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STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL
AFFAIRS

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

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

Wednesday, 6 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, Hurley, 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 Barnett, Brandis, Crossin, Feeney, Hanson-Young, 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

WITNESSES

CROOME, Mr Rodney, Committee Member, Australian Coalition for Equality	26
EGAN, Mr Richard John, National Policy Officer, Family Voice Australia.....	21
GRAY, Dr Matthew, Deputy Director, Research, Australian Institute of Family Studies.....	2
INNES, Mr Graeme, AM, Human Rights Commissioner, Human Rights and Equal Opportunity Commission.....	16
IRLAM, Mr Corey, Committee Member, Australian Coalition for Equality	26
KASPIEW, Dr Rae, Senior Research Fellow, Australian Institute of Family Studies	2
KENNEDY, Mr Ian Campbell, AM, Chair, Family Law Section, Law Council of Australia.....	9
MORGAN, Mr Wayne Kenneth, Consultant, Australian Coalition for Equality	26
TEMBY, Ms Kate, Director, Human Rights Policy Unit, Human Rights and Equal Opportunity Commission.....	16
WESTON, Ms Ruth, General Manager, Research, Australian Institute of Family Studies	2

Committee met at 9.17 am

CHAIR (Senator Crossin)—Good morning. I declare open this meeting of the Senate Standing Committee on Legal and Constitutional Affairs. Submissions that are to be considered at today's hearing have been authorised for publication and are available on the 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. We prefer 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. If a witness objects to answering a question, the witness 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.

Evidence was then taken on the Same Sex Relationships (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—

[11.49 am]

GRAY, Dr Matthew, Deputy Director, Research, Australian Institute of Family Studies

KASPIEW, Dr Rae, Senior Research Fellow, Australian Institute of Family Studies

WESTON, Ms Ruth, General Manager, Research, Australian Institute of Family Studies

CHAIR—I now welcome representatives from the Australian Institute of Family Studies. Before we begin, I remind senators that the Senate has resolved that an officer of a department of the Commonwealth or of a state, which the Australian Institute of Family Studies is, shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions of the officer to superior officers or to the minister.

Senator BRANDIS—They are not an agency, are they?

CHAIR—Yes, they are an agency. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude, though, questions asking for explanations of policy or factual questions about when and how policies are adopted. I also remind officers of the department that if you claim to not want to answer a question due to public interest then you should perhaps set out a basis and reason for that claim. We have received your submission, which we have numbered 17 for our purposes. Before you commence with a short opening statement, do you want to make any changes or amendments to that submission?

Dr Gray—No.

CHAIR—I invite you to make a brief opening statement and then at the conclusion of that we will go to questions.

Dr Gray—I would like to thank the Senate committee for inviting the Australian Institute of Family Studies to appear before this hearing. The Australian Institute of Family Studies was established in February 1980 under the Australian Family Law Act 1975 and resides within the portfolio of the Prime Minister and Cabinet. The institute conducts research on a broad range of policy relevant issues regarding families in Australia. The institute's submission to this inquiry is supportive of the proposal to introduce a federal regime to govern property and financial matters for cohabiting couples following relationship breakdown. The primary rationale for the institute's support is that the scheme has the potential to alleviate some of the family stress associated with relationship breakdown.

In its submission the institute identifies that cohabitation is an increasingly common family form. The 2006 census data shows that 1.24 million Australians were in cohabiting relationships and 15 per cent of all persons living with a partner were cohabiting. This was up from 10 per cent in 2001. Cohabitation is much less stable than marriage. Cohabiting relationships are much more likely to end in separation. They are also less likely to be converted into marriage than in the past. Looking at new cohabiting relationships that formed in the early 1970s, within five years 25 per cent ended in separation while 63 per cent were converted into marriage and 12 per cent were still cohabiting. By the early 1990s the rate of separation had increased and rates of marriage had decreased. Within five years 38 per cent of cohabiting relationships ended in separation while 43 per cent were converted into marriage and 19 per cent were still cohabiting.

While cohabiting relationships are less stable than marriage, much of the difference is explained by differences in characteristics between marriage and cohabitation. There are very strong selection effects. More children have been born to cohabiting couples. The 2006 census data shows that 261,000 Australian families comprised cohabiting parents with dependent children. Proportionately, this represents 11 per cent of couple families with children having cohabited rather than married. The institute's longitudinal study of 10,000 Australian children growing up in Australia revealed that children of cohabiting parents were more likely to experience parental separation compared with the children of married parents. The survey data also shows that compared with married parents cohabiting mothers are younger, have lower levels of education, are less likely to be in paid work, have lower family incomes and reported lower quality relationships.

Finally, the institute observed in its submission that, while there is general lack of quality data available about how cohabiting couples arrange their financial matters, the data that does exist suggests that cohabiting couples may have a different financial profile to married couples. For example, property ownership among cohabiting women is lower than it is for married women. The 2005 data shows that in their thirties 50 per cent of cohabiting women and 79 per cent of married women owned or were purchasing property. However, by their forties the property gap is smaller, with 73 per cent of cohabiting women and 88 per cent of married

women owning or purchasing property. Thank you—and I am being reminded by my colleague that we did have one minor correction to our submission. There was a typographical error which we could perhaps correct—

CHAIR—That is fine. Before we go to questions, I just want to place on record for Hansard purposes that this evidence relates specifically to the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, the bill in which in your capacity you now appear before us. We will now go to questions.

Senator TROOD—Dr Gray, I am just looking at your graphs, particularly appendix 1 to your submission. From my reading, and perhaps you will correct me if I am not reading it correctly, it suggests that marriage is in reasonably good shape in Australia—it was in 2006, anyway. Is that a fair assumption from the graph—that, as an institution, it continues to hold people's affection?

Dr Gray—Yes, I think that is fair. Most people in relationships aspire to marry—not all, but many do. I think that crisis in marriage and so on can often be overstated. These figures show that, particularly as people become older, rates of marriage increase. It will be interesting to monitor over time as new generations come through whether we see further reductions.

Senator TROOD—I was going to ask you that, actually, because I wondered whether or not you had any lineal studies over a period of time. This is 2006, but I wonder whether or not this trend has continued. Is it stable, or does it reflect a decline in the institution over a period of time? Do you have any statistics or at least information on that?

Ms Weston—We have. The proportion of people not living with a partner has increased, but also it has levelled off in the last—

Senator TROOD—I am sorry, Ms Weston; that is appendix 2, is it?

Ms Weston—Yes. It is not as great between this census and the last one as it was in the previous interval, between the two previous censuses but, if you look at the proportion of couples who are cohabiting rather than married, that proportion has increased over time too. As the younger cohorts come in, we will have to follow them up to see whether that continues, but certainly in the last two censuses we have seen an increase in the proportion of, say, those aged 25 to 29 who are cohabiting rather than married.

Senator TROOD—Is that true for all cohorts or just for the 20 to 29 cohort?

Ms Weston—I will have to get back to you, but I think that it is all cohorts. I am not certain about the teenagers, of course, because virtually all of them are cohabiting rather than married, but I know for the 20- to 24-year-olds and the 25- to 29-year-olds. Those are the ones I was focusing on. But we have a paper on that which we have published which shows what it was in the previous census and in the 2006 census.

Senator TROOD—I take your point that the number of people cohabiting over all cohorts is increasing. Of course, I have not seen the other comparisons, but in essence cohabiting seems to be an activity largely restricted to a younger cohort of people and, once you get beyond 30, the number of people participating in that kind of relationship and not preferring marriage as an alternative declines significantly.

Ms Weston—That is true, except post divorce. Post-divorce people are more inclined to cohabit rather than get remarried.

Senator TROOD—I see. How significant is the number of people cohabiting in each of these cohorts? You say it has increased over time.

Ms Weston—It is a pretty small increase—

Senator TROOD—Only a small increase?

Ms Weston—A small increase. We need to look at earlier censuses too.

Senator TROOD—I understand that.

Ms Weston—We have only looked at 2001 and compared it with 2006, but, as with the fertility rate, it can decrease by a tiny rate each year but over a 10-year period it can be quite substantial, so small increases can accumulate over time, of course.

Dr Gray—One fact from appendix 1 is that you can see that trend, because, as people get older, even though the proportion of relationships which are a marriage rather than a cohabiting relationship increases quite dramatically, nonetheless there still is an age relationship. People aged 35 to 39 are relatively more likely

to be cohabiting than those aged 60 to 64, so that does provide some evidence of what you might call a cohort change. In fact, from the age of 25 to 29, marriage becomes more common than cohabitation, and it becomes much more common for older age groups.

Senator TROOD—Indeed, yes. Thank you.

Senator PRATT—Your submission concludes by stating that, because of the prevalence of cohabiting relationships and the increasing number of children, ‘the removal of legal distinctions between the post-separation financial regulation of cohabiting and married relationships appears justified’. Dr Gray, you mentioned the level of stress clearly associated with breakdown and the manner in which access to this kind of equitable law would make a positive contribution. Notwithstanding the fact that there might only be a small number of families relatively, what can you do to highlight for us the stress of this situation and the manner in which access to laws like this might alleviate that?

Dr Gray—If you take a couple with children, for example, and if there is a question about the children and perhaps a contact dispute or something of that nature, that will need to be heard within the federal jurisdiction of the Family Court of Australia or the Federal Magistrates Court, irrespective of whether it is a cohabiting or de facto relationship or a marriage, whereas a property matter for a de facto couple would need to be heard under state based legislation, and that can create some difficulties, particularly when often these issues of property settlements and so on and arrangements around children in some senses are linked.

Dr Kaspiew—There are a couple of points I would like to make. Firstly, there is the issue of access to court systems. The federal court system, the Family Court and the Federal Magistrates Court, has an expeditious procedure. Particularly the Federal Magistrates Court has a simplified process for initiating applications, and it has lower filing fees, so a couple or an individual who is looking to file for children and property in the Federal Magistrates Court can access the fees for the simple application, whereas the process for initiating applications in state courts is much more complex, with a less expeditious process and higher legal costs involved.

I will just refer to some research that the institute is involved in with ANU in relation to relocation disputes. Our research shows that, regardless of whether a party has been successful or unsuccessful, they describe the experience of going to court in largely very negative terms and indicate that they found it quite traumatic. On the basis of that data, which is as yet unpublished, one might infer that the prospect of going through one or more court systems would be a significant disincentive and a significant source of stress to people involved in relationship breakdown.

Senator PRATT—Your submission talks about the different profiles of married and cohabiting relationships and parents. I do not know if you were here for the previous witnesses, but there are people who take the argument both ways and say that is a reason not to extend rights. What would you say to that, in relation to the notion that perhaps really, on the other hand, we should be looking at providing greater levels of stability to these families by proactively making these provisions available to them?

Dr Gray—In many ways we would like more relationships not to break down, but relationships do end—it is a fact of life—and in some cases that really can be in the best interests of the children and the parents or the couple. Given the rates of relationship breakdown, I think it is important that we have a system which enables this to be dealt with in a rational and sympathetic way, in which we can achieve the best outcomes for families post separation. Cohabitation is an increasing phenomenon. Yes, there are some differences on average between cohabiting and married couples, but there are also many similarities in the profiles. So, in our view, there are strong arguments for enabling the single jurisdiction to deal with property matters for de facto couples, cohabiting couples, as for married couples.

Senator PRATT—Has the institute done any research on the way same-sex couples and opposite-sex couples characterise their relationships? Also, when you are looking at a framework of law like this, people choosing to access laws like this, other than the fact that one couple is of same sex and one is of opposite sex, are there any other clear distinguishing features between those couples?

Dr Gray—That is not a topic on which the institute has conducted research.

Senator BRANDIS—So you do not collect any statistics in relation to same-sex couples?

Dr Gray—The institute runs a number of surveys. In some of those surveys there will be same-sex couples. In our surveys we get very small numbers, a very small proportion. As far as I am aware, we have not done a study specifically on this question.

Senator BRANDIS—I think you were here when the witnesses from the Australian Family Association were here. The distinction that Ms Conway seemed to be drawing most particularly was between marriages, both de facto and de jure, on the one hand and what she called contingent cohabitation relationships on the other. My understanding of your document is that you treat marriage strictly as a de jure marriage, a registered marriage, and all the other categories that you classify as cohabitation relationships are cohabitation relationships other than de jure marriage. Is that right?

Dr Gray—Yes.

Senator BRANDIS—From the point of view of your expertise in this area of social policy, which includes the collection of data in relation to this area of social policy, is that the most important relevant distinction between an actual registered marriage and other categories of cohabitation relationships?

Dr Gray—Yes.

Senator BRANDIS—That is where you would draw the line, as it were?

Dr Gray—It is a very important question. I think it is something which is shifting over time.

Senator BRANDIS—I just note, for example, from the second paragraph on the first page of the text of your submission, under the subheading ‘How Cohabitation Relationships Unfold’, there are very deep and very significant statistical differences between marriages—that is, actual de jure marriages—and all other categories of cohabitation relationship, so it is a real distinction which is reflected in the statistical outcomes.

Dr Gray—There are several points to make. One is that there is a great deal of diversity amongst couples who are married as well as amongst couples who are de facto. The second thing is that there are clear differences, on average, between those who cohabit and those who marry. Those who cohabit are more likely to be younger and to be of a lower socioeconomic status. There are a range of reasons. That is one of the important factors which explain why cohabiting relationships are less stable than marriage.

The very important question it really comes down to is: does marriage have a protective factor? That is an issue on which a great deal of research is done all over the world. It is not really clearly understood because it is a very difficult question to answer. I think our reading would be that, on balance, the evidence would show that much of the difference in relationship breakdown rates is due to these sorts of background characteristics, which explains both propensity to marriage versus cohabitation and the likelihood of the relationship breaking down. There probably is some small protective factor but it is not really clearly understood and the mechanisms by which that would happen are not clearly understood. Of course, the way in which relationships are formed now is very different from 30, 40 or 50 years ago. I think 76 per cent of couples who are now marrying have cohabited prior to marriage. In the past, you would have been unusual if you had cohabited prior to marriage. Now, you are unusual if you marry without cohabitation.

Senator BRANDIS—Thank you.

Ms Weston—The other factor is that people have different interpretations of the cohabiting relationship. Some would see it as a no-strings-attached relationship, others have not really thought about it and are just taking it one day at a time and others see it as a trial marriage.

Senator BRANDIS—But, presumably, there must be a minimum length of time of a shared domestic relationship. It is a purely informal—I hesitate to use the expression that Ms Conway used—very casual relationship.

Dr Gray—In many ways, when you are collecting data about this sort of issue, it depends for what purpose you are collecting it. The survey used a variety of definitions and sometimes a certain length of time was applied. In other cases it is about sharing a house and so on and having children, so there are a variety of definitions. It depends very much on the context in which you are asking.

Senator BRANDIS—Thank you very much, Dr Gray. In this rather difficult area it is good to see some rigorous empiricism.

Senator HANSON-YOUNG—This question follows on from Senator Brandis’s questions. A number—not a large number—of submissions we have received claim, and use a number of statistics to say, that children who are brought up in households where their parents are married are less inclined to be sexually promiscuous and less likely to fall pregnant as teenagers, and therefore these children have a more stable home life. Is there any credible research based in Australia that supports these claims?

Dr Gray—I will get Ms Weston to answer in a moment but, again, when comparing the outcomes for children in cohabiting relationships versus marriages, you need to take into account things like the income of the family, the education level and so on. It is easy to say you should do that but it is quite difficult in practice to do it convincingly. That is one of the challenges, and studies have found conflicting findings as to whether or not there is an effect.

Ms Weston—I think that Dr Gray is right. In our own most recent research, which is based on a longitudinal study of Australian children and which was funded by the federal government, we were looking at the four- to five-year-old cohort, and we found that their developmental outcomes, as reported largely by the mother, were not as good as the developmental outcomes of children in marriage. However, the differences were no longer statistically significant when we took into account some of the things that Dr Gray has talked about, as well as things like parental warmth or parental hostility, the expression of affection and whether the family enjoy doing things together, how consistent parents are in their parenting and the mother's mental health—and that is another factor that needs to be taken into account. There is an elevated risk of mental health problems amongst those who are cohabiting rather than those who are married. Part of the selectivity of the two groups which needs to be taken into account when you are talking about outcomes for children is: is it the cohabitation experience per se that is having the effect or is it other selective factors that are having the effect? When we control for these other factors I have talked about, the differences in developmental outcomes of the two groups of children—we are looking at only a short space of time—those differences are no longer significant.

Senator HANSON-YOUNG—I would imagine that trying to aggregate that even further in terms of the sexuality of the parents would be even more minute—if you were able to aggregate those results.

Dr Gray—It is not a question that we have looked at.

Senator BARNETT—On that point, Dr Gray and Ms Weston, you are from the Institute of Family Studies, so, Dr Gray, your last response, when you said that you have not looked at that point, bamboozled me. You and Ms Weston have just answered it at some length. Have you looked at that point or not?

Dr Gray—Perhaps I can clarify. I thought that Senator Hanson-Young's question was about same-sex couples.

Senator HANSON-YOUNG—I was talking generally. The statistics that have been used in other submissions have not been aggregated to same-sex couples.

Dr Gray—Just to clarify, we have done quite a significant amount of work on looking at cohabiting relationships versus marriage, including how children are doing in those relationships, and the Longitudinal Study of Australian Children provides data on that. We have not looked at same-sex couples specifically. In the Longitudinal Study of Australian Children that is not possible, simply because the number is quite small.

Senator BARNETT—That is fine. I am so pleased that matter has been clarified, because I perhaps took it a different way. So you have looked at and considered the differences in terms of outcomes for children in a marriage relationship and in a cohabiting relationship. Is that correct?

Dr Gray—Yes.

Senator BARNETT—You said earlier that you have to take into account the income, the educational status and all those things. Putting all those things to one side for one moment, please can you advise the committee on the outcomes for children in a marriage relationship compared to the outcomes for children in a cohabitation relationship? Which ones are better? If you would like to explain or expand in terms of education, misbehaviour, smoking, illegal drugs, alcohol consumption or sexual activity that would be welcome.

Dr Gray—Perhaps I can answer in two ways, and Ms Weston will expand on this in a moment. If you do not adjust for anything else, then the federal report is that the children in cohabiting relationships at age four to five are doing less well on a range of measures. When you take account of other factors, those differences are no longer there. We have published research on this and we can provide a copy of it to the committee if that would be of assistance.

Ms Weston—We looked at the physical domain, motor skills and health, mainly from the parents' assessment. Our analysis of the social and emotional domain, such as social competency and internalising-externalising behaviour, included teachers' assessments; however, we had a low response rate for the teachers, so it was mainly based on the parents' assessment. We also looked at the learning domain in terms of children's vocabulary, literacy, numeracy and approach to learning. The differences were largely explained by

a combination of other differences relating to economic resources of the family, parenting practices of the family, mothers' mental health and mothers' perception of the relationship quality with their partners. So all those factors combined. Relationship quality was lower, according to the mothers' perceptions, in de facto relationships than in cohabiting relationships. But that again is linked with mental health issues and low income, and a whole lot of other factors contribute to it. The key question is: are children better off in marriage because their parents are married, or is it related to the differences between the parents who do marry and the parents who do not? That is very hard to identify when some of these issues are process issues, such as parenting practices, parental warmth and the quality of the relationship in general.

Senator BARNETT—I understand all the exceptions. We could go on about it for a great deal of time, and I look forward to seeing the evidence if you could provide it to the committee. But I have asked what I would consider a reasonably simple question in terms of the outcomes in a marriage relationship compared to a cohabiting relationship, and I think Dr Gray answered it earlier.

Ms Weston—Children are better off, definitely. Their developmental outcomes are better.

Senator BARNETT—That is what I wanted for the record. We will certainly have a look at your study and consider it carefully.

Dr Gray—I would add to that that we would not be prepared to say that there was a causal link between marriage and the better outcomes.

Senator BARNETT—Okay. We will have a look at your study. Thank you for that. You expressed a view in the introduction and in the closing sentence of your submission about the legislation before us. We have also been advised by the chair and by Senate procedure that we are not, because you are a government instrumentality, entitled to ask you questions about policy. Yet in the introduction and the final comment of your submission you have reasonably bluntly expressed a view on a policy position. It causes some concern to me as a senator that you have expressed that view, yet legally or constitutionally in accordance with our rules of practice we are not meant to be asking you questions related to policy. I just draw that to your attention; I do not wish to go into it.

CHAIR—It is an opinion about a policy, not other matters.

Dr Gray—That is correct.

Senator BARNETT—Let me ask you about your submission and your comment that the legislation has the potential to reduce stress and so on and that there is general support for the legislation. Have you looked at the constitutional concerns and the importance of the referral of powers? Do you have a view on that?

Dr Gray—That is not an area on which the institute has conducted research. I am sorry; we have no comment on that issue.

Senator BARNETT—I thought that would be the case. Can you alert the committee and perhaps on notice provide further and better particulars about exactly how many marriages we have in Australia—the percentage, the average duration and trends. I think Senator Trood referred to your attachment A and the trends. Can you either now or on notice provide further and better particulars about marriage.

Dr Gray—It is probably best if we do provide some further detailed information. With the chair's permission, we have a copy of a recent publication that will provide quite a lot of that information. We have a copy for the committee. We can certainly provide further details on that.

Senator BARNETT—Thank you very much, Dr Gray. This is obviously an issue that is of great importance to the committee, and a whole range of witnesses have expressed a view that it undermines marriage. That is something that we will look forward to reviewing. Thank you.

CHAIR—Just before we go, I have one final question to ask you. Given the discussion we have had this morning about the difference in developmental aspects of children in a married relationship as opposed to a cohabiting relationship, and given also that your statistics show that there are certainly more people living in a cohabiting relationship these days than there were, say, 20 years ago, this legislation would seem to support your research—that is, that there are more children that may well be the product of a cohabiting relationship. Therefore, your research would support this legislation in extending the rights to children should that relationship not continue, would it not?

Dr Gray—Yes. Our research evidence clearly shows that the number of cohabiting relationships has increased. Many involve children, and there are clearly issues where there are two jurisdictions in relation to this.

Senator BARNETT—What is the average duration of a marriage in Australia today?

Dr Gray—We do have that information.

Ms Weston—Marriages are actually lasting a little bit longer. We will have to get back to you.

Senator BARNETT—Could you provide that information, and the average duration of a cohabitation, on notice.

Ms Weston—Yes, we have that information.

Senator BARNETT—And could you provide trends?

Dr Gray—Yes.

Ms Weston—It would be difficult to provide trends for cohabitation but we do know, on the basis of the *Household, income and labour dynamics in Australia* study of 2005, that, of cohabiting couples who had separated, 42 per cent did so before two years had elapsed since they started cohabiting. In other words, 58 per cent had separated after two years.

Senator BARNETT—That is good information. Can we get similar figures for marriages when you respond on notice? That would be appreciated.

Dr Gray—Yes, definitely. That data is available

CHAIR—Is that in there? Are some of those answers in the booklet you have provided us with?

Dr Gray—Some but not all. We are happy to provide some further statistical basis for the committee.

Ms Weston—There is also evidence that people are cohabiting for a longer period before they either separate or marry.

Senator BARNETT—Sure. I am interested in the duration of that and comparing that to marriage, because the key issue before the committee is the difference between a marriage and a cohabitation.

Dr Gray—Sure. We can provide that data.

CHAIR—Although there are probably some like my husband who, after 20 years of marriage, might suggest that you would not get that long for life if you had committed a dastardly deed. So if you were to do some research about attitudes in marriage, that might be useful at some stage. I just add that to perhaps lighten our procedures and discussions.

Dr Gray—Could I respond to that with yes.

CHAIR—I thank the three of you for taking the time to appear this morning.

Dr Gray—You are welcome. Thank you for the opportunity.

CHAIR—We want to place on record the work and the research that the institute does. It is valued and valuable and it does not go unrecognised. Thank you very much.

Proceedings suspended from 12.24 pm to 1.39 pm

KENNEDY, Mr Ian Campbell, AM, Chair, Family Law Section, Law Council of Australia

CHAIR—Welcome. Thank you for allowing us to have your time this afternoon. We have received the submission of the Law Council as No. 20. Do you have any changes or amendments you want to make to that?

Mr Kennedy—No.

CHAIR—I invite you to make a short opening statement and then following that we will proceed to questions.

Mr Kennedy—It may help to keep it short—I know that you are pressed for time—if I could have an indication from the committee as to whether you are still looking at the policy settings in any detail or whether you are more interested in the technical aspects of the legislation.

CHAIR—I think people will have different questions about the nature of both of those. Maybe you can give a brief introduction and then we will go to questions.

Mr Kennedy—I will touch on both of those matters as briefly as I can. In the view of the Law Council, as you will gather from our submission, we regard this as a very important piece of legislation, with quite profound implications for two significant groups in our community and for our society as a whole. For more than 30 years married couples have been able to have all aspects of their disputes resolved on a consistent national basis through the federal Family Law Courts, as they now are with the advent of the Federal Magistrates Court, but that advantage has not been available to a significant and increasing part of our community, being those who live in de facto and same-sex relationships. In more recent years, of course, those couples have been able to have issues relating to their children determined under the Family Law Act. The paradox of that is that it has compounded the impact on them as the Family Law Courts have not had the power to deal with the financial consequences of relationship breakdown. So non-married couples have had to have their issues resolved in two different jurisdictions—the federal jurisdiction for their children and the state jurisdiction for financial issues—at very significant additional cost and with stress on the families.

While it is true that the states and territories have progressively enacted laws regulating the financial aspects of relationships between non-married couples and, in most cases, same-sex couples, there has not been any consistency in the nature of the rights conferred, and the types of couples whose interests are protected vary from jurisdiction to jurisdiction. So couples in different jurisdictions may have quite different entitlements. Their financial affairs may be dealt with in quite different ways. In most instances there is no provision for ongoing support and there is no ability to divide superannuation, although I understand you took submissions in Sydney yesterday about the superannuation amendments. The problems are compounded by where the parties just happen to live or where their assets happen to be. The impact of that is to leave a large segment of the community, especially women, without adequate legal protection and to cause many, particularly older women, to be severely disadvantaged on relationship breakdown.

We are aware that the bill is reflective of the government's specific pre-election policy commitments to apply family law in a consistent and uniform way to de facto relationships across the country and to eliminate discrimination. We support those objectives. The need for the legislation has been apparent for many years and is increasingly so. I understand that you heard from the Institute of Family Studies this morning, and no doubt they have given you some information about the number of couples in our community who currently live in a non-married relationship—about one in seven of Australian couples, or 15 per cent, are not married. That is a statistic that is increasing on a consistent basis, so we are talking about a large number of couples.

You will be aware from our submission that the Law Council has a significant investment in the legislation in that we originally promoted it in the mid-1990s and it was introduced into SCAG in 1998. It has been a slow and steady progress since then, with a false start under the previous government when the legislation was drafted but ultimately not proceeded with prior to the last election. It has now been reintroduced and refined. We congratulate the government on moving swiftly to implement its election promises to meet the expectations of the community in this area.

As you will see from our submission there are various technical issues that we are working on with the Attorney's department. Our approach to that is to have a piece of legislation that will work from the outset and to deal with any issues that might otherwise arise before the legislation is passed in its final form. We see it as being a piece of legislation that is long overdue and which, by and large, had bipartisan support in its previous iteration, and we are very keen indeed to see it come to fruition as a matter of legislative priority.

I will just finish with a plea, Madam Chair. The Family Law Act has been amended more than once a year for 32 years. It originally comprised 123 sections numbered sequentially one to 123 contained within 80 pages. With these amendments it is now going to be well over 600 pages and I cannot begin to count the number of sections; but it is an alphabet soup of numbers and letters. It has become so unwieldy that it is now impenetrable even to trained lawyers, let alone the general public. There is, in our view, a pressing need for it to be reorganised and renumbered in a logical and coherent way. It is not a major task but it is one that really needs to be carried out. We would urge the committee to include in its report a strong recommendation to that effect. Those are the only matters, Madam Chair.

CHAIR—Thank you. In your submission at point No. 9 you say:

... there are a number of areas where the drafting could be improved to provide greater clarity and to rectify what are largely technical defects which may lead to unintended consequences ...

You give us two examples; can you elaborate on those or provide us with any other examples that might assist us in our analysis of this legislation?

Mr Kennedy—It is a little bit early to do that at the moment. We have various groups working with the Attorney-General's Department going through what is a fairly complex piece of legislation. We are happy to make additional submissions if there are particular areas that you would like clarified. We will come up with a number of suggestions, which will be available prior to your reporting date, but at the moment it is such a work in progress that I do not think I could make any helpful contribution at this stage.

CHAIR—One example you give us is the cessation of spousal maintenance, where you think the wording can be improved in the act.

Mr Kennedy—Yes.

CHAIR—And the other is the financial agreements geographical requirement.

Mr Kennedy—They were meant purely as examples to give you some idea of the sorts of things we were working on. Another random one is a very minor drafting provision in relation to the amendments in relation to separation declarations in financial agreements that relate to when they become binding. I think it says that the date of the declaration is when the last person signs it. It does not make much legal sense to have that, and we are looking at whether that might be better expressed. There is really nothing major. Bear in mind that this is the second iteration of the legislation and we have been through it all before. There are differences and additions and we are just trying to make sure that it is internally consistent and that the new provisions are consistent with the existing provisions which relate to married couples, subject of course to the constraints of the referring legislation from the various states. We understand the technical issues that arise from that.

CHAIR—Paragraphs 16, 17 and 18 reiterate the fact that you have members of your council working with the A-G's Department specifically on those four dot points and other technical areas.

Mr Kennedy—Yes, other technical areas. Again, that is by way of example and it is meant to be inclusive rather than comprehensive. Of course, the more one reads this sort of fairly complex legislation, complicated by the referring legislation, the more things come to mind that might need to be thought about and perhaps improved for consistency and workability.

Senator BARNETT—Thank you very much, Mr Kennedy, for your submission and responses. I would like to take up where the chair left off and to get some clarity about this matter. It appears that, in the mind of the Law Council, there is some ambiguity and confusion when reading the bill as it stands at the moment. One of the reasons you have seen fit to have further discussions and negotiations with the Attorney-General's Department is to clarify some of these matters to remove that ambiguity and confusion. Can you confirm that?

Mr Kennedy—That is not entirely right. A number of the miscellaneous amendments in the bill arise from previous submissions which we have made which were aimed at improving various aspects. There are issues relating to the arbitration provisions and financial agreements in particular which come to mind. They have been picked up in the bill. What we are looking at with the Attorney's department is to make sure that they do what was intended.

Senator BARNETT—Was the Law Council consulted prior to the bill being completed and introduced?

Mr Kennedy—No—it came a little bit out of the blue, as is so often the case with these things. The same thing happened with the shared parenting legislation—again, a huge pile of legislation, which takes a lot of getting through.

Senator BARNETT—How long have your discussions been taking place to date with the Attorney-General's Department?

Mr Kennedy—We started that process over the last couple of weeks. We needed some time to look at it first of all. Having said that, we have always had a very cooperative working relationship with the Attorney's department. In most cases, legislation of this nature is confidentially made available with the Attorney's approval beforehand so that any drafting errors can be picked up.

Senator BARNETT—Is it possible for you, for the sake of transparency and accountability, to advise not only the government but also the opposition and perhaps, indeed, other members of the Senate of the Law Council's view?

Mr Kennedy—We intend to advise the committee as soon as we have identified the areas that require discussion.

Senator BARNETT—You have identified them already today in your submission and we have been referring to them specifically, and they are set out in pages 2 and 3 of your submission.

Mr Kennedy—They are some examples of the things that we are currently looking at.

Senator BARNETT—When can we get a full list of the concerns that you have with the bill?

Mr Kennedy—I would think within the next two weeks. One of the problems, of course, is that my section committee is a voluntary committee. They are all practising legal practitioners and time is often a problem. We have been putting a lot of work into it and have made quite a lot of progress over that time.

Senator BARNETT—I am sure you have, and it is very much appreciated in light of the voluntary effort of you and your committee members. I draw your attention to point 17, where you state:

The Law Council's Family Law Section is working through each provision contained in the Bill and is in communication with the Attorney-General's Department.

So it is your view that there is a good amount of work still to be done to clarify and remove the ambiguity that is currently set out in the bill?

Mr Kennedy—Only to the degree that there are an awful lot of provisions in the bill that need to be looked at and isolated.

Senator BARNETT—It is a very substantial—

Mr Kennedy—But in terms of major issues that arise from them, the answer is: no, they are probably not major issues, so it is a matter of making sure that the bill does what it is intended to do.

Senator BARNETT—Sure, but nevertheless you want them fixed prior to the bill being passed through the parliament.

Mr Kennedy—Of course. That has always been our position on any legislation: it is better to get it right first than having to amend it later on.

Senator BARNETT—Indeed, and that is why we are having a Senate committee of inquiry and we are working through these issues. Regarding the constitutional validity of the bill, section 51 does not provide that this is an area for the Commonwealth—

Mr Kennedy—That is true.

Senator BARNETT—and, indeed, the states have to refer their powers, and some of the states have. Western Australia has a different arrangement and South Australia, I understand, is different again. So what is your understanding of the requirements in terms of the referral of powers so that this legislation can actually have full force and effect?

Mr Kennedy—I would not elevate myself to the status of a constitutional lawyer, but I would say that from our perspective the referring legislation from the referring states is adequate for the purpose. Our understanding is that South Australia will almost certainly come on board. Western Australia is Western Australia. It has its own separate Family Court and—

Senator BARNETT—So there would be separate rules and conditions relating to these matters in Western Australia?

Mr Kennedy—Yes, and that is the case now. Western Australia rarely has identical legislation. Unless it refers power, it does not get the ability to split superannuation interests.

Senator BARNETT—My understanding is that, yes, there is a different legislative regime in Western Australia and the rules apply in a different respect.

Mr Kennedy—That is true, and that is true of all the states and territories currently. By a quirk of timing, of course, Victoria has very recently passed its new Relationships Act, which is very close to this legislation, which does not actually come into effect until 1 December this year. It will no doubt be fairly rapidly overtaken for most couples by the federal legislation under the referring act.

Senator BARNETT—What evidence do you have that South Australia would necessarily come on board? Do you know something that we do not know about South Australia?

Mr Kennedy—Absolute gossip—nothing more than that.

Senator BARNETT—There are a number of pre-conditions to making this legislation have full force and effect across the country.

Mr Kennedy—Of course there are, and one would hope that all states will ultimately come on board. But that is part of the structure of the legislation itself, of course. It creates the ability for the two remaining states to come on board at a time that they decide to do that. In the meantime, the states which had referred their power are on board and those states will come under this legislation. It is a pretty good start—it is the vast majority of our population.

Senator BARNETT—A number of submissions have been put to us that express concern about marriage and the institution of marriage being undermined. What is the position of the Law Council?

Mr Kennedy—Our position is that there is no real substance to those concerns. This really is a policy argument that has long since been overtaken by the reality of our society. The social policy settings are established: this is an issue that has been with the Standing Committee of Attorneys-General for a decade now and has progressed to its present state. The major population states of the Commonwealth have already referred their powers to deal with these issues in a way that they consider appropriate. Our view would be that the marriage equivalent policy type debate is a rather sterile one at this stage of the game.

Senator BARNETT—So you do not have the view that the removal of the words ‘husband and wife’ and replacing them with ‘couple relationship’ has any impact on the moral, social or other foundational aspects of the institution of the marriage?

Mr Kennedy—Not at all. We already see one in seven Australian families who are not in a marriage relationship. That does not seem to have undermined our social fabric to any noticeable degree. Even with this legislation it still puts us a long way behind many other parts of the world, including what I would regard as far more conservative jurisdictions.

Senator BARNETT—Let me ask you this question: does the Law Council support homosexual marriage?

Mr Kennedy—The Law Council accepts the government’s position—both governments; the previous government and the present government—that formal marriage under the Marriage Act is not appropriate. But again, that puts us behind jurisdictions like the Netherlands, Belgium, some US states, Canada, Norway and even Spain, which is an extremely conservative country which does have same-sex marriage fully equivalent with heterosexual marriage.

Senator BARNETT—Is it the view of the Law Council then that, if we are behind those other countries, we should have homosexual marriage in Australia?

Mr Kennedy—The Law Council has not formed that sort of view, and it is certainly not, as I understand it, currently Law Council policy.

Senator HANSON-YOUNG—I have a question in relation to the intent of this bill. One of the outcomes we would like to see when it is passed—regardless of how it is passed and what amendments may or may not be considered—is that it is for the benefit of children. There have been some queries around that issue from other people who have submitted and appeared before us today and yesterday. But the general view does seem to be that this will be of benefit to children, at least those who live with parents who are in a de facto relationship. Is that the view of the council?

Mr Kennedy—It is true to say that children of de facto relationships are already well provided for under the Family Law Act. It is equally true to say, as I touched on briefly in my opening statement, that women in particular have suffered serious disadvantage as a result of relationship breakdown when they are not in a marriage relationship. This bill certainly has the advantage that a mother, rather than getting a

disproportionately meagre share of the wealth created in the relationship, has enough to provide for the children and to provide proper accommodation over and above whatever child support the father may pay.

Senator BRANDIS—There is just one small matter. Unless I have overlooked it, your submission does not touch on the question of possibly expanding the categories of entitlement beyond same-sex couples—I am talking about the same-sex bill—to so-called interdependent relationships. That is an expedient that has been adopted, for example, in Tasmania, as I am sure you are aware.

Mr Kennedy—And in the ACT.

Senator BRANDIS—It may well be that the Law Council does not have a position on that question. Does the Law Council have a view about that?

Mr Kennedy—Not to my knowledge. In terms of the submission itself, we restricted ourselves to the referring legislation and to the bill. Having said that, part of the problem is where you draw the line—

Senator BRANDIS—There will always be boundary issues; I appreciate that.

Mr Kennedy—People in that sort of relationship tend to come within the umbrella of a raft of state legislation rather than federal legislation.

Senator BRANDIS—In any event, the answer to my question is that the Law Council does not have a view on that.

Mr Kennedy—That is so.

Senator PRATT—We have only heard in evidence before this committee in fairly general terms about the disadvantage faced by couples who are unable to access the family courts. Are you able to highlight for us in greater detail the kinds of disadvantage that de facto couples face when compared to married couples?

Mr Kennedy—As I touched on in opening, the major disadvantage, particularly if they have children and children issues that need to be resolved, is that this is done in the two family law courts. If they have a financial issue that they need to have resolved then they have to go to the state courts, and very often to the state Supreme Court, which is an extremely expensive jurisdiction. Many people find that they cannot afford to do both. Even if they had a totally legitimate claim what usually happens in those relationships is that the assets tend to be concentrated in the hands of one person rather than both and to get appropriate relief you need a determination because the person wants to hold on to those assets. People are effectively disenfranchised.

Let me give you the example of a case I am doing tomorrow. I am acting for a woman who is 58 years old. She has been in a relationship for almost 18 years. All of the assets are in the male's name. He is a very senior professional with a high earning capacity. She has managed his practice for much of that time and improved it significantly. But he has left the relationship. She is now 58 years old. She is unemployed because she cannot work in the practice any more. Her entitlement to a share of assets under state law is very uncertain indeed. So what we are doing tomorrow is trying to mediate that and to come to some agreed outcome. Again, to fight that sort of case in the Supreme Court would be a hideously expensive and time-consuming process for her. So there are two types: families that have children can be seriously disadvantaged; and older women in particular tend to be seriously disadvantaged.

Senator PRATT—Further to that we have had some conversation about the state's referral of powers, noting that Western Australia has not referred its powers. One of the reasons, to my knowledge, given for that is the failure of the federal jurisdiction to pick up on de facto relationships, including same-sex couples, and also the capacity to recognise parenting relationships for same-sex couples within that framework. How far do these reforms go to addressing those kinds of concerns?

Mr Kennedy—I think they are aimed at a different outcome. Again, this bill is very much governed by the referring legislation from the referring states. In a sense it is a narrow issue and you cannot go beyond that. Western Australia takes the view that apart from the superannuation issue it has a well-established and workable regime, and does not see the need to change. Hopefully, there will be a different result over time. I think the superannuation aspect is important because very often the major asset that is built up over the course of a relationship is superannuation. Again, looking at the cases of the older women, they are left at the age of almost 60 to go onto the pension.

Senator PRATT—I note that the Western Australian Attorney-General has asked for an inclusion of those superannuation issues to be referred back to the states so that they might resolve that issue. Is that something you would support?

Mr Kennedy—No, we would see it as being a federal responsibility and having national consistency—Western Australia is a bit of a law unto itself, as we know, in a lot of areas.

Senator PRATT—I am from Western Australia! If Western Australia does not want to refer that particular provision it might be best to refer it back to the states so that an equitable solution is found in those parties?

Mr Kennedy—That will be a matter for government in the end. We have no policy position on that. Our policy is that we would like to see everyone come on board so there is complete national consistency in the legislation and wherever you happen to be in the country you are going to be treated the same way. That is particularly important. Again, I can take a current example of a case that I have, one which involves Senator Crossin's jurisdiction, among others. I act in a matter where there is property in Darwin, Melbourne and rural New South Wales. At the moment, technically, for the person who does not control the property to get any share of it they need to be litigating in three different jurisdictions. That is just crazy. We do not want Western Australia hanging out there in the same position. We are a very mobile country; people move around a great deal. Indeed, when relationships break down they tend to move back interstate or to other parts of the country or perhaps out of the country. They are real issues that need to be addressed.

Senator TROOD—There are two matters. The first relates to paragraph 11 of your submission, the one that deals with the problem of the ceasing of a maintenance order. You suggest in paragraph 11 the addition of a new circumstance which might lead to termination. Something occurs to me and I wonder whether you have a response to it: the difficulty with the proposal that an order might terminate on the formation of a de facto relationship is that, unlike a marriage, which occurs in a moment of time and one is clear that a marriage has been created or formed, a de facto relationship frequently has a time element to it. You cannot immediately determine when a de facto relationship has actually formed and is stable for the purposes of the legislation. I wonder whether that is, in fact, a solution to the problem that you foresee?

Mr Kennedy—It is interesting that you ask that because one of the other technical issues that we want to have a bit of a think about and which we are still looking at is the provisions relating to modification of maintenance orders—that is, changing the quantum or even discharging them. Under the bill, one of the factors that the court has to specifically take into account is whether the person has entered into a stable or continuing de facto relationship. But that does not apply when you go over to the termination of orders. It does not make much sense to have it in one part but not the other when the principles are very much the same. In any of these cases there is going to have to be a determination as to whether the relationship falls within the definition of de facto relationship—a finding of fact based on the evidence. So it is not, at that level, particularly difficult to do. But there seems to be an internal inconsistency in two adjacent provisions of the act.

Senator TROOD—I see the point in relation to that inconsistency. I still think there may be a question mark as to whether that is a useful mechanism by which a maintenance order or any other activity might occur under the legislation, given the difficulty of determining the nature of the de facto relationship.

Mr Kennedy—There is always going to be an issue as to whether people come under the act or do not—and there are certain criteria there. The court may have to make a declaration in relation to that, and the power to do that is incorporated in the bill. If you look at it from the other side, if someone is in receipt of ongoing maintenance from a former partner and then begins a relationship with a new partner, the first partner is not going to be entirely happy about continuing to make a financial contribution when that person has changed their financial position fairly significantly.

Senator TROOD—I can see that point. I know that it is a cause of grief and difficulty in relationships, particularly when they break up and partners remarry et cetera cetera. I am not sure this provides the kind of clarity that is required. However, that is a matter you are looking into.

Mr Kennedy—We are looking into it. We do not have a concluded view on it, obviously; these are issues that come to mind as we look at these things. But unless you have some provision, you are going to have people shouting from the rooftops that this is not fair—and we are well aware that all members of parliament see a constant procession of people who have concerns about family law.

Senator TROOD—I see the force of that argument. The other question I want to ask you is a somewhat wider one, and it is about the nature of de facto marriage. It has been put to us previously that providing rights and entitlements to people in de facto marriage relationships actually imports into those relationships rights and responsibilities which largely apply to marriage. It was put to us that people enter into de facto relationships for many reasons but specifically they often do not wish to enter into marriage. It was put to us

yesterday that, if they are in a de facto relationship and have all the attributions of marriage in relation to title and property et cetera, that perhaps detracts from their human rights. They are entitled to make choices about things without necessarily having the burden of the law brought down upon them. In other words, there is an 'irresponsible' dimension to a de facto relationship, which is perhaps one of the reasons why people choose that course of habitation rather than marriage itself. Do you have a view on the social policy element of that conundrum?

Mr Kennedy—That concept seems to me to be drawing a very long bow indeed. What the legislation is aiming at is to protect the interests of people who are disadvantaged as a result of being in a relationship. We do not use the term 'de facto marriage', and state and territory legislation mostly does not use that term; it tends to use terms like 'domestic relationship' or 'living in a marriage-like relationship'—and I think that is what you are looking at. But you are not going to get a flood of people coming into the courts unless there is some aspect of the relationship that requires redress. Some of the submissions ask: what happens if young couples have been living together in a de facto relationship for a year or two and it breaks down? The reality is that they are not likely to have acquired anything of substance in that time and they are unlikely to have any great issue that needs to be dealt with. What this legislation seems to be trying to do is provide a conduit to unravel the more complex issues that arise from a domestic relationship where one person is disadvantaged from the breakdown of the relationship and their rights are not recognised and their entitlements, in terms of their contribution, or the impact of that relationship on their financial future, are not currently recognised. I gave an example before of a 58-year-old woman who leaves a long relationship and is basically unemployable and has limited capital behind her. That seems to be the sort of case for which our society would see it as being fundamental to provide some sort of proper recourse.

Senator TROOD—The case of people in longer term relationships is perhaps an easier one to deal with than those who might be in a shorter term relationship, where allegations arise about importing property contributions to the relationship, which have to be divided up. I think part of the concern that has been expressed is that people do not to have that arbitrated in a legal fashion.

Mr Kennedy—There is an easy answer to that, and the legislation provides for it: if people do not want that, they have the ability to contract out of the provisions of the legislation—and many people do. The Victorian legislation, for example, even though it does not start until December, already permits parties to enter into an agreement that will exclude the jurisdiction of that legislation once it comes into effect. We do see quite a number of those already, particularly with second marriages or people who come into a relationship with pre-existing assets. People are saying, 'We don't intend to get married but we want to segregate our financial affairs, not necessarily on the basis that our relationship may break down but so that there is no issue between our respective families if one of us dies or if something happens in the future.' That seems to me to be particularly sensible. The ability to do that is clearly there in the legislation, by way of a pre-relationship or relationship agreement.

Senator TROOD—That opportunity may well exist in Victoria, but I am wondering whether that is the nature of these relationships—that people are cognisant of the need to preclude what might be the breakdown of a relationship—

Mr Kennedy—My members from around the country tell me that that is certainly the case—that there are many, many queries at the moment, because of the publicity about the bill, as to when it is starting, whether they can have an agreement and what legislation they have to do it under. So there is certainly a lot of community awareness about it. Again, in exactly the same way as the Family Law Act provides for a prenuptial agreement to do the same thing in appropriate cases, the ability to do it is there.

Senator TROOD—Thank you.

CHAIR—Mr Kennedy, that is all the questions we have for you today. Thank you for your time and for making yourself available for our inquiry.

Mr Kennedy—That is my pleasure. We will do our best to get some more details for the committee before your reporting date, once we have finished the analysis.

CHAIR—That would be appreciated. Thank you very much.

[2.56 pm]

INNES, Mr Graeme, AM, Human Rights Commissioner, Human Rights and Equal Opportunity Commission

TEMBY, Ms Kate, Director, Human Rights Policy Unit, Human Rights and Equal Opportunity Commission

CHAIR—We will invite you, if you so choose, to make an opening statement in relation to the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008.

Mr Innes—Thank you. I will make some brief comments on the family law bill. We support the new definition of ‘de facto relationship’ contained in this bill because it brings equality to same-sex and opposite-sex couples. However, we are concerned about the approach of this bill to the definition of ‘child of a de facto relationship’. The new definition extends the application of the section of the Family Law Act dealing with parenting presumptions to property matters. This means that lesbian co-mothers will be considered parents for the purpose of property matters. Our main concern is that the new definition relies on a convoluted amplification of section 60H of the Family Law Act, which only applies to matters regarding property matters and not to matters regarding children. This inconsistency will disadvantage same-sex couples when it comes to determining parental responsibility.

We think it would be a better approach to amend section 60H itself and have it apply to the entire Family Law Act. However, even if this occurs, there will be no protection for a child born through a surrogacy agreement to gay fathers. As I outlined earlier, to include all same-sex families, this amendment would need to be accompanied by a uniform reform of state surrogacy laws. Consequently, we prefer the approach of the more inclusive definition of ‘child’ contained in the superannuation bill and recommend that it is also adopted in the amendments to the Family Law Act.

If I can just make a couple of concluding comments about both bills. These are important reforms. For the first time, same-sex couples and their children will be properly recognised in Commonwealth laws. We commend the government on these reforms, particularly on the commitment to an equitable outcome in the complex area of recognising parent-child relationships, and we urge the speedy passage of this legislation, especially the superannuation legislation, where a delay of just a few months could have serious consequences for some same-sex couples, particularly people who are unwell.

Senator BARNETT—Sorry, what did you say then? You did not finish the sentence or I did not hear.

Mr Innes—I said ‘particularly to people who are unwell’. We look forward to the omnibus legislation, which we understand will be introduced in the spring session of parliament. All Australians should be treated equally by the law, and we hope that we will soon be able to celebrate this significant step towards equality for same-sex couples and their children. Thank you.

CHAIR—Thanks very much.

Senator PRATT—I want to ask again about the human rights of children. You highlighted your concerns about the fact that this act will only apply to the division of property. What are the implications for children of a failure to extend that relationship in relation to matters over child custody and the like?

Ms Temby—I think it was very eloquently explained by the previous witness that it could cause considerable difficulty for families if one legal proceeding is dealing with the property matters and another legal proceeding is dealing with matters relating to children. In addition, we understand that in some cases property matters and issues dealing with children are inseparable; they are fundamentally connected. We are not family law experts and did not look into that in significant detail, but our understanding is that the two court proceedings could cause significant difficulty for families.

Mr Innes—The other thing that we heard about during the inquiry was the financial impact of couples, whether de facto, opposite- or same-sex couples, having to apply in two jurisdictions and the legal and court costs related to that. That of course is going to have as much, if not more, impact on couples where there are children involved.

Senator PRATT—What about the potential impact of a child having a relationship with their non-birth parent severed to their emotional detriment because the non-birth parent is not recognised legally? Is that a possibility without that kind of reform?

Ms Temby—Again, I would say we are not family law experts. I understand that there is another mechanism for ensuring contact with significant people. The thing about the part of the Family Law Act that deals with children is that there is a presumption that there should be an equal or a shared division of time between the parents. That presumption is the starting point, and a non-biological parent might be disadvantaged if that presumption is not taken with regard to them, although there may be other mechanisms to include time with other significant people.

Senator PRATT—So there would be no reason in your view to differentiate between, say, a child of a heterosexual couple and a child of a same-sex couple. You say both children could have been created with donor gametes, including a sperm donor father, so there would be no reason to differentiate between those two families.

Ms Temby—Absolutely not.

Mr Innes—No.

CHAIR—On page 8 of your submission you recommend:

The definition of ‘child of a de facto relationship’ should be ... in the same terms as the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008.

Is that different again to the definition in the Family Law Act? Are we looking at three different definitions here?

Ms Temby—No, two.

CHAIR—So which one are you suggesting is the pre-eminent one that should prevail?

Mr Innes—The definition in the superannuation law.

Ms Temby—The definition that is in the superannuation legislation of ‘child’ or ‘child of a couple relationship’ is not currently proposed to be included in the Family Law Act. The first thing to say is that we recognise that this is an incredibly difficult area. We exercised our minds about the potential solutions for many months. We have a concern about the proposed amendment to section 60H of the Family Law Act, whether it be through amending section 60H itself or through inserting the proposed section 90RB, which essentially means section 60H. Our concern about that approach is that it essentially brings equality to what we call lesbian co-mothers, the non-biological mothers; however, it does not cover the situation of a surrogate father, whether that father be in a same-sex or an opposite-sex relationship. Amending section 60H does not bring equality to fathers in surrogate situations. Our starting point is looking at equality for same-sex and opposite-sex couples. Our view is that the definition of ‘child’ or ‘child of a couple relationship’ hinges on the term ‘product of the relationship’ and that is sufficiently flexible and inclusive—which is probably more important—that it covers the variety of family forms that you find in same-sex families. It does cover both a lesbian couple who are parents and a gay couple who are parents.

CHAIR—So if we took the definition that is in the same-sex superannuation legislation and applied it to this legislation and then applied it to the Family Law Act, would that be ideal?

Mr Innes—That is what we are suggesting.

Ms Temby—That is what we are suggesting. We are suggesting that this is a more appropriate definition to include all same-sex families.

CHAIR—If it is inserted into the Family Law Act, does that then get over the problem with the provisions in the Child Support Act in relation to the problem you outline in paragraph 37 of your submission?

Ms Temby—It would do, because the Child Support Act relies on the definitions in the Family Law Act.

CHAIR—So, to overcome some of the issues regarding child support, we would also need to change the definition in the Family Law Act. Would you put that as a recommendation to us—that we should look at that?

Ms Temby—Yes. That is my understanding of what is contained in our submission.

Mr Innes—Yes.

CHAIR—I just want to make it clear so that—

Mr Innes—I do not have the submission, but I think it is a recommendation in the submission, isn't it?

CHAIR—There is one recommendation that that definition should apply to the Family Law Act and then, a couple of pages on, you suggest that the Child Support Act should reflect the definition that is in the same-sex relationship—

Mr Innes—Okay. I see.

CHAIR—If in fact you put that definition in the Family Law Act, that would be an even better solution. That is what I am trying to get to the bottom of.

Mr Innes—Yes.

CHAIR—Thanks. Senator Barnett, do you have questions?

Senator BARNETT—Was HREOC consulted on the family law de facto legislation prior to it being introduced?

Mr Innes—We had several meetings with the department between the time of our report and the introduction of these bills, in which we expressed our views. We were not consulted in the sense of interaction as to what the bill should contain, and we did not—

Senator BARNETT—I am aware of the—

Mr Innes—I am just trying to be clear with you and to draw that distinction.

Senator BARNETT—Yes, indeed. Earlier, I thought you were answering Senator Brandis's questions with respect to the same-sex entitlements bill—

Mr Innes—I probably was.

Senator BARNETT—but were you answering with respect to both bills?

Mr Innes—Yes. Those answers would apply equally.

Senator BARNETT—Since the bills have been introduced, have you discussed or negotiated with the minister's office or the department with respect to any aspect of the legislation?

Mr Innes—We have certainly discussed with both the minister's office and the department aspects of the legislation, but I would probably refrain from using the term 'negotiated'. We do—as do many other organisations with departments and ministers' offices—share our views, and they are taken into the mix.

Senator BARNETT—Have your views been taken into account?

Mr Innes—I guess our views were taken into account in the framing of the bills. I am not aware that the bills have been changed since then, so I guess our latest views in these submissions have not yet been taken into account, but I am hopeful that our advice may be followed.

Senator BARNETT—Has the government advised you that they will accept your recommendations or advice?

Mr Innes—I think the answer to that question is no, but you might need to be a bit more specific. In the sense that they have accepted a lot of the advice in our report, I guess the reality is that, yes, it has been accepted, but there has been no further discussions with government as to whether or not they would accept our advice on these bills.

Senator BARNETT—You put two submissions to us on two different bills and they include recommendations, so I am asking you—

Mr Innes—Oh, then the answer is no. I am sorry; I did not understand your question properly. The answer is no.

Senator BARNETT—Is it your understanding that the use of the words 'couple relationship' is a new definition? You said in your opening remarks that there is a new definition of a couple relationship. I wanted to ask whether you could confirm that this is the first time, to your knowledge, that that is being used in Australia. And can you confirm that, to your understanding, this is the first time the words 'product of a couple relationship' have ever been used to define a child?

Mr Innes—My understanding is that the two pieces of terminology to which you referred are new, but the definition is the same. As I think I indicated in my opening comments, we support that definition but that is not what was recommended in our report. Government has developed this and we have looked at it and we support it.

Senator BARNETT—Sure. You said with some earnestness, I think, that people should be treated equally and that relationships should be treated equally, whether they be homosexual, de facto or married couple relationships. Can you advise the committee whether the Human Rights and Equal Opportunity Commission supports gay marriage.

Mr Innes—When we conducted our inquiry we heard a great deal of evidence about the distress that same-sex couples face because they cannot marry to demonstrate that their relationships are equally lengthy, loving, committed and strong. We heard a great deal of evidence in that regard.

Senator BARNETT—And what is the position of HREOC?

Mr Innes—I was coming to that—perhaps not quickly enough! We were looking at how financial and work related benefits and the discrimination which occurs in that area impacted on couples, whether they were de facto or married couples. We were looking at it through the prisms of nondiscrimination and the best interests of the child. In that sense, we determined that discrimination did occur and that children were affected. We were not looking at the issue of same-sex marriage in that inquiry. But I would have to say that if you looked at the issue of same-sex marriage through those prisms it would be hard to form the view that same-sex couples are currently equally treated.

Senator BARNETT—Is that a yes?

Mr Innes—Yes. That is right. It would be hard to form a view that they are currently equally treated.

Senator BARNETT—So that would be a yes, that HREOC supports—

Mr Innes—It is not a ‘yes’ in the sense that the commission has not made a decision on the issue. I am one member of a four-person commission. I suppose what I am saying to you is that, looked at through those prisms, it would be hard for the commission to come to a different view.

Senator BARNETT—Based on the evidence that you have heard and the advice that you have provided to us, there is a strong disposition towards supporting that proposition—is that a correct understanding of your analysis?

Mr Innes—With the caveat that we have not considered the issue of same-sex marriage because it is not on the policy agenda. But, with that caveat, yes.

Senator BARNETT—One of the reasons I ask is because we have had witnesses presenting different views to this committee, obviously. This morning, for example, we heard the Catholic Church saying that the legislation put before the committee undermines marriage and is a threat to marriage. One proposition that was put was that it would ultimately lead to a legal threat to marriage as we currently know it. What would your response be to that?

Mr Innes—I think our response would be similar to that of the previous witness—that is, in no way does this legislation undermine or threaten the institution of marriage. The level of keenness and desperation that I heard from a range of the same-sex couples who wish to become married and join that institution would suggest that in fact it is supported by those views rather than undermined by them.

Senator BARNETT—I have one final question. Professor Parkinson suggests that the bill may discriminate against heterosexual de facto couples who have chosen not to marry by depriving them of the fruits of that choice. What would you say in response to that?

Mr Innes—Again, to a large degree I would probably adopt the view of the Law Council that was expressed previously: I would not see that as an issue. I think Professor Parkinson’s assertions relate to one or perhaps two states, although I have not looked carefully at his submission; I only became aware of it in the last day or so. But if people are concerned about wanting to keep assets separate then there are contracting out provisions available and this bill does not change that.

Senator PRATT—You have talked about your preference for a ‘product of the relationship’ definition to deal with children’s issues. Where we have states that have recognised the kinds of parenting relationships that would fall into that category, would you support some kind of guidance or regulation within such a definition to explicitly ensure that such parenting relationships were recognised within the definition?

Ms Temby—Our position is that we would support the recognition in federal or state laws that can confer parental status—if you are working under Professor Millbank’s model—where you have the amended parenting presumptions, the reform of surrogacy laws and then recognition in federal law of all state laws that confer parental status. In the absence of that model, particularly in the absence of the uniform reform of surrogacy law, our position is that we would prefer the definition ‘product of a relationship’. I am not sure that it would be necessary to include recognition of state laws that confer parental status in the ‘product of the relationship’ definition because that is sufficiently broad, inclusive and flexible, so the state recognition of parental status would be covered by that. I cannot think of a situation where state recognition would not come within the ‘product of the relationship’ definition.

Senator PRATT—Thank you.

CHAIR—Senator Brandis, do you have any questions?

Senator BRANDIS—I had some, but I was told we had run out of time for my questions, Madam Chair.

CHAIR—I did not say that we had run out of time; I said we were running out of time. Do you have any questions, Senator Brandis?

Senator BRANDIS—No more, thanks.

CHAIR—Mr Innes and Ms Temby, thank you very much for your submission and also for making yourselves available to appear before our committee today.

Mr Innes—Thank you.

CHAIR—It was much appreciated. Thank you very much.

Proceedings suspended from 3.18 pm to 3.34 pm

Evidence was then taken on the Same-Sex Relationships (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—

[4.04 pm]

EGAN, Mr Richard John, National Policy Officer, Family Voice Australia

CHAIR—Mr Egan, do you wish to provide us with a very brief opening statement on the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, and then there might be questions in relation to that.

Mr Egan—I have five quick points, if I may. Firstly, the imposition of this property settlement regime, which has been developed over the years to deal with the unfortunate situation of marriage breakdown, imposes on de facto couples, in my view unjustly, the assumption that they have entered into the same kind of union as a married couple—that is, that what is mine is yours and what is yours is mine, which is the fundamental assumption of property settlements with regard to marriage in the absence of a prenuptial agreement to the contrary. The suggestion from the Law Council and others that, before moving in together, two 17-year-olds should go to their lawyer first and sign an opt-out agreement is just laughable. If the Senate committee takes that seriously, that natural conclusion follows, with respect.

The second point is that the definition of ‘de facto couple’ has nine points to be considered. Most couples will not know if they are in a de facto relationship or not. There are nine factors to be considered, none of which are conclusive and none of which are determinative—so you figure out whether you are in a de facto relationship or not and whether that means your partner can claim half of your house if you split up. The whole proposition is just quite ludicrous.

Thirdly, this is a formal endorsement of adultery. The definition of de facto couple specifies that you can be in a de facto relationship even if one of the partners, and presumably both of the parties, is married to another person. Marriage by law in Australia, as civil celebrants have to tell people when they get married, is to the exclusion of all others. Obviously adultery happens, but for the Commonwealth parliament to endorse adultery by giving legal rights to the adulterous partner is quite outrageous and is the biggest assault on marriage that I have ever seen in any proposed act.

Fourthly, this same point formally endorses a form of polygamy, with a first wife whom you would be legally married to and subsequent wives who would be in effect concubines or mistresses but where the second and third wives would have the same legal rights as the first wife under this provision of the Family Law Act. So the recent demands from some Islamic leaders for legalising polygamy in Australia have, perhaps unwittingly, been granted by the Rudd government in this bill.

Fifthly, the definition of de facto relationship includes endorsement of the registered relationship schemes in states that are being rolled out across the country. In our view, these registered relationships do pose a direct threat to marriage because they are taking one of the important aspects of marriage—that is, public recognition and registration in the register of births, deaths and marriages—and applying it to non-marital couple relationships but on far lesser terms than marriage, namely with no commitment to exclusivity and no commitment to permanence, with an opt-out clause, certainly in Victoria, of 90 days unilateral notice. So, in our view, the Commonwealth bill that would recognise these registered relationships in this indirect way also serves to undermine marriage.

For all these reasons, and because the bill is not being proposed under any head of Commonwealth power except the referrals head of power, in our view the Commonwealth should have declined to accept the references from the states and the Senate should certainly be advised not to go ahead with this bill.

Senator FEENEY—Mr Egan, thank you. We have heard evidence over the course of the last couple of days concerning de facto couples. Notwithstanding your example of the two 17-year-olds, the evidence we have heard suggests that those kinds of relationships do not generally give rise to litigation or grievances—temporary relationships between 17-year-olds do not tend to give rise to rights or obligations—but rather there is an issue with older persons, and older women in particular. There was an example, and you may have been here when it was put to us, of a 58-year-old woman in a long-term de facto relationship. It seems that, rather than this being a matter for young people cohabiting for brief periods of time, in fact there is an incidence of discrimination for older, more mature persons, particularly women, who find themselves in relationships—

Mr Egan—Sure, I am happy to address that.

Senator FEENEY—I would be interested to hear from you how that group of persons who appear to be presently discriminated against might—

Mr Egan—That will be a very small subset of the total number of relationships that are, at least, potentially caught by this bill. The proposal that the Law Council is putting to the majority of people, to protect their assets by opting out, should instead be put to the minority who enter into a de facto relationship of the kind you are describing and, before they do, they should go to a good lawyer and get an agreement drawn up. There is absolutely nothing to stop a proper contract being drawn up to protect the interests of a woman, who, for whatever reason, chooses not to insist on a marriage certificate before putting herself in a financially vulnerable situation.

Senator FEENEY—But, under your model, the onus is on the affected persons to find their own relief, isn't it; otherwise discrimination will prevail?

Mr Egan—It certainly seems sensible to me. Because they are the minority, it seems more sensible to require them to look out for their own affairs, as it were. Of course, they are not entirely without remedy; they already have the remedies of civil law—

Senator FEENEY—Or the Supreme Court?

Mr Egan—or state law. How it is dealt with varies from state to state, but it just seems overkill for the sake of that small number of relationships to impose a regime on all cohabiting relationships, which may give rise to new injustices.

Senator BRANDIS—Mr Egan, I enjoyed your argument. I thought your first point was a very powerful one, very similar to a point made to this committee by Professor Parkinson yesterday. But can I rejoin to you with the same observation I made to him: it is all very well to say that these relationships, because they are not marriages, should not be subject to a legal regime, but they already are. Whenever two people pool their money and jointly own or jointly enjoy the benefit of the use of property or jointly acquire property and hold it on whatever terms and then they part company, then something has to happen to that property. Currently, when that happens in the context of a domestic relationship, other courts—not the Family Court—in the states have to deal with the issue of who is entitled to what.

Mr Egan—Yes.

Senator BRANDIS—I do not think we can pretend that, simply because these issues arise in relationships that are not marriages, they do not already attract legal consequences and are not already required to be dealt with by the courts.

Mr Egan—That is certainly the case. In such proceedings the court has to make an inquiry—in the case of this particular partnership, if you like—about what the expectations and intentions were. I am not a lawyer, but that is my understanding of it.

Senator BRANDIS—That is fair enough.

Mr Egan—In the case of marriage and property settlement after divorce, in the absence of a prenuptial agreement, the court has a working assumption as to what two people agreed to when they got married.

Senator BRANDIS—That is true.

Mr Egan—My understanding is that this bill will apply that longstanding assumption about married couples to all de facto couples, without any necessary inquiry into the particulars of that individual de facto relationship.

Senator BRANDIS—I think the application of the rules of the division of property by analogy with matrimonial property would be a starting point. But what this bill, in effect, will do is transfer to the jurisdiction of the Family Court of Australia a large number of cases that are now dealt with in state supreme courts, district courts and county courts—

Mr Egan—Yes, but with different starting assumptions.

Senator BRANDIS—in which one additional question may be posed, which is hardly ever posed in the Family Court—that is, does the relevant relationship, sufficient to attract the court's jurisdiction, exist at all, which is part of your point?

Mr Egan—Sure.

Senator BRANDIS—When the Family Court is seized of a matrimonial dispute, it is almost unknown for there to be any issue about whether or not in fact there was a marriage—

Mr Egan—Of course.

Senator BRANDIS—so the attraction of the court’s jurisdiction is a given. In these cases there will quite often be a threshold question as to whether or not there was a relevant de facto relationship so as to enliven the court’s jurisdiction in the first place. But all that tells us is that the cases will be more complicated. These cases are already being argued in other courts. The effect of this bill is merely to assimilate all of these different disputes about matrimonial property and property arising from the termination of de facto relationships under the same judicial roof, and I cannot see what is so shocking about that.

Mr Egan—I think that what is at issue about it is the shifting of the burden of proof onto the party that has most to lose to establish to the court that the assumptions applying to marriage should not apply to this de facto relationship, because the starting point of the court will be that those assumptions do apply. If someone who is particularly wealthy with a lot of assets, for example, enters into a de facto relationship—or in fact, even more complicated because of the uncertainties of it, if there is a claim that he entered into a de facto relationship—with another party he is in a much more vulnerable position than if he had been foolish enough to marry the person.

Senator BRANDIS—That is a very good point, Mr Egan. What you would urge this committee to do is to recommend, in the event that it were to recommend that this particular bill go ahead, that it be amended to remove from the bill a rebuttal presumption that the application of the matrimonial property rules would apply by analogy to de facto property disputes, and it would require the court to enter into this process from a neutral standpoint rather than from the rebuttal presumption that it was to be treated as if it were matrimonial property.

Mr Egan—That seems a very fair proposition.

Senator BRANDIS—That is your point.

Mr Egan—I would also, though, if one were looking at proposed amendments, directly tackle the assault on marriage through allowing someone to be in a legally recognised de facto relationship whilst still married. My points about adultery and polygamy—

Senator BRANDIS—I understand that point as well. Thank you, Mr Egan.

Senator PRATT—Your submission asserts that de facto relationships whether they be same sex or heterosexual are more unstable than married relationships and that marriage is a way of conferring stability on a relationship. To my mind that sounds like an argument for greater access of legal remedies for other couples rather than lesser access to such institutions. What would you say to that?

Mr Egan—There are only three categories of people I think—maybe there are more—who cannot marry: those who are related by blood, and that would involve amending incest laws so I am not in favour of that for obvious reasons; those who are already married, and I am not in favour of polygamy for reasons I could go into but will not detain the committee with; and same-sex couples. I can rehearse the case against same-sex marriage, if you like, but it does not seem to me that it is really the purview of this committee and I am reluctant to turn the committee to it.

Senator PRATT—You have just criticised these relationships as being in your view unstable—

Mr Egan—That is a fact from research evidence.

Senator PRATT—To me that would seem like an argument to confer greater entitlements. I did not use the word ‘marriage’; we are simply here talking about de facto laws and superannuation—

Mr Egan—I see. So by giving them benefits you are making the statement—

Senator PRATT—and that we might enhance people’s capacity to conduct their relationships in a stable and orderly manner with access to such laws.

Mr Egan—I do not think that would follow. The best data on the greater instability, say, in lesbian relationships comes from Scandinavia. Looking at nations where there has been legal same-sex marriage for some period of time and complete equivalence of benefits, those relationships break up at six times the rate of marriages within a three-year period—and that is subject to correction and I am checking the fact off the top of my head. There is a significantly greater break-up rate, so it does not seem from the evidence in other jurisdictions that conferring either legal status equivalence by access to marriage or conferring equivalent social benefits does anything. So the conclusion from that is that there is something in the nature of the relationships themselves that makes them more inherently unstable.

Senator PRATT—Thank you for your opinion.

Senator BARNETT—Mr Egan, some of your propositions seem very similar to Professor Parkinson's in his evidence that was put to the committee yesterday in Sydney. He also has a view that is set out in his submission that this committee needs to resolve serious drafting problems before proceeding with the enactment of the bill. He referred specifically to the use of the words 'marital relationship' becoming 'couple relationship' and to the definition of a child 'born of a relationship' leading to the definition in this bill of a child who is the 'product of a relationship'. You commented on it briefly earlier, but do you have a similar view and similar concerns to those of Professor Parkinson with regard to those definitions?

Mr Egan—Specifically, in relation to the family law amendment bill, our concerns with the definition of 'de facto couple', as I have canvassed, are to do with the vagueness of it but particularly the egregious insult to marriage by allowing someone to be in a legally recognised de facto relationship while married. So certainly that ought to be remedied before the bill proceeds any further in either house. More broadly speaking, I think if the approach to the drafting in the same-sex entitlements bill, if I can briefly refer back to that bill, in relation to the definition of a child are indicative of what is to come in the further proposed legislation then I think we are looking at a major shift in public policy in regard to the interests of children. I think a far more wide-ranging Senate inquiry should be undertaken before any further steps are taken in that direction.

Senator BARNETT—In regard to the de facto legislation, Professor Parkinson suggested that the bill may discriminate against heterosexual de facto couples who have chosen not to marry by depriving them of the fruits of that choice. I think you alluded to that earlier in some of your evidence. Just to confirm for the record: do you support that proposition?

Mr Egan—Yes. In my interchange with Senator Brandis earlier I agreed with the proposition that the bill should not be allowed to proceed in a way that imposes on de facto couples a presumption that a court would adopt, in regard to any property settlement on the break-up of the relationship, that they had entered into the same kind of union as a marriage, where it is the working assumption that what is mine is yours and what is yours is mine—that that is not the intention of most people moving into a relationship of cohabitation. For the court to adopt that as a starting point would be an injustice. Of course in property settlement you are talking about winners and losers. That is the whole nature of a property settlement: someone is going to come out better than someone else. So any shift in the rules on which that is determined should be regarded with caution if it has not been widely canvassed.

I noted in the submission from the Australian Institute of Family Studies what I thought was, with respect, a logical jump. They said that there was evidence that cohabitation relationships were markedly different from marriage, that not much was known about the financial matters and how they were handled in cohabiting relationships; therefore this bill should proceed. It seemed to me the opposite conclusion followed—that, in the absence of more understanding of how cohabiting couples dealt with financial matters, some caution should be exercised before this bill proceeds.

Senator TROOD—Thank you for your elegant frankness on this matter. It has been very helpful to the committee. Do you think any provision should be made with regard to de facto relationships? You have made clear your view about what should not happen, as proposed in the bill, but do you think there is a need to legislate in some way—

Mr Egan—For de facto relationships property settlements?

Senator BARNETT—Yes.

Mr Egan—It seems redundant to me. All the states have legislation on this. I am a federalist. I cannot see any need for a referral of powers on this particular matter. I think one of the advantages of federalism is that you can compare how things are working in different jurisdictions and see which regimes are working better. You can see where the mistakes have been made in some new model, and regimes will develop over the years.

New South Wales, for example, has not gone down quite the same track on this as some of the other states have, and yet this bill will, willy-nilly, bring de facto couples in New South Wales under a regime which the New South Wales legislature has not directly voted for. They have washed their hands of it by referring it on to the Commonwealth. I cannot see any particular reason for the Commonwealth to accept this referral. I cannot see any inherent Commonwealth interest in the property settlements of de facto and same-sex couples.

Senator HANSON-YOUNG—Can I follow on from that. One of the big reasons for this legislation is to protect the rights of the child. If there is an avenue to discuss who should have what in terms of property, surely there needs to be a consistent approach when talking about the rights of the child, who cares for the

child and responsibilities to the child or children from the relationship that has ended. The rights of the child are at the heart of all of these decisions, are they not?

Mr Egan—This legislation is applying willy-nilly to couples who have children and couples who do not have children, so I do not think it is correct to say that the interests of the child are at the heart of this particular bill.

Senator HANSON-YOUNG—But, from your response before—admittedly you said that you do not care for de facto relationships, whether heterosexual or same sex—you understand that there is always a need to protect the child, whatever relationship the child is a product of, to use the terminology in these bills. In relation to your concern, surely that is at the heart of making sure that this is right and that we are protecting the rights of the child and ensuring that this is not just an avenue for families who break up to have a debate over who gets the car and the house but that there are remedies to ensure that the best interests of the child are at heart.

Mr Egan—My understanding is that the Family Court already has jurisdiction over matters relating to the child in regard to relationship breakdowns, so that is taken care of. This is dealing purely with property settlements, and I do not think it follows at all that that needs to be referred to a centralist Family Court as opposed to being dealt with as it currently is under relevant state legislation.

Senator BARNETT—Thanks very much, Mr Egan.

[4.31 pm]

CROOME, Mr Rodney, Committee Member, Australian Coalition for Equality

IRLAM, Mr Corey, Committee Member, Australian Coalition for Equality

MORGAN, Mr Wayne Kenneth, Consultant, Australian Coalition for Equality

Evidence from Mr Croome and Mr Morgan was taken via teleconference—

CHAIR—Welcome. We are dealing with the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008. We have your submission with us. Do you need to change or amend that?

Mr Irlam—No. I reserve the right to make a supplementary submission.

CHAIR—All right. If you could perhaps make a brief opening statement in relation to the bill, we will take questions and then we will move onto the second bill. Thanks.

Mr Irlam—Certainly. The Australian Coalition for Equality, or ACE, supports equal access to the Family Court for all forms of relationship breakdown, both in de facto relationships, regardless of gender, and in married and opposite-sex relationships. We support the alternative dispute resolution process, as the Family Court provides a less traumatic dispute process. My understanding from a letter from the former Chief Justice of the Family Court, the Honourable. Alastair Nicholson, is that 60 per cent of cases appearing before the Family Court are resolved prior to going to trial. In addition, the Family Court offers a less traumatic process and a cheaper alternative and provides additional security that is not afforded within the state supreme court. I note for the committee's benefit, as has been noted before, that the 2006 census identifies that 15 per cent of social marriages are of a de facto nature. I read an interesting article last week that identified that back in the eighties only five per cent of social marriages were de facto. That is an increase of 10 per cent over 20 years.

Senator BRANDIS—When you say 'social marriages' do you mean what we have been calling de facto marriages?

Mr Irlam—In my understanding, social marriage, according to the Australian Bureau of Statistics, is inclusive of both de jure and de facto marriage. So, of that total, 15 per cent are de facto, to clarify.

Senator BRANDIS—That is what I mean; thanks.

Mr Irlam—It is our desire that the bulk of the time be spent on superannuation, so my only point to raise with regard to this bill is to note that registered relationships that do not meet the criteria outlined for de facto relationships will not be entitled to access the Family Court under these terms of reference, and I would recommend that the committee, in their report, follow the lead of the Attorney-General in seeking an enhanced referral of powers from the states to accommodate for these relationships.

Senator PRATT—You made reference to registration of relationships and the manner in which it would be desirable to have that recognised as a way of accessing de facto status. Can you outline for us the reasons why couples might wish to utilise that mechanism of having their relationship recognised under federal law.

Mr Irlam—I submit that I did not say 'recognising under de facto status' and our submission actually states that registered relationships should have their own category under law. I will limit my comments to access to the Family Court and expand on it in the superannuation bill. That is simply to highlight that if you do not meet the criteria—you do not live together, you have not been together for X period of time—you would still be required to go to the state Supreme Court. I am just highlighting that if you have not met one of those criteria that is there to go to de facto status then you may not be able to access the Family Court—although my understanding is that even if you do meet those criteria, your certificate of registration or your deed of registration will be contributing evidence towards the existence of your relationship.

CHAIR—Thank you. I do not think we have any questions about that.

Evidence was then taken on the Same Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill—

Committee adjourned at 5.10 pm