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STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL
AFFAIRS

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

Thursday, 7 August 2008

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

Substitute members: (As per most recent Senate Notice Paper)

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, Farrell, Feeney, Fisher, Marshall and Trood

Terms of reference for the inquiry:

To inquire into and report on: Evidence Amendment Bill 2008

WITNESSES

DUGGAN, Mr Kym, Assistant Secretary, Family Law Branch, Attorney-General’s Department 8

**FITCH, Ms Catherine, Acting Assistant Secretary, Administrative Law and Civil Procedure
Branch, Attorney-General’s Department 8**

McCRIMMON, Professor Les, Commissioner, Australian Law Reform Commission 2

**WILLIAMS, Ms Kimberley, Senior Legal Officer, Evidence and Legislative Framework Section,
Attorney-General’s Department 8**

Committee met at 9.04 am

ACTING CHAIR (Senator Barnett)—I open this hearing of the Senate Standing Committee on Legal and Constitutional Affairs in relation to the Evidence Amendment Bill 2008. The submissions that are being considered today have been authorised for publication and are available on the committee's website. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. The committee prefers all evidence to be given in public but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask 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. Such a request may, of course, also be made at any other time. I ask the people in the hearing room to ensure that their mobile phones be either turned off or switched to silent. I would ask witnesses to remain behind for a few minutes at the conclusion of their evidence in case the Hansard staff need to clarify any references.

[9.05 am]

McCRIMMON, Professor Les, Commissioner, Australian Law Reform Commission

ACTING CHAIR—I welcome the representative from the Australian Law Reform Commission. The Australian Law Reform Commission has lodged submission No. 7 with the committee. Do you wish to make any amendments or alterations to it at this time?

Prof. McCrimmon—I do not.

ACTING CHAIR—Before we start, I remind senators that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy. It does not preclude questions asking for explanations or policies or factual questions about when and how policies were adopted. Officers of the departments are also reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim. I now invite you to make a short opening statement, at the conclusion of which I invite members of the committee to ask questions.

Prof. McCrimmon—Thank you to the committee for providing us with the opportunity to make comments on our submission to the committee. I want to start by saying that the bill that is being considered by you today is a bill which indicates that cooperative federalism can work. This bill came about as a result of cooperation in a number of different respects. First was the cooperation of the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission working together to produce the evidence report. We then had the cooperation of a working party of SCAG, which I understand had members from all states and territories with the exception of one, to produce the bill that is being considered by you today. We had the cooperation of parliamentary counsel in producing that bill and we then had the cooperation of the numerous stakeholders that made submissions to our inquiry and agreed to consult with us during the course of that inquiry.

The bill that is being considered before you today is mirror legislation. Mirror legislation by its nature is one way of achieving cooperative federalism. It is one that is somewhat fragile in that if there are amendments made in any of the different jurisdictions that results in the mirror reflecting a somewhat distorted picture. With the bill that you are considering today the mirror is in pretty good shape, with the exception of two matters; that is, the professional confidential relationships privilege and the application of the Commonwealth act to pre-trial matters. The bill is substantially similar to the uniform evidence legislation which has been introduced and passed in the New South Wales parliament and has been introduced in the Victorian parliament. We hope that once the Commonwealth act is passed that will prompt other states and territories to come on board for the uniform evidence acts scheme and by the conclusion of the ALRC's inquiry the governments of South Australia, Western Australia and the Northern Territory had put the implementation of the uniform evidence act on their legislative reform agendas. As the committee would be aware, Tasmania is already a member of the uniform evidence acts scheme, as is Norfolk Island.

We understand from the comments that have been made by the Commonwealth Attorney-General that the two matters that we raised in our submission and which I have already mentioned—the professional confidential relationships privilege and the application of the act pre-trial—will be considered when the government considers our privilege report. In light of that, it is hoped that the current bill that is before you is passed so that that can prompt other jurisdictions to enact the uniform evidence act so that we have a truly uniform evidence act regime applying across the country so that we are not in the position that we are in now where state courts are applying one type of evidence law and the federal courts another and jurisdictions differing in the evidence law that is applied. We would hope that this committee sees fit to recommend that the bill be passed. Those are my opening comments, thank you.

ACTING CHAIR—Before I invite senators to ask questions, could I take this opportunity on behalf of the committee to welcome to his first committee Senator Don Farrell from South Australia. It is very good to have you with us. And to all the senators here today, welcome.

Senator TROOD—What is the situation in relation to the act within Queensland? When you mentioned those states that were moving towards implementation you did not mention Queensland that I heard.

Prof. McCrimmon—That is the one that from my understanding was not involved in the working party. I can comment on what we did in relation to consultations in Queensland. We met with the Attorney-General of Queensland on two occasions, Attorney-General Lavarch and subsequently Attorney-General Shine. We met with members of the court and members of the Justice Department in Queensland. I cannot comment as to whether Queensland is going to come on board. If the rest of the country does, I think there would be a push for it. There was an indication at some of the levels of the courts in Queensland that they would like a uniform evidence act to be brought in. Certainly, members of the commercial bar in Queensland indicated that they would like it because they are in the position of having to apply the uniform evidence act when they appear in the federal courts and the state act when they appear in the state courts. There is some support for the uniform evidence act in Queensland. Certainly that support is not uniform but that is the nature of these matters; we find that across the country.

Senator TROOD—You seem to be reasonably clear on the intentions of other state governments. I am grateful for your observations with regard to the legal profession in Queensland, but can you give us any clarity of the view from the state government in Queensland?

Prof. McCrimmon—I have to comment on the situation at the end of 2006, because that is when our inquiry finished. My life has been consumed by privacy for the two and a half years since then. But at the end of 2006 Attorney-General Lavarch referred the matter to the Queensland Law Reform Commission and they produced a report which indicated that in the event that Queensland came on board for the uniform evidence acts scheme there were a number of matters that they felt would need to be dealt with; for example, legislation dealing with specific types of witnesses, such as children. Attorney-General Shine did not indicate one way or the other whether they would be pushing for the uniform evidence act to be brought in in that state. I really cannot take the matter any further than that.

Senator TROOD—You have had no further consultation with them since 2006?

Prof. McCrimmon—No. We usually do not have any further consultations once our report is provided to the government.

Senator BRANDIS—Does this still sit on the SCAG agenda?

Prof. McCrimmon—That is probably a matter for the department.

Senator BRANDIS—I will pursue that with them but I wonder if I could draw you out a little more. Where does the resistance from the Queensland point of view to adopting the Commonwealth Evidence Act lie? Does it lie within the state Attorney-General's department, within the state government, within the legal profession or within the courts? Do you have an impression as to where the stumbling block is?

Prof. McCrimmon—I think I would have to say that during our consultations there was some resistance in the Supreme Court, not from all members of the Supreme Court but from some. There was support in the District Court and the Chief Judge indicated that she thought that bringing in a uniform evidence act in Queensland would be a good idea. With members of the profession there was resistance within the criminal bar. That resistance is not uncommon. We found that in other states as well.

Senator BRANDIS—Did the criminal bar have problems with some of the changes for hearsay rules?

Prof. McCrimmon—I think it is fair to say that the criminal bar often has problems with changes, full stop. I am being a bit flippant—

Senator BRANDIS—No, that is true.

Prof. McCrimmon—They were concerned about section 60 of the evidence act, which is the section which provides that if evidence is admitted for any other purpose it can be used for the purpose of hearsay. That is something that did cause them concern. Again, I am trying to recall if we had a submission from the Queensland criminal bar. I do not recall. I would have to take that on notice.

Senator BRANDIS—What about the Queensland Bar Association?

Prof. McCrimmon—I cannot recall, I am sorry.

Senator BRANDIS—Could you take that on notice? If you did have a submission from the Queensland Bar Association, could you favour us with a copy of it, please?

Prof. McCrimmon—Yes.

Senator BRANDIS—As I understand you, we are now in a situation in which we have New South Wales, Victoria and Tasmania on board. Western Australia, South Australia and the Northern Territory are expected to

come on board. The ACT I assume were already on board. Norfolk Island is on board. This act is being applied obviously by federal courts in Queensland but Queensland state courts are expected to be the only courts in the country which are standing out from the uniform scheme; is that the position?

Prof. McCrimmon—If things unfold as you have indicated, that would be the position.

Senator BRANDIS—Sorry, it is not what I have indicated. That is what I gathered from what you were saying that you did expect the other states to adopt the uniform scheme. If I have overstated your position, please correct me.

Prof. McCrimmon—No, you have not overstated the position. That was the indication at the end of our inquiry in 2006. Whether the Queensland position has changed in that time, I cannot say. We have not consulted. I was at a conference on federalism about three weeks ago where the Chief Justice indicated that evidence was one of the areas where it made sense to have uniformity—

Senator BRANDIS—It certainly makes sense within a state to have a common set of rules of evidence between federal courts and state courts.

Prof. McCrimmon—Yes.

Senator BRANDIS—Would you be kind enough to remind me where in the bill the definition of ‘de facto partner’ is to be found? That is in the dictionary, isn’t it?

Prof. McCrimmon—In the dictionary, yes.

Senator BRANDIS—That is clause 94(11)(3). Very unhelpfully, this copy is not paginated. For the benefit of other senators, I am referring to item 94 of schedule 1 and in particular the indicia set out in proposed clause 94(11)(3). What is the provenance of that clause? Are those tests taken from any other legislation and, if so, what? And if not, how were they arrived at?

Prof. McCrimmon—How they were arrived at would be more a matter for the department. In our report we suggested three of those indicia.

Senator BRANDIS—Which of those did you suggest? I should say that I have no particular criticism of the selection of each of those seven indicia. They all seem to me logically to bear upon the question of the existence or non-existence of the relevant relationship. I would just like to know to what extent they match treatment elsewhere in Commonwealth law of the same question.

Prof. McCrimmon—Just to answer the first question, the indicia that we recommended—again, these are just matters that could be taken into account; other matters could be—are: the duration of the relationship, the extent to which the persons have a mutual commitment to a shared life and the reputation and public aspects of the relationship. More have been added—

Senator BRANDIS—These have been added at the drafting stage.

Prof. McCrimmon—Yes.

Senator BRANDIS—That is post your report; you had no input into the drafting of this provision?

Prof. McCrimmon—I personally did have some input in it in that I was on the expert advisory committee that worked with the SCAG working party on the bill. As to the other indicia, there are different tests for de facto relationships in other pieces of state and territory legislation. This is an amalgam. What is now in the bill before you and in the New South Wales uniform evidence act and the Victorian evidence act, which has recently been put into the Victorian parliament, is an amalgam and those are the same. It is just flushed out a bit more than what we suggested in our report and it draws also from the Tasmanian legislation.

Senator BRANDIS—Do you have any criticism of the inclusion of the other four indicia beyond the three that your report recommended, or are you comfortable with the inclusion of each of these seven?

Prof. McCrimmon—We are comfortable with the inclusion of all seven.

Senator BRANDIS—When you say this is an amalgam, unless I misheard you, you did not refer to any Commonwealth act. Are there any current Commonwealth acts in which, for example taxation statutes and superannuation statutes including the SI(S) Act, ‘de facto spouse’ is defined?

Prof. McCrimmon—In Commonwealth legislation ‘de facto spouse’ as defined is a gendered definition. One of the things—

Senator BRANDIS—A gendered definition?

Prof. McCrimmon—In other words, a de facto spouse has to be a man and a woman; you could not have same-sex—

Senator BRANDIS—But that only bears on subclause (5), though. I am talking about the indicia. Whether it is a gendered or non-gendered definition, the observation you have made only bears on the same sex question, but that is not the question I am pursuing with you at the moment. For example, there are set out indicia in the Superannuation Industry (Supervision) Act, are there not, to indicate whether or not a de facto relationship exists between two people for the purposes of assignment of a superannuation entitlement?

Prof. McCrimmon—Our focus was to try to have uniformity across the jurisdictions that were going to enact the uniform evidence act as opposed to ensuring that the definition of de facto across Commonwealth legislation was the same as in the uniform evidence act, because we had to get the agreement of the states and territories on the definition. I can take on notice to what extent it complies with or is similar to other pieces of Commonwealth—

Senator BRANDIS—I can do that myself. It is not fair to you to ask you to do what would in effect be a research task. I do have a concern. By way of preface, I understand why, given the task of which you were seized, it was important for you to try to secure uniformity across the state and territory jurisdictions in relation to the application of this issue to the rules of evidence. However, do you understand my concern that the consequence of the adoption of this definition of ‘de facto spouse’—the selection of these indicia or criteria for the determination of the existence or non-existence of a de facto spousal relationship—in the uniform evidence law of the Commonwealth being potentially inconsistent with or identifying different indicia or criteria than other Commonwealth laws is going to cause confusion?

Prof. McCrimmon—No, I do not share that concern. The way the definition of ‘de facto spouse’ works within the context of the evidence act is whether an objection can be made to giving evidence in a criminal trial under section 18 of the act. That also applies to spouse, de facto spouse, parent or child and so it is a very limited application of the definition of ‘de facto spouse’ in that context.

Senator BRANDIS—Why, because this sets out a series of tests upon the satisfaction of which a privilege can be invoked?

Prof. McCrimmon—An objection to giving evidence.

Senator BRANDIS—I would say a privilege, but we mean the same thing.

Prof. McCrimmon—Again, it is not a privilege in that it can be overruled if the judge determines that the value of the evidence to the court outweighs the damage that could be occasioned to the relationship. I think our view is that in the context of the evidence act the definition of ‘de facto spouse’ should be crafted with reference to the way it is going to be used in the context of giving evidence in court and in particular in criminal trials.

Senator TROOD—Do you not agree though that there is some value in trying to establish a uniform definition for the use of the term in Commonwealth legislation?

Prof. McCrimmon—It is a difficult one because we are dealing with uniform legislation. If we were trying to have a uniform definition of ‘de facto spouse’ across all state, territory and Commonwealth legislation then, of course, that would be desirable. In relation to the evidence act, our view is that it is more important to have a uniform definition across the state, territory and Commonwealth legislation as opposed to the Commonwealth legislation and other pieces of Commonwealth legislation. I guess—

Senator BRANDIS—It is not an either/or question though. Was any objection raised by any of the states and territories with whom you had these discussions to the incorporation of definitions from other Commonwealth statutes or was this issue of consistency not merely between the state and territory laws but consistency with other Commonwealth laws even addressed or adverted to?

Prof. McCrimmon—The problem with Commonwealth legislation as it stood in 2006 when we passed the report and what the amendments to the act are aimed at is that the definition in Commonwealth legislation was gendered. The purpose—

Senator BRANDIS—With respect, that does not matter. Whether it is gendered or not, each of the seven criteria in subclause (3) is a relevant consideration, is it not?

Prof. McCrimmon—It is a relevant consideration but the point I am making is that we did not use the Commonwealth legislation as the starting point. What we were looking at were primarily the definitions that were used in other uniform evidence act jurisdictions and the definitions that were in that included the

definitions in Tasmania and New South Wales and they did differ from the Commonwealth act, so that was our starting point as opposed to other pieces of Commonwealth legislation.

Senator BRANDIS—I do not want to go on too much about this. I think Senator Trood and I have made the point. But we now have a situation before the Senate in which this bill containing a particular definition of ‘de facto partner’ is being considered in this inquiry along with another bill, the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill, which has a different definition of ‘de facto spouse’ and although there is no logical reason why the evidence bill and a bill dealing with the expansion of the jurisdiction of the Family Court should necessarily be treated as part of a package, in a practical sense that is what has now happened. The Senate will be addressing and debating these measures if not in a cognate debate then in close proximity to one another and we face the problematic legislative position that the government is inviting the Senate to pass two different and potentially inconsistent definitions of what constitutes a de facto spouse. I know you are here only to speak to the evidence bill but have you had a look at the proposed definition of ‘de facto spouse’ in the Family Law amendment bill?

Prof. McCrimmon—No, nor was that bill contemplated at the time we—

Senator BRANDIS—No, I understand that. I am just wondering whether you have recently had an opportunity to have a look at it.

Prof. McCrimmon—No.

Senator BRANDIS—Thank you.

Prof. McCrimmon—Can I make one comment, though?

Senator BRANDIS—Yes.

Prof. McCrimmon—It is an issue that we deal with whenever we are trying to get uniform legislation through. I would suggest it is one of the inevitable consequences. If the Commonwealth stipulates that the definition of ‘de facto spouse’ must be the same in all pieces of Commonwealth legislation, then that means that there would be a change to the evidence act. Then you need to get the agreement of all the states and territories to change their legislation to incorporate that definition, and that would be desirable. There is no question of that. The problem is in doing that you do have to go to that second step to get the agreement of the states and territories—

Senator BRANDIS—I understand that.

Prof. McCrimmon—If you do not get that agreement then you start to have uniform legislation which is becoming less and less uniform.

Senator BRANDIS—No. I understand the problem entirely. And, of course, it may well be that the problem does not present itself at all if this committee and the Senate were to be of the view that the criteria that you have chosen here in subclause (3) is the best expression of the relevant criteria so that, if there were amendments to the criteria for determining the existence of a de facto relationship in other bills, those bills should be amended to incorporate your subclause (3). This, in other words, might end up being considered to be the sovereign or model provision. But it may not be as well. There are implications in other areas of policy of a less technical character, if I could put it that way, that we are seized of at the moment on which this issue intrudes very significantly.

Senator TROOD—Are there any references before the commission of which you are aware that might allow this matter to be explored more fully?

Prof. McCrimmon—No.

ACTING CHAIR—My understanding in terms of this de facto definition is that it is a definition of a de facto partner, not de facto spouse. Is that the first time that that term has been used: ‘de facto partner’ rather than ‘de facto spouse’? Secondly, historically, ‘de facto spouse’ has required exclusivity in the relationship. That is my understanding. I would seek your response to that. Can you confirm that? Secondly, it has previously required a sexual relationship and the definition has no such reference to that. Can you respond to those points?

Prof. McCrimmon—The term ‘de facto partner’ was chosen deliberately; it was to provide a broader definition than maybe the use of the word ‘spouse’, which brings the indicia that you have indicated. The term ‘de facto partner’ was used to provide for a close relationship. It may be you have a situation where the couple are no longer living together; one may be in long-term care, but they are still in a relationship. They may have

separate residences. The issue from an evidence act perspective is this: would the requirement for the individual to give evidence against an accused in a criminal trial who is their partner fracture the relationship? The judge has to determine whether the importance of the evidence that is being given outweighs the result that would occur in the event that the evidence is required to be given; that is, the damage to the relationship. The choice of the term 'partner' was chosen deliberately. It was chosen to be broader and it was not chosen with reference to other pieces of legislation.

ACTING CHAIR—Let me just draw you out on my first point and that is that previously a de facto spouse or de facto partner under this new definition required exclusivity in the relationship. Is it possible under this definition, which seems to be very broad and very general, that you can actually be married and also have a de facto partner?

Prof. McCrimmon—Yes.

Senator FEENEY—Would it not have been true that the existing legislation enables an accused person to have simultaneously a spouse and a de facto spouse; that is to say you can be married and have a de facto spouse, for example?

Prof. McCrimmon—I have not looked at that specifically, but I think that is correct.

Senator FEENEY—What I am suggesting is that the changes do not create that position for the first time. It is possible in a criminal trial that a person could simultaneously have a wife and a de facto partner and that they could both seek to have evidence excluded on that basis?

Prof. McCrimmon—Yes.

Senator FEENEY—That is a pre-existing condition.

Senator BRANDIS—Even more absurdly, you could have proceedings before the Family Court under its expanded jurisdiction if the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill goes through in which the same court is asked to apply one test under one statute to determine whether a de facto relationship exists for the purpose of applying the rules of evidence and a different test as to whether the de facto relationship exists to dispose of a substantive matter between the parties in the same cause. That is absurd.

Prof. McCrimmon—My understanding of the application of 'de facto partner' within the evidence act is that it only arises in a criminal context under section 18 of the act. The Family Court would not be exercising criminal jurisdiction.

ACTING CHAIR—It is clearly an expansion of the definition from 'de facto spouse' to 'partner' and it seems that you can be both married and have a de facto partner under this definition. You have confirmed that. Is it also conceivable that someone in an interdependent relationship can also be covered by this definition?

Prof. McCrimmon—Yes.

Senator BRANDIS—Can I just point out to you that, in fact, the definition of de facto relationship for the purpose of the Family Law Act were it to be amended pursuant to the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill is to be found in item 21 of schedule 1 to that bill by the insertion in the Family Law Act of a new section 4AA and in subsection 2 of that section there are nine criteria. You will be pleased to know that all seven of the criteria in the uniform evidence bill are incorporated in identical terms. But there are two additional criteria. That is by sub-subsection (c) 'whether a sexual relationship exists', and by sub-subsection (g) 'whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship'. Would the incorporation of those two additional criteria into the proposed section (11)(3) cause problems other than the process problem of securing the agreement of the other states and territories to the addition of those words?

Prof. McCrimmon—I assume those are indicia that can be looked at? They are not required—

Senator BRANDIS—They are facultative, not mandatory, yes. I can have the secretary pass you a copy of the bill, if you like, so you can look at it for yourself. It is at the foot of that page. If you go to the foot of the page that is open before you at the start of subsection 2 you will see that it is facultative. Then you go over the page and it sets out the nine criteria. I have marked in pencil the two other ones.

Prof. McCrimmon—No, I do not think it would cause us any problems. As long as it is not required that all the indicia be complied with, it is just indicia for the court to determine whether a de facto relationship—

Senator BRANDIS—No, it is the same mechanism. None of them are a necessary requirement but all are relevant criteria. Thank you.

ACTING CHAIR—I will pass the chair back to Senator Crossin.

CHAIR (Senator Crossin)—Thank you.

Senator BARNETT—I have one other final question. The New South Wales legislation you say has been passed. I have not read it, but is it consistent with the definition that you have put forward here for ‘de facto partner’?

Prof. McCrimmon—Yes. The New South Wales legislation, the Commonwealth act that is before you and the Victorian act are based on a model bill that was produced by the SCAG working party and the New South Wales legislation would mirror what is before you today.

CHAIR—Thank you. My apologies for arriving late. I appreciate your submission on behalf of the Law Reform Commission and the time you have made available today to appear before the committee.

Prof. McCrimmon—Can I just make one clarification in response to Senator Barnett’s question? When I say that it mirrors the legislation in relation to ‘de facto partner’, there are some differences between the bills but in relation to the term ‘de facto partner’ the New South Wales legislation mirrors the Commonwealth legislation.

CHAIR—Thank you for that clarification.

[9.43 am]

DUGGAN, Mr Kym, Assistant Secretary, Family Law Branch, Attorney-General’s Department

FITCH, Ms Catherine, Acting Assistant Secretary, Administrative Law and Civil Procedure Branch, Attorney-General’s Department

WILLIAMS, Ms Kimberley, Senior Legal Officer, Evidence and Legislative Framework Section, Attorney-General’s Department

CHAIR—I welcome the representatives from the Attorney-General’s Department. Do you have a short opening statement you wish to commence with?

Ms Fitch—No, we do not.

CHAIR—We will go straight to questions then.

Senator BRANDIS—Can you describe to the committee briefly please the nature of your own involvement in the preparation of the bill?

Ms Fitch—Yes. I will describe briefly my branch’s involvement in the development of the bill as it appears before us. The branch is responsible for, amongst other things, the development of the evidence act and the development of the uniform evidence law. The branch was responsible for these issues when terms of reference for the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission were issued by the previous Attorney-General Ruddock and, in fact, played a leading role in the Standing Committee of Attorneys-General working group which considered these issues following the issuance of the Law Reform Commission’s joint report—

Senator BRANDIS—Do you mean this report?

Ms Fitch—That is right. We have also been closely involved with dealing with the expert reference group that has been established to assist the SCAG working group to develop its response to the provisions of the model bill which essentially formulates the response to the commissions’ report. We are now responsible for seeing this bill through the process. Indeed, we are responsible for dealing with the range of issues which are covered in the uniform evidence law report but are not part of this model bill that is currently before the—

Senator BRANDIS—Would I be right to assume that the body you have described as the SCAG working group is the body in which the discussion between the Commonwealth and its state and territory interlocutors takes place?

Ms Fitch—That is correct.

Senator BRANDIS—Are you personally familiar with those discussions?

Ms Fitch—I have not been personally involved in the detail of the deliberations of the SCAG working group because my acting role currently is different to my normal substantive role. Ms Williams and several other officers in the evidence section of the department have been involved.

Senator BRANDIS—Perhaps I should be asking these questions then of you, Ms Williams. Have you been involved in the SCAG working group discussions?

Ms Williams—Yes, I have been involved in the SCAG working group discussions since April last year. Prior to that, it was another officer.

Senator BRANDIS—Who was that officer?

Ms Williams—There was a lady by the name of Carmen Miragaya. There was also a principal legal officer who has now left the department. I am afraid I do not recall her name.

Ms Fitch—There have been a range of officers given our team working situation.

Senator BRANDIS—I think you were in the room before when Professor McCrimmon gave evidence and said that for the purpose of developing the uniform evidence law concern was primarily focused—and I have no criticism of this, by the way—on seeking to establish uniformity between the Commonwealth, state and territory laws rather than adverting to the question of the uniformity or consistency of definitions within the uniform evidence law and other Commonwealth statutes; is that right?

Ms Williams—That is my understanding.

Senator BRANDIS—I am just going to give you copies of the bill with which you are concerned, the uniform evidence bill provisions, and also another bill. I am fully aware that this is not the bill you have come to discuss but it bears upon what I want to ask you about; that is, the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008. No doubt, you are familiar with your own bill and the definition of ‘de facto partner’ which would be clause (11) of part (2) of the dictionary in forms item 94 of schedule (1) of your bill. Can I also direct your attention to where I have put a little yellow post-it note on the edge of it and to item 21 of schedule (1), I think it is, of the family law amendment bill, which contains the definition of de facto relationships which would be by its proposed section (4AA)? Do you see that?

Ms Williams—Yes.

Senator BRANDIS—You will see that by subsection (2) of proposed section (4AA) the circumstances to which the court may have regard in determining whether a de facto relationship exists are set out and there are nine of them over the page. Do you see that?

Ms Williams—Yes.

Senator BRANDIS—You can satisfy yourself if you like, but can I just tell you that all seven of the evidence bill criteria are replicated in identical words in the family law amendment bill but, as well, there are two additional criteria in the family law amendment bill; that is, proposed sub-subsection (c) ‘whether a sexual relationship exists’, and proposed sub-subsection (g) ‘whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship’. Then there are other provisions that are in common or substantially similar, including proposed subsection (5) about the non-gendered nature of these de facto relationships. When the evidence bill was prepared and, in particular, when this provision was being drafted, was regard had within the Attorney-General’s Department to the development of the amendments to the family law bill and, in particular, the development of this definition within the family law bill?

Ms Fitch—It is my understanding that the formulation of the definition of ‘de facto partner’ in the evidence bill was developed prior to the definition and the test contained in the family law bill.

Senator BRANDIS—We will have to ask other officers of the Attorney-General’s Department about that. The fact that the words in all but two respects are identical cannot be a coincidence, so I think we may surmise that they followed your definition and added two other criteria.

Ms Fitch—I think that is right.

Senator BRANDIS—Were you aware of this before I brought it to your attention this morning?

Ms Fitch—Yes.

Senator BRANDIS—There has been some discussion within A-Gs about this matter?

Ms Fitch—Yes.

Senator BRANDIS—Tell us about those discussions, please. You can start by telling us who were the participants in the discussions and when they took place. And if they were minuted or otherwise recorded, can I ask you on notice to produce to the committee a copy of those minutes or other records of the discussions?

Ms Fitch—Yes, there were some discussions within the Attorney-General's Department about the differences. I might say that the government's position on the differences is substantiated by its view that there are public policy reasons why there might be substantial similarity, but differences between the different elements of the test—

Senator BRANDIS—What are those reasons?

Senator BARNETT—Yes, what are they?

Ms Fitch—From the evidence bill perspective, we are looking at a situation where what is to be protected is a category of close personal relationships. That obviously forms part of a test that has consequences procedurally for what evidence may be available to a court in proceedings or not; that is different from a situation where there might be Commonwealth benefit or another benefit available to particular categories that live in that close personal relationships definition.

Senator BRANDIS—For example, when it comes to applying the evidence act and the court is seized of the question, 'Is there a de facto relationship,' is it quite an advertent decision by the government to exclude the existence or non-existence of a sexual relationship between two people in determining the existence or non-existence of that relationship?

Ms Williams—There is another difference between—

Senator BRANDIS—No, before you get onto that, answer my question. Is that quite an advertent decision?

Ms Williams—Yes, it is an advertent decision—

Senator BRANDIS—Why, please?

Ms Williams—If you look at the evidence definition, it is broad enough to capture the situation where there is non-cohabitation. In the family law legislation that is before us 1(c) requires them to 'have a relationship as a couple living together on a genuine domestic basis'. The evidence bill just requires the persons to have a relationship as a couple and—

Senator BRANDIS—Sorry, you have lost me. Where are you?

Ms Williams—In the family law division, if you look at the definition of 'de facto relationships', 1(c), it requires that 'they have a relationship as a couple living together on a genuine domestic basis'.

Senator BRANDIS—And that provision is not to be seen in the evidence bill?

Ms Williams—No. It was a decision of the ALRC, which was supported by the evidence working group and adopted by SCAG, that the definition for the purposes of the evidence act should be broader and capture non-cohabitation to reflect the situation that currently exists in society where there may be one partner who has to move interstate for work, who may be living in a nursing home or who may have to go and look after an elderly parent and may be out of the house for a significant period of time. In those situations, it was considered that having a reference to a sexual relationship may actually remove some couples who would otherwise be considered to be in a genuine de facto relationship under the evidence act from the consideration of the court and so—

Senator BRANDIS—Why doesn't the same consideration apply to both bills?

Senator BARNETT—Why is it different?

Ms Williams—Perhaps I can pass this question to my colleague who is responsible for that bill, but I believe this revolves around the reference of powers for that bill.

Senator TROOD—I would like to hear from Mr Duggan on that point but these are only indicia to which the court has to have reference. None of them are determinative of themselves.

Ms Williams—That is correct.

Senator TROOD—Why might you not include that particular indicia as one to be considered, not necessarily substantive or determinative?

Ms Williams—There was a concern with the SCAG working group that that indicia may be interpreted to exclude some of the genuine de facto relationships.

Senator TROOD—But if nothing else is clear in these particular definitions, it is clear that no single indicia is determinative of a result or a definition.

Ms Williams—That is correct and it is certainly a factor that—

Senator TROOD—I do not understand the logic of that, I am afraid.

Ms Williams—It is a factor that the court can have consideration to—

Senator TROOD—Trust me, it is a factor of which the court can have consideration.

Ms Williams—But it was something that the working group decided not to put specific reference to in case it may work to exclude the operation of certain—

Senator BRANDIS—I think what you want to say is that by omitting it you are not encouraging the court to put a particular weight on that criterion—

Ms Williams—Thank you, yes.

Senator TROOD—or indicia.

Senator BRANDIS—Nevertheless, I have a deeper problem with the logic of this. You have one Commonwealth bill that says people are in a de facto relationship if that relationship meets certain specified criteria and another Commonwealth bill, which coincidentally we are considering at the same time, which says that people are in a de facto relationship if the relationship meets certain other or additional criteria. It seems to me that what the draftsman is doing here is to really put below the radar screen, as it were, in relation to one bill a different description of a relationship which is nevertheless defined in the same language; that is, a de facto relationship. It sounds to me as if a de facto relationship for the purpose of the evidence bill means something different to you from a de facto relationship for the purpose of the family law bill. In fact, that must follow. If that is the government's purpose here, why not come out and say it rather than define the same words inconsistently in two different statutes?

Ms Fitch—I think that in the development of the definition of 'de facto partner' in the evidence bill, the SCAG working group had regard to the fact that other relevant considerations can and would be taken into account by the court in particular cases. The government's position overall is that the definitions are substantially similar—

Senator BRANDIS—It does not matter if they are substantially similar if they are materially different, and they are obviously materially different because they are, in fact, identical in seven respects but then completely different in two others. It does not answer the point to say that they are substantially similar when there are two important material differences.

Senator BARNETT—Can I give you two examples, perhaps, for you to consider and confirm whether they are considered differently? The first is an interdependent relationship. Under the evidence act, it is a very broad definition, as we have discussed, and the proposal before us, as was confirmed by the previous witness—and if you could confirm your understanding—would also cover a couple in an interdependent relationship. That is the first example; if you could respond to that. The second would be that, if somebody was in a marriage relationship and had, under the evidence act, a de facto partner—so there is no exclusivity—the de facto relationship would also be covered under the evidence act but not under the family law act. Can you confirm that for the committee?

Ms Williams—The first issue is I would disagree with Professor Les McCrimmon in relation to the interdependency situation—

Senator BRANDIS—You disagree with Professor McCrimmon, did you say?

Ms Williams—If we are talking about an interdependency relationship where we perhaps have two elderly siblings living together, that would not be captured by the evidence act because the evidence act requires under paragraph 2 of clause (11) in schedule (2) of the dictionary that the persons have a relationship as a couple.

Senator BRANDIS—Where is the definition of 'couple'?

Ms Williams—There is no definition of couple.

Senator BRANDIS—That does not get you anywhere.

Ms Williams—However, the intention behind that provision is—

Senator BRANDIS—But that does not tell the Senate committee what the intention of the legislation is—

Senator BARNETT—It may be the intention—

Senator BRANDIS—If it does not appear in the statute itself, that is of no assistance at all.

Senator BARNETT—We are not interested in the intention. We are looking at the act.

Senator BRANDIS—How does a judge trying to apply this legislation get any guidance at all from—with all due respect—a public servant saying to a Senate committee, ‘Well, it is not in the bill but that is the intention’? It is not in the EM, is it? I do not think it was in the second-reading speech, was it?

Ms Williams—The relationship? Yes, the EM does refer to it. It says, ‘The definition is only intended to cover types of relationships where the two people have a relationship as a couple.’ I appreciate that does not take us any further than—

Senator BRANDIS—That begs the question completely.

Senator BARNETT—I think you are digging a hole for yourself, Ms Williams. I apologise. That is not to be considered in a pejorative way, but I think your responses refer to perhaps what may have been an intention, but we can only consider what is before us and that is what is proposed. Professor McCrimmon has made his view very clear and it seems from a reading of the very broad definition that it could quite conceivably cover an interdependent relationship. That is why I use that example. It is clearly different to the family law bill before us as well. That is the first example. What about the second one?

Ms Fitch—If I could return to the exclusivity example, I might answer the first part of that question and then allow my colleague Mr Duggan to discuss how it applies in the context of his bill. Certainly it is the case that it is possible for somebody to be legally married and also in a de facto relationship with another person. Both relationships involving the same person would be covered and protected in the context of the evidence bill.

Senator FEENEY—When you say ‘protected’, the court has a discretion in criminal matters, doesn’t it? Presumably, if multiple persons apply for privilege in those circumstances, obviously the court retains a discretion to not provide someone with limited privilege in those circumstances.

Ms Fitch—Yes, that is right. And the court may decide, in fact, that both relationships, if they are relevant to the proceedings being considered, are worthy of protection, or neither.

Senator BARNETT—My point is that that definition is entirely different to the definition in the family law bill that is before this committee in another committee setting and that covers a domestic relationship of a couple living together in a bona fide domestic relationship. Do you concur?

Ms Williams—It is different, yes.

Senator BARNETT—That is what we were trying to confirm and I think we have just done that.

Senator BRANDIS—It is offensive to my sense of rationality that there would be inconsistent definitions of the same thing in two different Commonwealth statutes. You will recall that I said to Professor McCrimmon, ‘You mean to say that a court in the same cause could be applying one test to determine if it was a de facto relationship for the purposes of the evidence act and a different test to determine if it was a de facto relationship to dispose of the substantive matter before the court?’ And Professor McCrimmon pointed out to me, ‘Well, that would not happen in the family court because the evidence act provisions are only operative in a criminal court.’ I have been thinking about his answer but, with respect, it does not meet the occasion because what if, for example, this were to happen, as it very easily could: the Family Court was seized of a cause between parties and one of the issues in that cause was whether a de facto relationship existed; that is, it is a jurisdictional threshold issue. And the Family Court, applying the tests in the expanded Family Law Act, arrived at a particular conclusion. It subsequently transpired that one of the witnesses before the Family Court had misled the court and, let us say, a decision was made to prosecute that person for perjury. Let us say it was a criminal prosecution in the Federal Magistrates Court. In that prosecution, the Federal Magistrates Court might, if the privilege were sought to be invoked, be called upon to apply a different criterion for determining whether a de facto relationship existed between the same two people arising out of the same cause. How can that be logical?

Ms Fitch—The government’s position is that there would not be fundamental inconsistencies in operation because they are not exclusive tests, but I think your—

Senator BRANDIS—It is not a question of whether there would be but whether there could be. You know that. You are a good lawyer, no doubt. These are facultative tests. The fact that potentially there could be inconsistencies is the vice here, not whether there necessarily would be.

Ms Fitch—The explicit factors in each test as they are written are not the same. To that extent, if you see that as an inconsistency, it might be an inconsistency in one sense but not a practical inconsistency. But, yes, that is right.

Senator BRANDIS—It could be an inconsistency.

Senator TROOD—Wouldn't it be desirable for the Commonwealth to have a single view about the definition of a de facto relationship?

Ms Fitch—I do not know that we are—

Senator TROOD—Do not do that. Do not do that, please. Just answer my question.

Ms Fitch—It may be desirable for the Commonwealth to have a consistent approach but that is not the only consideration that we are taking into account in determining these matters.

Senator TROOD—Clearly, that is the case, but I would like to know what is the public policy argument as to why the Commonwealth should not have a uniform view about the definition of a de facto relationship?

Mr Duggan—As you have highlighted, there are competing public policy issues to be considered here. In relation to the evidence act, for example—and Senator Brandis mentioned this before—the need for uniformity throughout Australia was a very overriding requirement in relation to the development of that legislation. As I understand it, the factors that you see set out in the legislation are factors that have been, as has been explained by Ms Williams, the subject of significant consultation and collaboration with the states and territories through the processes that were outlined. In relation to the Family Law Act, the family law legislation is drafted very much with a mind to the referral legislation which was made to the Commonwealth by the states in 2004. Arguably, that very specifically refers to things like a marriage-like relationship. A de facto relationship, arguably in a narrower sense, was considered in relation to the states and territories considerations through the SCAG process, so that is—

Senator BARNETT—Why is it in a narrower sense?

Mr Duggan—At least in part because of the relationship registers which Senator Brandis mentioned. Actually, that is not quite true, as I think there was one relationship register at the time that the SCAG consideration was being made as to the definition of de facto relationships. Our reference talks very much about the fact that it means a marriage-like relationship between two persons. That is what was referred to the Commonwealth and that is one of the reasons why the Commonwealth has adopted the provisions that it has done, particularly in relation to a sexual relationship.

Senator BRANDIS—Your understanding, by the way, of the sequence of this, I take it, is the same as Ms Fitch's evidence, which was that the evidence bill definition came first and the family law de facto relationships bill definition drew upon that definition and was subsequent to it?

Mr Duggan—That is correct.

Senator BRANDIS—But then at the time when the relevant mind was turned to the question of the definition for the purposes of the family law bill these two additional criteria were added, criterion (c) and criterion (g), sexual relationship and relationships register. Who made that decision? Do you know? Perhaps we should ask other officers later. Do you know?

Mr Duggan—Yes, the government made the decision—

Senator BRANDIS—But which officer or officers?

Mr Duggan—Officers do not make such decisions, as you know. Ministers make such decisions.

Senator BRANDIS—Of course, I accept what you say. But let me approach it slightly differently, then. This, I dare say, in its generation emerged essentially as a technical issue and officers addressing technical issues sit in committees like the SCAG working party and the implementation group, or whatever it was that Professor McCrimmon described. There was within the Attorney-General's Department and between the Attorney-General's Department and its interlocutors in the states and territories a time at which this issue was addressed by a committee or a working party of officials, or some such body. Is that the case?

Mr Duggan—Are you referring to the definition in the Family Law Act?

Senator BRANDIS—Yes, I am.

Mr Duggan—There was not a formal committee or subcommittee of state and territory officials and Commonwealth officials drafting this piece of legislation as there was in the SCAG process.

Senator BRANDIS—When was the decision made to add (c) and (g) to the family law bill?

Mr Duggan—To give you the exact time I would have to take it on notice.

Senator BRANDIS—Perhaps in fairness to you I should ask that under family law.

Mr Duggan—I am the family law person. I can get you an answer. I am happy to do that. I just do not want to guess.

Senator BRANDIS—Was it this year?

Mr Duggan—I can find you an answer. We are appearing in a couple of hours. I can—

Senator BRANDIS—Can these matters be sought urgently, please, so that when you come in your other manifestation later in the day, you can answer them? I would like to know these things. I would like to know when the decision was made to add (c) and (g) to the definition in proposed subsection 2.

Mr Duggan—I am fairly confident it was this year, but I do not want to mislead you.

Senator BRANDIS—You are being properly circumspect about your answers.

Senator TROOD—I would like to know when proposed section 4 was added: ‘a court determining whether a de facto relationship’, et cetera, which does not appear in the evidence act.

Senator FISHER—In answers to Senators Brandis and Trood you indicated that there was clearly a desire for uniformity in the context of the evidence related amendments. As I understood it, you attempted to provide that as a reason for differentiating the treatment between that and the family law provisions, but would not the same desire for uniformity and, at the very least, consistency apply in respect of the family law amendments, particularly when the explanatory memorandum talks on the first page about offering de facto couples covered by the bill in the context of the family law de facto financial matters amendments a nationally consistent financial settlement regime? Don’t the same arguments apply to both and therefore, as my colleagues have been putting to you, should not the factors to be considered be consistent?

Mr Duggan—Government considered quite carefully the issues that you have raised. If I can just move to a slightly different point in relation to the development of our legislation, as a number of you would be aware, when the Commonwealth enacts legislation on the basis of a reference from the states there is a very significant amount of consideration given to ensuring that the Commonwealth legislation is, as far as we can make it, going only as far as the states give us power and no further. As you can probably appreciate, we have very extensive constitutional advice which I will not be able to table before the committee—

Senator BRANDIS—Why not, by the way? Unless the Attorney-General directs you not to, you can—

Mr Duggan—I do not have the powers behind me at the moment is what I am saying. If you ask me that question, I will refer it to the Attorney-General.

Senator BRANDIS—I am asking that question and if he decides to withhold it from the public that is a matter for him.

Mr Duggan—On the issue of just exactly how far we can go in relation to the legislation that we enact, our advice in that regard was that there was a need for caution in relation to the definition based upon the references of power that we have from the states that have so far referred—

Senator BARNETT—Who gave you that advice?

Mr Duggan—It is advice the government would have got from senior counsel.

Senator BARNETT—Within the department, or—

Mr Duggan—No, it would have been through the Australian Government Solicitor.

Senator BARNETT—Can you take on notice if we can have a copy of that?

Mr Duggan—I—

Senator BRANDIS—I do not know if the rules of waiver of privilege apply to parliamentary proceedings, but in stating substantially what the effect of the advice was, I suspect you might have waived the Attorney-General’s right to withhold it now.

Mr Duggan—I will ask the Attorney-General what his views are about that. Upon that basis, our definition is drafted very carefully to, as I say, give it the best foundation in relation to the reference of power that we have.

Senator BRANDIS—I understand why in a mechanical and intergovernmental sense that is the way this all happened, but none of this really addresses the core issue that Senator Trood pinpointed very succinctly. The Commonwealth is saying that de facto spouse means different things in different acts and I think most people would find that illogical and offensive. There are other things that I want you to take on notice. I would like to know the body, group or working party that decided to recommend the insertion of criteria (c) and (g).

Mr Duggan—I can answer that question. That was a decision by the Commonwealth minister. There was no body, group—

Senator BRANDIS—It was a recommendation but to the minister directly by officials?

Mr Duggan—Yes.

Senator BRANDIS—That recommendation was not based on a working group or some puny body within the department? It was direct advice to the minister from the relevant official?

Mr Duggan—That is right.

Senator BRANDIS—Can you tell us the date on which that decision was made? And, if the recommendation to the minister was informed by negotiations with other governments, as you have indicated, I would like to see a copy of correspondence between the Commonwealth and the other state and territory governments concerning this issue.

Mr Duggan—Can I answer that question now?

Senator BRANDIS—Yes.

Mr Duggan—There was no ongoing discussion between Commonwealth ministers and state ministers on this issue—

Senator BRANDIS—But was there a discussion at the officials level?

Mr Duggan—That is not my understanding. Our advice to the minister was based primarily upon the legal advice that we got and the need for our legislation to mirror as close as possible the references of power. The primary discussion—

Senator BRANDIS—Pardon my ignorance, but surely when these powers are referred the reference is the culmination of a long process of argy-bargy—to use a technical term—between the Commonwealth and the state and territory governments?

Mr Duggan—Absolutely.

Senator BRANDIS—That argy-bargy would find itself embodied in exchanges of correspondence or even email traffic or discussions at official meetings which would be minuted, surely?

Mr Duggan—The manifestation of the discussion through the Standing Committee of Attorneys-General, which took many years and which was initiated by the then Attorney-General, Darryl Williams, culminated in the legislation that I have referred to which was what is called in New South Wales, I think, the Commonwealth Powers De Facto Relationships Act 2003, which is a piece of legislation modelled upon legislation drafted by the first parliamentary counsel's committee which advises and prepares legislation on behalf of the standing committee—

Senator BRANDIS—But nevertheless, these two matters which make the two tests inconsistent, (c) and (g), were inserted, you have said, as a result of a ministerial decision this year. You are going to check that but you seem reasonably confident that it was this year. I just want to know where they come from and why, after this long process of discussions with its state and territory partners and the reference of powers and so on, the Commonwealth this year decided to make this very consequential change to the definitions by the addition of (c) and (g)?

Mr Duggan—There are different considerations to the two factors you have mentioned. Consideration (c) is based upon the legal advice that I mentioned previously. Consideration (g) arises because of the Commonwealth's desire to encourage the states to consider the development of relationship registers—

Senator BRANDIS—So, that is a substantive social policy decision made by the Rudd government to encourage the states to develop relationships registers?

Mr Duggan—That is right.

Senator BRANDIS—Has that substantive social policy decision by the Rudd government been the subject of an announcement by either the Attorney-General or, to the best of your knowledge, any other minister, or is it simply being slipped below the radar screen in this piece of legislation?

Mr Duggan—Not at all. I do not have that in front of me but the Commonwealth's position is quite clear, and it has made announcements in a number of places and I will, again, attempt to find that out.

Senator BRANDIS—Thank you.

Senator BARNETT—Were you also the officer responsible for the same-sex entitlements bill?

Mr Duggan—No. There are other officers who will be representing for that. Depending on the question, we could perhaps take it on notice so we can make sure we have an answer for you this afternoon, if that would be helpful.

Senator BARNETT—I am just interested to know if you were involved in both bills.

Mr Duggan—The officers involved have had discussions on issues that we have—

Senator BARNETT—Yes, because the same-sex entitlements bill has definitions of a couple relationship which, based on my understanding of the bill, do require an ongoing, exclusive relationship as opposed to this broader definition that we are seeing today in the evidence act. I am just seeing if there is a contrast there and the reasoning for that contrast. Secondly, I am interested to know in terms of the de facto spouse traditional view, and I am seeking confirmation from your officers, that it has generally been considered that it requires an exclusive relationship between the two people and also that there is generally a requirement for there to be a sexual relationship between the two people.

Mr Duggan—In relation to your first question, no, there has not been an understanding by us that the relationship necessarily requires exclusivity. Indeed, the reference legislation that I have referred to, the New South Wales bill, talks about a de facto relationship existing even if the de facto partner is legally married to someone else or is in another de facto relationship. The understanding of the state referrers was that the relationship did not have to be exclusive. In relation to the sexual aspect, the de facto relationships referrals define 'de facto relationship' to mean a marriage-like relationship. That is actually in the legislation that is referring the power to us. We were therefore, if you like, basing our definition on that definition because that is what was referred to by the Commonwealth.

Senator BARNETT—What is more consistent with current Commonwealth law? Is it the proposal and the definition in the evidence act that is before the committee today, is it the family law de facto amendment bill that is before the same committee, or is it neither or those two? Is it another definition? I am interested to know across the Commonwealth laws the definition that applies to what previously we have known as 'de facto spouse' now being defined today in the evidence bill as a 'de facto partner'. Could you consider that and advise us as soon as possible?

Senator FISHER—As to the concerning inconsistent definition of de facto, you have taken on notice some further questions from my colleagues about the timing in the development of the legislation. Courts can attribute parliamentary intent when there is a question about the interpretation of legislation and, despite the permissibility of these inclusive factors, I would suggest that the timing of the passage of the legislation itself may be relevant, particularly if both amendments end up being passed by the same parliament. What is your understanding of the government's intent in terms of the passage of these particular amendments?

Mr Duggan—Do you mean in terms of timing?

Senator FISHER—Yes.

Mr Duggan—I will not speak for the evidence bill but certainly in relation to our bill—this, of course, is a matter entirely for the parliament—the government is working on the understanding that the de facto bill is likely to be passed in the upcoming session. It will be debated early in that session in the House and then, depending on the Senate's timetable, it will hopefully pass the Senate before Christmas.

Senator BARNETT—It has been debated in the House, hasn't it?

Mr Duggan—No, it has only just been introduced.

Senator FISHER—In respect of the other?

Ms Fitch—It is the government's hope that this bill be passed as soon as possible. It has already been passed by the House of Representatives and it would be desirable, particularly given the passage of the New

South Wales legislation and where the other states and other jurisdictions stand on the issue, that it be passed as soon as possible.

Senator FISHER—If it were to come to pass that an identical parliament were to pass both bills in terms of the de facto definition in their current forms, surely then it would be open to a court to attribute intention to parliament as to why there were differentiating factors, given that the same parliament may well come to pass both bills.

Ms Fitch—I suppose that is right—

Senator FISHER—Thank you.

CHAIR—Do you want to finish what you were saying?

Ms Fitch—I was only going to add that the government's position, as I think I mentioned previously, is that there are different public policy reasons behind the different tests, so I am not sure that the government would agree that it is entirely illogical.

Senator BARNETT—But you have not outlined to the committee the public policy. You made one attempt earlier but there was not a clear understanding of what these public policy positions of the government are that cause the difference, apart from what Mr Duggan said about the Rudd government recognising same-sex relationship registers and giving them support around the country.

Senator FEENEY—And the issue of reference.

Senator BARNETT—Are there any other public policy pronouncements that you wish to advise the committee that the government has taken on board?

Ms Fitch—Not in particular. What I had in mind when I mentioned those differences was, perhaps, more my own opinion, which obviously is not relevant, but it would seem that the consequences of protecting a certain category of close personal relationships may be different from the consequences of determining who might receive a benefit in certain circumstances.

Senator BARNETT—You are not required to provide a personal opinion.

Ms Fitch—No, I understand that.

Senator BARNETT—We are not requiring that of you today.

Ms Williams—This amendment to the evidence act is consistent with the underlying rationale of the evidence act, which is that the community should not make unduly harsh demands of its members by compelling them where the general interest does not require it to give evidence that will bring punishment upon those they love, betray their confidences or entail economic and social hardships. The ALRC and working group in looking at that made the decision that that category of people, in terms of de facto relationships—and the court is actually there to look at the nature of the relationship between those two parties—has been expanded a little in terms of non-cohabitation, in terms of the fact that one or both the parties can be under the age of 18 and in terms of the fact that it has been extended to same-sex relationships. The reasoning for that has been set out by the ALRC in their document.

The other difference between our provision and those of my colleagues is that this is a threshold test in that once that has been established the court is then required to look at whether the evidence of that party outweighs the prejudice that could be done to the relationship. There is a second step in that process. While this may create a broader category of relationship that the court recognises that damage could be done to as a result of giving evidence, there is then that step above it which is that the court then considers the probity of that evidence against the dangers that exist in that relationship. The third public policy reason is, as we have said before, that this is a uniform evidence scheme and this definition had been determined through consultation with not only a number of stakeholders through the ALRC process but through state and territory and Commonwealth consultations within the SCAG process.

CHAIR—In the Australian Law Reform Commission's submission to this inquiry, in the last paragraph of the last page it actually says to us that it supports the definition of 'de facto partner' in the evidence bill. It then goes on to use as an example the fact that that definition says, 'This approach is less prescriptive because it does not require that the parties to a relationship live together.' My understanding is that the test of a de facto relationship in the application of the evidence bill is not as prescriptive because you are requiring of the parties something quite different under the Family Law Act. Is that correct?

Ms Williams—Under the Family Law Act, they are required to live together as a couple. Under the evidence act there is not that cohabitation requirement. That is correct.

CHAIR—Is that one example of why the definitions are perhaps different? That is, you use seven criteria in one but it is more prescriptive in relation to that definition for the Family Law Act.

Ms Williams—That is right.

Senator TROOD—I do not think that is an appropriate conclusion to draw, frankly. All it is is a criterion that has to be considered in determining whether or not a de facto relationship exists. It is just one of a range of issues which are relevant to the consideration. It is not more or less prescriptive. It is an issue which the court, if it chooses, can take into account.

Mr Duggan—The definition in our legislation has two parts and proposed (4AA) subsection (1) is indeed prescriptive in that it says:

A de facto relationship can only exist where having regard to all the circumstances of that relationship they have a relationship as a couple living together on a genuine domestic basis.

Indeed, for the benefit of the court, proposed subsection (2) then goes on to consider a range of factors that the court may take into account in making that decision but there has to be a decision that, in fact, the couple do have a relationship and are living together on a genuine domestic basis. That is quite prescriptive in the legislation.

CHAIR—There were some discussions in questioning from Senator Brandis before about the lack of definition of a couple if it is not defined in the evidence act but there is a reference to the definition of a couple in the evidence bill before us. That is, it might not be specifically defined but is it referenced to either any piece of other legislation or the Acts Interpretation Act?

Ms Fitch—I am not immediately aware. My understanding is there is not a definition of ‘couple’ in the evidence act or proposed in the evidence bill. There may be one elsewhere in common law—

CHAIR—And that is my question to you. If there is not a specific definition in the evidence bill, is a definition of the word ‘couple’ referenced or cross-referenced with the Acts Interpretation Act?

Ms Williams—I do not believe there is a reference to, or a definition of, ‘couple’ in the Acts Interpretation Act, but we will look at that and I can get back to the committee.

Senator TROOD—Ms Williams, you may have been here when I was exploring with Professor McCrimmon the matter of Queensland’s status in relation to the evidence act. Are you able to shed any more light on its intentions with regard to the act?

Ms Williams—Queensland has not been an active member of the SCAG working group and has not been involved in the development of the first tranche of the model evidence reforms. As far as I am aware, there has been no public statement as to what their intention is in relation to implementing the uniform evidence act.

Senator TROOD—It has not participated in the drafting of this bill?

Ms Williams—That is correct.

Senator TROOD—You do not have any clear understandings of its intentions with regard to the act; is that right?

Ms Williams—That is correct.

Senator TROOD—The matter stands as Professor McCrimmon described to the committee earlier on, which is that there seems to be some division in the legal profession and amongst members of the government in Queensland as to its intention with regard to the evidence act?

Ms Fitch—I am not sure that the department itself had discussions with members of the profession but we have no reason to consider anything different from what Professor McCrimmon said.

Senator TROOD—We are no clearer as to Queensland’s intentions on the matter?

Ms Fitch—That is right. We are not aware that they have made that publicly known.

Ms Williams—At this stage we are not aware that they are intending to implement it.

CHAIR—Thank you very much for your attendance and evidence today. That actually concludes our inquiry into the Evidence Amendment Bill 2008.

Committee adjourned at 10.40 am