will go to the second bill. Of course, we need do that within the 45 minutes that we have.

[9.11 am]

**GRAY, Ms Emily, Co-convenor, New South Wales Gay and Lesbian Rights Lobby**

**KASSISIEH, Mr Ghassan, Policy and Development Coordinator, New South Wales Gay and Lesbian Rights Lobby**

**CHAIR**—I welcome representatives from the New South Wales Gay and Lesbian Rights Lobby. We have received submissions Nos 14 and 19 from you in respect of the two bills. Do you need to make any amendments or changes to those submissions?

**Mr Kassisieh**—No amendments. We do want to tender just one thing in relation to the bill, but I can do that when I speak on it, if that is all right.

**CHAIR**—That will be fine. I would ask you to make a short opening statement—to leave time for questions, because there are quite a few of us here—firstly, in relation to the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill.

**Mr Kassisieh**—First of all, we would like to thank the committee for the opportunity to give an oral submission on the current inquiries. The New South Wales Gay and Lesbian Rights Lobby has been at the forefront of relationship and parenting reform over the last 20 years, representing the largest gay and lesbian community in Australia. In 2007 we launched the report of our consultation with over 1,300 gay, lesbian, bisexual and transgender people in New South Wales on the subject of federal same-sex relationship recognition. Five years earlier, we conducted extensive consultations on parenting issues with lesbian and gay families in regional and metropolitan areas of New South Wales. Our submissions on these bills in particular reflect our expertise in consulting and representing the views of our community as well as our experience in law reform and policy advocacy, particularly on similar reforms in our home state.

In relation to the de facto bill, our submission states our strong support for the bill's definition of 'de facto' and for treating de facto couples, including same-sex couples, in a similar fashion to married couples for the purposes of property division. This reflects current practice in state and territory de facto regimes, which between 1994 and 2006 were universally reformed to include same-sex couples or were introduced from the outset with same-sex couples included. We believe the inclusion of the same-sex couples is therefore well established and anything less would be a backward step. We do not have any concerns about the obligations imposed on de facto partners under the de facto bill but in fact note that they have positive impacts for vulnerable parties, particularly the children of de facto couples, and have raised no problems at a state or territory level.

Our main argument in relation to the de facto bill concerns the definition of 'parent'. Our serious concerns are that, unless the Family Law Amendment Act is consistently amended throughout to recognise the parents of children parented by lesbian couples through assisted reproductive technology, the best interests of children will be jeopardised.

In particular we are talking about section 90RB(3) of the de facto bill and its relationship to section 60H(1) of the Family Law Act. Section 60H provides for a presumption of parentage where a child is born through assisted reproductive technology. The male partner of the birth mother is considered a parent under the Family Law Act. The problem is that, where the partner of the birth mother is a female partner, she is invisible under the Family Law Act. Section 90RB(3) of the family law amendment bill, which concerns the division of property, makes her a parent for the purposes of property only. But it does not make her a parent for the purposes of any other aspect of the Family Law Act and, most importantly, the best interests of the child as determined in child related proceedings. So the impact on children of having one of their parents virtually invisible under the law is that the resident parent has no right to child support under the Child Support Scheme, which also mirrors section 60H of the Family Law Act.

Regarding children's rights to relationships with the parents, upon the breakdown of the parental relationship, you have a situation where one parent is legally recognised and one is not. We believe that 60H should be amended rather than a backdoor provision be included in section 90RB saying that, for the purposes of property only, same-sex couples should be treated without discrimination. We believe it is in the best interests of the child to have economic and emotional security, which comes with the legal recognition of their parents. We note that 60H is inconsistent with the majority of states and territories. Western Australia, the Northern Territory, the ACT, New South Wales and Victoria have, or may soon have, parentage presumptions which reflect our recommendations.

We also note that parents who at the moment are recognised in their home states and territories have to go through a complicated legal process to be recognised as parents under the law. That is demonstrated by a recent case which the Family Court decided: the matter of *Kemble and Ebner* [2008] FamCA 579. A mother from the ACT and her partner, the non-biological mother—whom we refer to as the co-mother—wanted to get consent orders which would allow them to secure child support for their child. The Family Court had to first of all, in its cross-vesting jurisdiction, apply the ACT law to find that one of the parents was in fact a parent under the ACT law. Therefore, section 69S of the Family Law Act applied. That says that, where an order has been made that someone is a parent in another court, it is binding and conclusively binding on the Family Court. Therefore, she was then a parent under the Family Court. We note that, because they lived in the territories, the cross-vesting was allowed to happen in the same court proceedings. But, for the majority of co-mothers who live in states that are recognised, they would have to go to the Supreme Court in their home state first to get that very same order. Costs and, of course, the cumbersome legal process which come at the time of a conflict between the parties are not, we believe, in the best interests of children, particularly as we note that the ABS shows that around 20 per cent of lesbians are, in fact, parenting for children. So this is a live issue for our communities.

Should we come back to the support from our communities once we address the second bill?

**CHAIR**—Are you talking about support in relation to this—

**Mr Kassisieh**—For the reform as a whole. In particular, we did note in our written submission the level of support for the de facto changes. I will probably just recommend that you look at that section in our submission in particular.

**CHAIR**—I think, given the fact that we are short of time—we have your submission and I think we can read of and are convinced of the level of support you have for this—our time is best used asking you questions, if that is all right.

**Mr Kassisieh**—Certainly.

**CHAIR**—Ms Gray, did you want to say anything about this bill before we go to questions?

**Ms Gray**—No, not before questions.

**CHAIR**—Senator Trood, do you have any questions?

**Senator TROOD**—What is the public policy argument that you have made in your submission with regard to the matter of children?

**Mr Kassisieh**—The public policy argument is on the basis of the best interests of the child. At the breakdown of a relationship a child will have one parent recognised and another not, and that impacts on the ability for the resident parent to secure child support. It also complicates the matter with regard to contact and time spent with the child and where the child will live, because one parent is not recognised as a legal parent.

**Ms Gray**—In the majority of states and territories lesbian parents are recognised as such from birth. It is a difficult legal situation, I suppose, to have them recognised at a state level but not at the federal level, especially where child support is concerned. When we are recognising the rights of lesbian parents we would like to think that we are also recognising the responsibilities of those parents, particularly when it comes to child support.

**Senator TROOD**—Is that the position in Queensland at the moment?

**Ms Gray**—No, not in Queensland. Queensland is one of the states that have not yet recognised lesbian parents. New South Wales has just passed laws to recognise lesbian parents—co-mothers.

**Senator TROOD**—If the amendment that you are proposing did not succeed, what would be the consequences of that? Would the situation as it now exists continue or would the matter become more complicated perhaps than it already is?

**Mr Kassisieh**—We would see that the Family Law Act would then apply inconsistently, depending on where the children live and where their parents live. In the ACT and the Northern Territory, which recognise co-mothers, the Family Court would be able to use its cross-vesting jurisdiction to find them as parents under territory law and then go through the process of finding them as parents under the Family Law Act and, in this case, order that the child support assessment scheme does, in fact, accommodate the same-sex couple within the determination of child support obligations. In the states that recognise co-mothers—New South Wales and

Western Australia—you would first have to go to the state Supreme Court and then get the same order that would be available for the territories for the Family Court decision to be binding.

In Queensland and South Australia, and in some cases in Tasmania, where there is not currently recognition—and in Victoria, although it is proposed for this year—what that will mean is that children will have fewer rights, not more, with regard to not being recognised under the Family Law Act. Their parents will not be recognised for state based purposes, like medical consent and inheritance. That needs to come from state reform. Parental responsibility needs to come under the Family Law Act and child support obligations need to be dealt with through changes in the federal law.

**Senator TROOD**—Thank you. I do not have any more questions.

**Senator PRATT**—Could you highlight for us whether lesbian parents require special recognition or whether perhaps the act simply needs amendment to express the recognition of parents in gender-neutral terms?

**Ms Gray**—Firstly I will start by talking about how co-mothers have been recognised at state levels, most recently in New South Wales. The law reforms that have occurred have simply equalled the playing field. They have simply allowed co-mothers the same provisions as fathers in instances where, for example, a father is infertile and a heterosexual couple uses a donor sperm. In that case, the husband or the male partner is automatically recognised as that child's parent from birth. What the recent state and territory reforms have done is simply extend that to a co-mother where a co-mother, for obvious reasons, cannot biologically make the child but is automatically recognised as the parent because those two parents think very carefully about wanting a family and it is in the best interests of the child to have two legal parents from birth. Ghassan, could you address what would be required at a federal level?

**Mr Kasssieh**—Simply, as you mentioned: gender neutral changes to 60H to ensure that a male or female partner can be recognised as a legal parent. We note that 90RB tries to do that. Subsection 3 of 90RB says that section 60H should be read as if it were applying to same-sex or opposite sex couples. Our position is that for such an important recognition of parental status it should not be done through a back-door provision which is at best vague—it is really only meant to cover female same-sex couples, because the provision hinges off who the partner of the birth mother is. Where gay men have children there needs to be other types of reform, particularly in surrogacy. I notice that that is something that needs to be done, probably in a different forum, in terms of much more broad federal, state and territory reform.

**Ms Gray**—That is in relation to heterosexual couples as well. We are not advocating any particular surrogacy arrangements that are different for gay men as for heterosexual couples. That is not something we are addressing at the moment.

**Senator BRANDIS**—I would like to draw you out a bit on your problem with section 90RB(3). Is your point that subsection (3) is ineffective for some technical reason to achieve what seems, on face value, to be its intention or is your point that for such an important change to the law you would want it highlighted in a more obvious way in the legislation? If it is the latter I really cannot see the point. This is a dense statute and as long as it changes the law efficaciously to a position that you would prefer, what does it matter that it happens to be a subsection of the section? I mean, they are all subsections of sections. Can you elaborate on your criticism, please?

**Ms Gray**—I do not think our point is that it needs to be highlighted or that people need to be made aware of it. Our concern has always been that it is the most effective and efficient way of recognising the rights of children and their parents across the board, so they are consistent both with state and territory laws and in terms of administering those laws. We are certainly not concerned at all whether the laws are highlighted.

**Senator BRANDIS**—Good. Then what is the point of your criticism of the way this is approached through section 90RB(3)?

**Mr Kasssieh**—In terms of the intention of subsection (3), it says that it applies to parties in a de facto relationship in the same way whether they are opposite or same-sex. The key issue is that the male de facto partner of the birth mother needs to be gender neutral not that the birth mother needs to be gender neutral. So in terms of its drafting it is a vague provision. It is meant to apply to female same-sex couples, not same-sex couples in general. So we think that, in clarifying that, simply amending 60H would be a better way.

**Senator BRANDIS**—Is that right? Is that what the explanatory memorandum says?

**Mr Kassisieh**—The explanatory memorandum does highlight that it is intended to apply, but when you read it—

**Senator BRANDIS**—To both or only to female same-sex couples?

**Mr Kassisieh**—I am not clear on that.

**Senator BRANDIS**—But that is your point, as I understand it. The way you read this, it appears to be intended to apply to female but not to male same-sex couples. Is that what you are saying?

**Mr Kassisieh**—We are saying that 60H should apply to female same-sex couples only because it hinges off the birth mother and her female partner being recognised. It does not hinge off a male partner and his partner being recognised. The more important point about this is that 90RB only applies for purposes of property division. So the mother is a mother for the purposes of who gets the house, who gets the car and the future needs of the children. She is not a mother to her children for the purposes of where the children will live and who the children will spend time with.

**Senator BRANDIS**—So you want a 90RB(3) equivalent provision with the vagueness removed to apply uniformly throughout the act.

**Mr Kassisieh**—Absolutely.

**Senator BRANDIS**—I understand.

**Senator HANSON-YOUNG**—In your first recommendation you talk about the need to ensure that de facto relationships do not simply lose their recognition because people separate while they are perhaps trying to work issues out. I understand what you are trying to say, and I accept that, but how do you suggest that it is built into a bill to ensure that we do not continue with vagueness throughout? That seems to be your criticism across the entire thing. While we understand the intent, it is about trying to avoid the vague. How would you explain that?

**Mr Kassisieh**—The recommendation would be to insert into the de facto definition another subsection—we recommend subsection (7)—which would say that two people may still be in a de facto relationship if they are living apart from each other on a temporary basis. That builds on the patchwork of recognition which is currently under state and territory schemes and which has resulted in some rather unusual judicial decisions where a relationship that has gone through a temporary separation mid the relationship is found, at the end once the parties have separated and gone to court, to be two separate de facto relationships rather than one continuing one with a temporary separation in the middle. It is just to clarify what the current common law in New South Wales says, which is that you take an aggregate approach to a relationship over the course of its time. It also tries to draw on Western Australia's position, which gives some guidance to the court about considering temporary separation in determining whether a de facto relationship exists. In South Australia it actually says that a relationship of three years, which is the general time bar that is required before you have access to property division rights, can be aggregated over four years. It is just trying to provide some clarity in terms of the practical effects of relationships—sometimes separating, sometimes coming back together. That should not complicate the property division process.

**CHAIR**—You have not touched on your other recommendation, which is the definition of de facto relationships—your first recommendation. Can you clarify for us why it is that you think it should be amended?

**Mr Kassisieh**—It is only to be amended with respect to that temporary separation point. We note that the Human Rights and Equal Opportunity Commission in their model definition of 'de facto' did recommend a very similar provision. It is just to clarify that if a longer relationship does separate in the middle it should not be treated as two; it should be treated as one.

**CHAIR**—That recommendation will fall in line with the recommendation from the HREOC report. Is that right?

**Mr Kassisieh**—The model de facto definition in the HREOC report, yes.

**CHAIR**—It should be one that should be picked up and reflected in this legislation?

**Ms Gray**—Yes, we would support that.

**CHAIR**—Thank you.

*Evidence was then taken on the Same-Sex Relationship (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008 but later resumed on the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008—*

[10.06 am]

**PARKINSON, Professor Patrick, Private capacity**

**CHAIR**—Welcome. I begin by thanking you for being so accommodating with the arrangements in your appearing before us today. I think we shuffled you around a fair bit.

**Prof. Parkinson**—Everything worked out.

**CHAIR**—I do appreciate your cooperation in accommodating the needs of the committee. We have decided to try to produce a *Hansard* for each separate bill, so we are going to start with the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 first and the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008 second. Is there anything you wish to add about the capacity in which you appear?

**Prof. Parkinson**—I am a professor of law at the University of Sydney.

**CHAIR**—We have two submissions from you—submission Nos 6 and 14. Do you have any amendments or changes that you want to make before you begin?

**Prof. Parkinson**—No.

**CHAIR**—Do you wish to make a short opening statement in relation to the family law amendment bill and then we will go to questions?

**Prof. Parkinson**—Thank you for the opportunity to appear before the committee. There is a common theme in both of the bills and that is the need across government policy to have a coherent approach to marriage, de facto relationships and same-sex relationships. What you see when you compare the two bills is this lack of coherence in what we are trying to achieve and what we believe about families, which needs a radical overhaul. It needs government to have a much broader policy review about families in Australia.

But because we are focusing on just one bill at a time, let me explain to you my very serious concerns about the de facto relationships bill. These are points that I have been making to the Public Service for three or four years, but to almost no avail. The problem is that the motivation for this bill is about equality. I have no problem with equality; no problem with treating different sorts of family relationships equally. The difficulty is that the way in which some people think we should treat families equally is by treating them all the same. What we are doing in this bill is taking the marriage paradigm—the idea of marriage as a lifelong socioeconomic partnership—and applying it to people who have never chosen that, who had a free choice whether to choose it and who would be shocked to know that they are being treated as if they are married when they are not. I am thinking particularly here of heterosexual de factos.

I am not arguing against equal treatment for same-sex couples if that is what they want—and if the evidence from the people before and Jenni Milbank is that that is the view of the same-sex community, I would have no quarrel with that. The difficulty is that we have simply not asked the Australian people whether they want marriage to be treated the same as cohabitation, and we have not asked heterosexual de factos whether they want that. Most of the sociological evidence is against it. Most of the sociological evidence I have read suggests that there are quite significant differences between people who have chosen to marry or intend to marry and those who have not. What we are doing in this bill is wiping out all those differences and treating everybody as ‘married’.

**CHAIR**—You assume in your submission, though, that the pre-eminent form of relationship in this country is marriage. There is no move away from changing and undermining the definition of marriage; it is simply about having a broader catchphrase that will include couples in a same-sex relationship. This is simply because, under our Marriage Act, they cannot marry; they may well choose to, but legally they are not able to. So is not it the case that, in this legislation, what we are simply doing is making the parameters broader to apply some sort of equal rights to a broader set of couples in our community?

**Prof. Parkinson**—Yes and no. I have no problem if that is what people want to do in terms of same-sex relationships, because marriage is not a choice for them. But I think it is important in the debate—and I heard the last part of the earlier debate—to get away from abstract discussions about interdependency, de facto relationships and same-sex relationships and ask: what is the purpose of this bill and what is it doing? This bill takes the idea of marriage, as it is played out in terms of property division and maintenance, and applies it to people who do not have those intentions or expectations. We have the broadest discretion of almost any country in the world when it comes to family property. Everything that people have ever owned and

everything they have got—whether it is an inheritance, a lottery win, property acquired after separation or a damages award—is on the table and at the discretion of a Family Court judge.

The way those principles work is that we treat marriage as a socioeconomic partnership. I am fully in favour of it. I am married myself and that is what I have chosen. That means if you get a big inheritance a year or so before a break-up, it is available for the other person's future needs—because we promise to live together 'for richer or for poorer, for better or for worse, until death do us part'. The basis on which we have maintenance obligations is that covenant, that promise, that people make. So do young people who have a sexual relationship and then live together to save rent really want to be treated as if they were married for property division and maintenance? Do they want a lifelong commitment to each other of that kind? That is where I think we need to treat families equally but differently.

**Senator BRANDIS**—I am fascinated by your observations, Professor Parkinson, but isn't it the case that, where currently state and federal courts deal with disputes arising from the break-up of a de facto relationship, they apply by analogy the same principles as the Family Court will apply to the break-up of a marriage?

**Prof. Parkinson**—Yes and no. The position varies across the states. The two most populous states—New South Wales and Victoria—currently do not apply the same principles. We have a retrospective approach of saying: 'Here are the assets that have been acquired. How did they contribute to those assets, including as a homemaker and a parent?' But we do not have the broader view of looking at each of their future needs, their financial resources and the much broader approach that the Family Court takes. In Queensland, by contrast, they have gone down this track, as have Tasmania and other states as well. So we have quite a diverse approach at the moment across Australia.

**Senator PRATT**—I am from Western Australia and we have a model where de factos have the same rights as married couples and it does not appear that the world has ended of late. How do you best protect people who are not in the situation of being in a married relationship, whether that is by choice or not? I am thinking specifically of heterosexual de facto women who are in long-term relationships, who probably would have quite liked to have married but that is not how things turned out for them and their relationship ends in disaster. This is why I would argue that they should have the same rights and entitlements as married couples under those separations. How do you have a catch-all for all of these kinds of relationships?

**Prof. Parkinson**—First of all, let me say that the argument that we give to de factos the same rights as married couples sounds very attractive. Why wouldn't you do that? But you have to remember that what we are doing here is giving a right to have a bitter fight in court. The rights for one person are the obligations for the other. It is not like access to family tax benefit. One person has rights, the other one is the loser in all of that, and so we have to look at both women's and men's expectations here, not just one.

There is a simple answer to this problem in this bill. I think there would be widespread support among the Australian population for saying that we should treat people as married for property division and maintenance if they have had a child from the relationship; if they have registered their relationship, which means they have made a choice and they have some information about what the consequences of that are; or if they have made substantial contributions to the relationship which would not be recognised if they were not given rights under the Family Law Act. You could amend this bill quite easily to do that. We are just way out of touch with the Australian people if we think that childless relationships, many of them entered into for two or three years by people when they are in their 20s, are ones where people want the expectations of marriage to apply. Women lose out most when they withdraw from the workforce in order to care for children. What I am proposing would deal with that because if there is a child or they have made substantial contributions or they are registered then they would be within the terms of the bill.

**Senator HANSON-YOUNG**—Are you therefore suggesting that we have some type of federal registering system for people in same-sex de facto relationships who want the same rights—the right to have that bitter fight in court? Is that what you are suggesting, that we need to scrap the idea of looking at trying to define everything and putting up a type of registration instead?

**Prof. Parkinson**—Respect for human rights means respect for people's choices. If there was a widely understood registration system federally, as there currently is in three states—I know there is a movement that way—then people know they have a choice. What is more, it gives us the certainty that we just do not have when we are trying to look at this couple who may be living together, maybe not, maybe living together Monday to Thursday but not Friday to Sunday and so on and so forth. A registration system is simple, straightforward and clear. I would have it for same-sex and heterosexual relationships so that everyone is equal in that way.

**Senator TROOD**—Professor Parkinson, would it be fair to say that your position is one characterised by the view that you see some social virtue in the institution of a de facto relationship?

**Prof. Parkinson**—I see an enormous social virtue in the institution of marriage.

**Senator TROOD**—I understand that, but do you also see social virtue in the institution of a de facto relationship different to marriage?

**Prof. Parkinson**—What I am saying here is that we need to respect what people have chosen for themselves. I am not saying whether it is a virtue or not; I am looking at the evidence sociologically that people who choose de facto relationships very often are choosing something different from marriage. What that institution means for them may vary enormously, but I do not think it is one thing for them.

**Senator TROOD**—I will leave out the judgemental dimension of virtue and put this proposition to you: a de facto relationship serves the human rights interests of some people in society and you are sympathetic to that particular dimension of its value. Does it follow from that position that there would be some value in society codifying the consequences of being in a de facto relationship and not codifying them in the way this bill proposes to codify them, which is to lump them all in with marriage?

**Prof. Parkinson**—That is exactly my view. I think we need to look across Commonwealth law and ask: what does a de facto relationship mean? In many situations, treating de facto relationships and marriage equally would be entirely the right thing to do. In much of Commonwealth law what matters is parenthood rather than the status of the relationship. But let us think about it carefully across Commonwealth law and not have this ad hoc approach which has characterised both Commonwealth and state laws over the last 15 years.

**Senator TROOD**—So, as someone who is sympathetic to marriage, you are concerned about the fact that marriage may be devalued by the direction of this bill. But, as a lawyer and a person concerned by human rights, you are troubled by the fact that individuals are going to have their rights affected in ways about which they presumably have no knowledge or are unlikely to have knowledge. They have chosen the institution of the de facto relationship for a particular reason, presumably—of course, it might not be so—and there is some value in recognising that particular values and rules in law apply to that particular institution, as distinct to marriage.

**Prof. Parkinson**—Absolutely so. Again, one has to look at the purposes in each case for why the law exists—and not have an abstract discussion about this. In situations where a man and woman live together and have children, there are economic entanglements, there are repercussions from that, which need to be sorted out by courts if they cannot sort them out themselves. There is every need to recognise a de facto relationship where there are children or where there are substantial contributions for that purpose. But we need to be a bit cleverer about why we are doing that, and when, instead of lumping them altogether as if they were the same thing, when they are not.

**Senator HANSON-YOUNG**—There have been suggestions in some of the other submissions that we need to insert in the Acts Interpretation Act a definition that is clear enough to ensure that we have consistency across the board in terms of Commonwealth law and not just, as you say, take an ad hoc approach to superannuation law and family law.

**Prof. Parkinson**—I think that would be a disaster, if I may say so. The point is that we cannot do this on the run. We will talk about the superannuation bill in a second, but we have to look at the purpose of each law and ask: why are we recognising a certain sort of family relationship for this purpose? I came in on the tail-end of a discussion about close personal relationships—and, sure, there may be situations where a daughter has looked after an elderly mother and they have a big break-up and end up in court, but you would not treat them as ‘married’. You would not say that they have the same financial entanglements as marriage, the same property sharing arrangements and so on. So you have to think about what is going on in this particular piece of legislation and why it is that we need certain rights and obligations to flow from that. What I have experienced over the years is that that thinking has not been done—and a generic definition would not do it either.

*Evidence was then taken on the Same-Sex Relationship (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008—*

**CHAIR**—Professor Parkinson, thank you for evidence today and for your two submissions. It is much appreciated.

**Proceedings suspended from 10.50 am to 11.07 am**

**MILLBANK, Professor Jenni, Private capacity**

**CHAIR**—Welcome. Professor, in what capacity are you appearing?

**Prof. Millbank**—I am a professor of law at the University of Technology Sydney. I am appearing in a private capacity.

**CHAIR**—You have lodged submissions Nos 5 and 8 with us. Do you need to amend those or make any changes to them?

**Prof. Millbank**—No.

**CHAIR**—What we have decided to do today is, for the purposes of the *Hansard* and our reporting requirements, to deal with each bill separately. First of all, I would ask you to make any opening statement you might have in relation to the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008. We will go to questions on that and then we will deal with the Same-Sex Relationship (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008.

**Prof. Millbank**—Sure.

**CHAIR**—I now ask you to make a few opening comments on the family law amendment bill.

**Prof. Millbank**—I want to start off by saying, as I think is clear from my submissions, that the main impetus of both the family law reforms and the superannuation law reforms is to include a broader range of family forms, to include same-sex couples and de facto couples, and to include children from a variety of non-traditional family forms who do not necessarily have a biological relationship with both of their social parents. I think that is the right move for this legislation. It is broadly consistent with both trends in state law over the last 10 years and trends in comparable jurisdictions such as Canada, Britain, New Zealand and, to a much more limited extent, the United States and also South Africa.

In general, I think the legislation is good. The essence of my submissions and my comments today is to be very much more specific as to particular definitions and particular categories and as to how they will play out both in this legislation and in other legislation if the proposed acts, in particular the proposed superannuation act, are used as a model for later reforms and for the omnibus bills to come—and I suspect that they are. I think both of these bills give me cause for concern if what they are doing is replicated elsewhere. That is as well as what they are doing here today and what you are looking at today.

My major concern with the family law reforms is that there is an inexplicable inclusion of children of lesbian couples born through assisted reproductive technology for the purposes only of property, not for the purposes of being children. Section 60H, which has been crying out for amendment for the past 15 years for many reasons, has been left untouched. There is a new clause that says it will be applied in a gender neutral way for the purposes of property division of same-sex couples but not for all of the other sections of the act to do with children.

We have a quite crazy position where children are children for the purposes of assessing contributions—homemaker and care-giving contributions—through the course of a relationship. Children are children for the purposes of being assessed for future needs provision if one parent is the primary caregiver for the children after separation, but children are not children for the purposes of being children. They are not children for the purposes of parental responsibility or for the presumptions or guidelines in the division of time with children when parents separate. For lesbian couples who have children through ART, that is a completely unnecessary burden and the disjuncture between state and federal law on this issue has been sharp for some time and is getting sharper. I want to say a couple of things about why it is wrong and then talk about the inconsistency issue.

For intact lesbian couples, it is incredibly important that both parents have parental responsibility for their children. In all states and territories, if they are having kids through donor insemination at home or through a clinic or IVE, there is no legal father and there is one legal mother—the one who had the child. The other mother in that household does not have parental responsibility over her child, despite the fact that she is a functional and intended parent of that child and is caring for that child. That is terribly difficult for families while they are intact. Many lesbian mothers now go to the Family Court to seek orders by consent to get themselves parental responsibility. It is not as though the law has made that impossible; it has just made it very hard, expensive and available only to the people who have the gumption to pursue it.

On separation, those problems are even more severe because, even with an order of parental responsibility—so mothers who have done all they can to get shared parental responsibility—people themselves on very unequal ground when they have separated. I have to say that over the last couple of years I have received increasing numbers of inquiries from mothers who have separated, including mothers who have separated amicably and want to use the child support scheme to organise the financial support of their children. They cannot because of section 60H of the Family Law Act. They also find themselves on very unequal ground on separation if they are in dispute and are arguing about time with children or parental responsibility of children and go to the Family Court because one of those mothers is a parent under the act and the other person is a person concerned with the care, welfare and responsibility of the children. They have to meet a threshold test. They do not get the benefits of any of the presumptions about substantial and significant or equal time that are now currently in the act for the benefit of parents.

For those reasons, I think the section cries out for amendment in simple justice terms. It also cries out for amendment in legal terms. We now have four states and territories—soon to be five—where the second mother, the nonbiological parent, is a legal parent under state and territory law, will be on the birth certificate and is on the birth register, meaning that she is a parent for some purposes and not for others. It also means that, if there is a dispute, she can turn up to the Family Court with that birth certificate and, having gone through a state or territory court first, she can seek a binding declaration from that court that she is a parent. Part of the Family Law Act—I think section 69R—says that the court is bound by the declaration of another court as to who a parent is. The mother in those circumstances goes to the Supreme Court of New South Wales or uses the cross-vesting provision of the Family Court in the territories, she gets a declaration that she is a parent, then she comes to the Family Court and says, ‘Now I am a parent because another court said I am,’ and then the Family Court has to treat her as a parent. That happened this year in the case of *Kemble and Ebner*, handed down in May—I can provide the citation later.

**CHAIR**—We were given a copy of that this morning.

**Prof. Millbank**—Great. So what you have here then is the situation where lesbian mothers from the recognition states at least, which are soon to be the majority of states and territories in Australia, are not for any good public policy reason excluded from being parents. They are caregivers to their children, they are legal parents under state law and what they face under federal law is a process burden—they face a legal barrier to rights which they do have anyway but they have to spend a hell of a lot more time and money to access them.

So there is a simple consistency argument here: we can see the trend of recognition; we have a model that has been implemented across most of the states. It is a model that has been implemented in comparable jurisdictions—the UK, Canada, New Zealand, South Africa and a small number of American states. There is absolutely no reason to put mothers in the position of having to take the time and trouble to go to two separate courts before they can simply be treated as the people they are, namely the parent of their child under the Family Law Act. That is the gist of my argument on this proposed legislation.

**CHAIR**—We will go to questions. Senator Hanson-Young.

**Senator HANSON-YOUNG**—Regarding the bill’s treatment of section 60H of the act, how do you see that that fits with HREOC’s recommendations in their equal entitlements report?

**Prof. Millbank**—It is a step towards it, but it does not implement their recommendations on parentage at all, I would say. It is really sidestepping them.

**Senator PRATT**—What would section 60H, regarding children born as a result of artificial conception procedures, look like under a reformed model with an ideal definition?

**Prof. Millbank**—In my submission I say what I think the bill should do, and that is to amend 60H but also make it clear how 60H fits into the Family Law Act as a whole. As I will mention later on the superannuation legislation, part of the problem with the Family Law Act—part of the problem with federal law generally—is that, for 20 or 30 years, no-one has really thought about who a parent is, so the developments of the definitions have been really shambolic. We have seen in cases like *Re Patrick* and *Re Mark* the Family Court going, ‘Um, there is no actual definition of parent in the Family Law Act.’ We have different definitions in different sections, but we do not know whether they apply to the whole act or not. I would say: start with a definition of parent under section 4 of the act and say the obvious, which the court has said in the case of *Tobin*—a child is a child born through intercourse to two biological parents. That is not so hard. With assisted conception methods where you have partial genetic connections, it becomes more complicated. So I would say: (1) the

biological parents of a child conceived through intercourse (2) the parents of a child lawfully adopted by them (3) parents who are recognised under section 60H and (4) parents recognised under state law as prescribed by the Family Law Act. Then I would amend section 60H to make it gender-neutral. I would use the words 'assisted conception' rather than 'artificial conception' because I think artificial is quite insulting to the tens of thousands of people who use assisted conception procedures every year in Australia.

You make section 60 gender-neutral so that you cover the children of lesbian couples. By mirroring state provisions or having a process whereby you can prescribe particular state acts, you then leave the door open. You give the ability in family law to recognise other developments such as surrogacy. As I will say in a moment, I think those developments should start with the states. I think it is important that parentage start with the states because they keep the birth registries and the birth certificates. Federal law should be largely mirroring those developments. By having the ability to pick up parentage by prescription of state acts, you then leave it in the hands of the federal law to determine whether they are going to take those up in the future, whether they want to do it one by one as the states do it or whether they want to wait and do it all at the same time. That is how I would see it going.

**Senator PRATT**—What are the potential problems of having a 'product of the relationship' definition?

**Prof. Millbank**—It is interesting to me that the 'product of the relationship' definition has been used in the super legislation and not in family law legislation. That in itself is quite telling. It has been used in the super legislation because it is very broad—it is quite ill defined, in my view—and it has not been put in the family law legislation for precisely the reason that you cannot be absolutely sure who the child's parents are. You have the possibility of four parents, I would say, in surrogacy arrangements. You do not have a clear connection with the assisted conception parentage presumptions in state law. I am segueing into what I am going to talk about with the super legislation, but you do not have a point in time and you do not have a consent requirement. You have the definition pulling in two different directions with the assisted conception presumptions and with surrogacy. The fact that it has not been put in the Family Law Act shows that it is not a workable definition.

**Senator HANSON-YOUNG**—I understand that the majority of your concerns in relation to this particular bill are in relation to the children. We just heard from Professor Patrick Parkinson, who suggested that the bill may unintentionally discriminate against heterosexual couples by removing the fruits of choice. I would like to hear what your response to that is.

**Prof. Millbank**—Yes, I am happy to comment on that. I touched on it in a one-liner in my submission. It makes absolute sense to put de facto and married couples in the same property regime. It does not remove people's choice; it protects the vulnerable party in an economic and emotional relationship. These arguments were thrashed out in great detail when New South Wales first introduced the de facto regime in 1984-85. There was a real panic—'these people have chosen not to be married and now we are forcing all of these obligations on them'—and there was real care taken in the New South Wales legislation to differentiate between marriage and de facto, and that is why New South Wales had only the past contribution focus and not the future needs focus. I think that is a real furphy these days, particularly when people cohabit for lengthy periods and particularly when they have children. That economic interdependence and dependence happens and should be recognised. A number of the states in their later de facto regimes, such as the ACT, have a model now which is almost identical to the Family Law Act anyway. It does not make sense to me to have different regimes operating. You can contract out of it, and the family law provisions to contract out have become significantly broader since about 2000, when the binding financial agreement provisions were put in place. So before your relationship, during your relationship, after your relationship you can contract out of the family law regime if you do not want it to apply to you.

The other thing I would say is: if people are going to fight about money when they separate, they should be doing it in a forum which is cheaper, easier and simpler to use. The New South Wales system in particular is really antiquated and the process burden on parties is \$20,000 or \$30,000 to argue over very minor property matters. So the family law regime is a better one to use, a more streamlined one to use and the additional scope of the jurisdiction to separate superannuation is going to give you fairer results. The additional jurisdiction to give needs adjustments is very minor. Most needs adjustments are in the order of five to 10 per cent out of lengthy relationships with children. It is very rare that you see spousal maintenance and it is very rare that you would see a needs adjustment of more than 10 per cent of the property pool. And for most people, they will have saved that money by using a family court instead of a state court. So that is money that is going into the mouths of children who need to be fed rather than into the pockets of lawyers who are going to be spending a

lot of time totting up people's pay slips and who paid the rent to do contributions assessments under the state scheme. I think that argument is a real furphy.

*Evidence was then taken on the Same-Sex Relationship (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008—*

**Committee adjourned at 3.14 pm**