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Official Committee Hansard

SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL
AFFAIRS

**Reference: Same-Sex Relationships (Equal Treatment in Commonwealth Laws—
General Law Reform) Bill 2008**

MONDAY, 22 SEPTEMBER 2008

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

Monday, 22 September 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, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta 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 Brandis, Barnett, Crossin, Farrell, Feeney, Fisher, Hanson-Young and Trood

Terms of reference for the inquiry:

To inquire into and report on: Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008

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Committee met at 9.02 am

CHAIR (Senator Crossin)—I declare open this public hearing of the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the provisions of the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008. The inquiry was referred to the committee by the Senate on 4 September, for report by 30 September 2008. The committee has subsequently sought to extend the reporting date until 8 October 2008.

This bill seeks to amend 68 Commonwealth acts to eliminate discrimination against same-sex couples and the children of same-sex relationships in a wide range of Commonwealth laws. To date, we have received 59 submissions for this inquiry. All of those submissions have been authorised for publication and are available on our 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 a committee.

The committee prefers all evidence to be given in public but, under the Senate's resolution, 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.

[9.04 am]

INNES, Mr Graeme, AM, Human Rights Commissioner, Australian Human Rights Commission

TEMBY, Ms Kate, Acting Director, Human Rights Unit, Australian Human Rights Commission

CHAIR—Welcome. Thank you for appearing before us this morning. We have received your submission and labelled it as No. 12. Do you wish to make any amendments or alterations?

Mr Innes—No, we do not have any amendments.

CHAIR—I invite you to make a short opening statement, and then we will go to questions.

Mr Innes—Thank you for the invitation to the Australian Human Rights Commission to appear before the committee today. The commission welcomes the introduction of this bill. This bill implements the recommendations of the commission's inquiry and removes the discrimination experienced by same-sex couples and their families. In summary, the commission supports the introduction of new definitions of 'de facto partner' and 'de facto relationships' as well as the new definitions of 'child' and 'parent'. The commission is pleased that the bill responds to our recommendation that the definitions of 'stepchild' and 'step-parent' recognise these relationships in de facto families.

Before I discuss these I would like to make some general comments about the definition of 'child'. As we have noted previously, defining the parent-child relationship in a way that includes all same-sex families is the most challenging area of this reform. There has been much discussion over the past month about the proposed definition of 'product of a relationship'. The commission supports the new definition. Our main reason for doing so is that it is inclusive. It includes all same-sex families, particularly gay fathers who form families through surrogacy who may not be included by other approaches to the definition of 'child'. It also includes families where there may be more than two people who have a parental relationship with a child from the time of birth.

We are aware that there are other advocates who prefer the approach of amending the parenting presumption in section 60H of the Family Law Act and extending federal recognition of parental status granted in state and territory laws. While we do not oppose this alternative approach we have two concerns about preferring this approach to the definition in the current bill. Firstly, it seems to us that this approach will only provide equality to children in all same-sex families if all states and territories amend their surrogacy laws in a way that includes same-sex couples. It is our understanding that it may be many years before all state and territory surrogacy laws include same-sex couples. Secondly, this approach does not include families where there are more than two people who have a parental relationship with a child from the time of birth. This situation is quite common in the case of same-sex families. Our primary concern is that the legislation protect all children in same-sex families. It seems to us that the

definition of ‘product of a relationship’ is more inclusive of the various same-sex family arrangements, and we therefore prefer that approach.

I will now turn to two specific concerns about the bill. Firstly, we are disappointed that the amendments to the Sex Discrimination Act do not remove discrimination against same-sex couples in the area of marital status discrimination. We think that it is important that all unmarried couples are protected from discrimination on the basis of being in a de facto relationship. The commission does not believe that this amendment will provide protection from discrimination on the basis of sexuality or being in a same-sex relationship. A person in a same-sex relationship would only be protected from discrimination if the discrimination were due to their status of being in a de facto couple rather than due to their sexuality or being in a same-sex couple. Secondly, we are concerned about the impact of restricting parental status in the Migration Act to two people only. The commission is concerned that this approach may exclude a child of people in some same-sex parenting arrangements.

Thank you for the opportunity to appear before you today. We look forward to the speedy passage of this legislation through parliament. The removal of this discrimination is an important step on the path to full equality for same-sex couples and their children.

CHAIR—Mr Innes, thank you very much. Ms Temby, do you want to add to that?

Ms Temby—No, thank you.

CHAIR—We will go to questions. Senator Barnett, would you like to start?

Senator BARNETT—Thank you, Chair. Thank you for your submission. You have addressed the issue of ‘children of a couple relationship’ straight up. I am glad you did because it is an area of significant concern to many people. I draw to your attention the submission we have received from Professor Jenni Millbank. You would know Professor Millbank and you are probably aware of what she said in the previous inquiry.

Mr Innes—Yes, we are. Professor Millbank did some work for us on our inquiry.

Senator BARNETT—Yes, indeed. That is why I assumed that. She says in her submission:

... the definition does not specify, as all state parentage presumptions (eg Status of Children Act 1996 (NSW)) do, the requirement of consent to the conception of the child, nor the point at which consent must be given in order to trigger recognition. By way of example, if a woman become pregnant through ART while not in a de facto relationship, and then during the course of the pregnancy entered into a de facto relationship with another person, it is not clear whether a child would or would not be the “product of the relationship” under the Bill.

She goes on to say:

Under the Family Law Act 1975 (Cth) and state parentage presumptions as they currently stand a de facto partner or husband would not be a parent in such circumstances as there was not consent to the conception attempt by the partner ...

That is my first concern. It is a concern which Professor Millbank has raised—and you know her quite well. The second major concern I have with this definition of a child being ‘the product of

a couple relationship' is the fact that two people of the same sex simply cannot physically and biologically be parents to the one child. How would you respond to those two concerns?

Ms Temby—As to your first concern about consent, this was also raised with us by Professor Millbank. We note that that concern is specifically addressed in the explanatory memorandum. It explains that the intention is that the term 'product of a relationship' implies consent, because people in a relationship tend to have a child together and, if the child is born to the people in that relationship, that implies that they consent to that child being born. So we feel satisfied that consent is there. Jenni Millbank does raise the issue that there may be confusion about the point in time at which consent is given.

Senator BARNETT—Could you acknowledge at least that there is some doubt about whether there is consent? The explanatory memorandum uses a range of examples. Professor Parkinson's submission absolutely blasts a hole through the government's argument that there is consent. He says there is clearly significant doubt that there is consent. Would you at least acknowledge that to the committee?

Ms Temby—I am not sure that I would say there was doubt about whether there is consent. What I would say is that there are differing views about whether consent is implied in the definition of 'product of a relationship'. It is not something that we are particularly concerned about.

Senator BARNETT—Would you at least acknowledge that there are differing views?

Ms Temby—There clearly are.

Senator BARNETT—I hope the government accepts that as well, as a result of this inquiry. Do you think the government should stop and reflect on the importance of a child coming into this world and knowing who their father is and who their mother is? That is critically important to the identity of the child and the child's best interests.

Mr Innes—That is not a new situation. There are occasions, and there have been since the beginning of time, where children have been in that situation. It is not perhaps an ideal situation but neither is it a situation with which society has not dealt in the past.

Senator BARNETT—I put it to you, Mr Innes, that, firstly, the government is proactively creating a law here under which a child can come into the world without knowing who its mother and father are and, secondly, without having clarity not only for the child but for the community as a whole. That for me, and I think for others, raises considerable concern. I would like to address the second question, unless you want to respond to that comment.

Mr Innes—Yes. I do want to come to your second question, so I think we are going to the same place. Your second question related to a child's physical or biological parents. What this definition tries to do, as I understand it, is provide direction for a child who is the product of a relationship. It comes down to the question of parenting. For some same-sex couples it is just not possible for a parent to be, as we might describe, the physical parent, but they still might be playing the major or one of the roles in a parental relationship, such as being a co-mother in a lesbian relationship. That is exactly what this definition and this legislation try to address: to

recognise that in society that situation is occurring in at least 25,000 families in Australia, which I think is probably a conservative figure from the last ABS census, and to change laws to achieve the removal of discrimination against those sorts of families.

Senator BARNETT—I put it to you, Mr Innes, that under this legislation we are putting forward a proposal where children will have different parents for different purposes. Is it correct that the bill does not amend the Family Law Act, for example? So you have a different scenario under the Family Law Act whereby it says that a child has a father and a mother but under this proposed legislation a child has different parents for different purposes and could actually have two mothers and indeed one father.

Mr Innes—Absolutely. And in fact by doing that the law recognises what is going on in society and has been going on for some time. During our inquiry we had many people come to us as the parents of children—and the children appeared at the hearings on many occasions. Mostly they were two women in a same-sex relationship but sometimes two men. This is a reality in our society today, and this law is recognising that reality and attempting in all federal laws to do what most state governments have done to a large degree, which is to remove discrimination that exists against those couples not only in financial and work related areas, as our inquiry covered, but in a broader range of areas that the government has added to in the changes being introduced.

Senator BARNETT—You mentioned ‘all federal laws’. I want to take issue with you there and would like to get your confirmation as to what exactly is your understanding of this bill before us. Is it your understanding that the bill amends federal laws, apart from the Family Law Act and the Marriage Act.

Mr Innes—Yes that is my understanding. If I said all federal laws, you are correct that those are the two that I do not include.

Senator BARNETT—Is it correct that the Family Law Act is the primary federal law which determines parental responsibility? In fact, it defines parental responsibility, so you will have one federal law which says for a child the parents are two mothers or two fathers and then under the Family Law Act you are going to have a federal law which says that this child will have a mother and a father, so different parents for different purposes.

Ms Temby—Yes. We recognise that there is inconsistency between the approach in the Family Law Act and in the other legislation being amended by this bill.

Senator BARNETT—So why would you support this bill?

Ms Temby—When we appeared before the committee inquiry into the Family Law Act, we suggested at that stage that our preferred definition is ‘product of a relationship’ and that we could see one approach being to insert that definition also into the Family Law Act to provide consistency. In the event that that is not possible—and we understand that amendments to section 60H of the Family Law Act were circulated last week—we would certainly not oppose those amendments because we think the effect of those amendments is to ensure equal recognition of the majority of same-sex families. Also, those amendments deal with recognising surrogacy arrangements where they have been confirmed by a state or territory court.

Senator BARNETT—That is different to this bill—correct?

Ms Temby—That is different to this bill.

Senator BARNETT—And we have not yet addressed the surrogacy issue?

Ms Temby—No. So to summarise: our preferred approach to the definition of child is the definition ‘product of the relationship’. There are two reasons for that. One is inclusiveness, that it includes the range of family forms in same-sex families. The other reason is that the alternative approach, which is encapsulated in the amendments to the Family Law Act, which were circulated last week, will not work for all same-sex families until all state and territory laws governing surrogacy are reformed so that there are appropriate processes to transfer parental status and also a reform so that they include same-sex families.

Senator BARNETT—Sure. I can understand your support for certain objectives and your support for certain intentions, but we have a law and we are looking at this legislation before us. You have confirmed the inconsistencies in the law and the differences between the outcomes under this law, the outcomes under the Family Law Act as it stands today and you have confirmed the fact that you have different parenting responsibilities applying. You will have different parents for different purposes. Let me ask a final question, because I know other senators will want to ask questions and we have not even got on to the surrogacy issue which is a hugely important matter. Do you believe it is in the best interests of the child to come into the world with a reasonable expectation of having both a mother and a father?

Mr Innes—It is in the best interests of the child for the parents of that child, who are functioning as the parents of that child—

Senator BARNETT—That was not my question.

CHAIR—Senator Barnett, let Mr Innes have a chance to finish.

Mr Innes—not to be discriminated against by almost 100 Commonwealth laws. That is what is in the best interests of the child.

Senator BARNETT—That was not my question, Mr Innes. I am asking what is in the best interests of the child, not what is in the best interests of the parents.

Mr Innes—I am answering what is in the best interests of the child.

Senator BARNETT—I asked: is it fair for them to have a reasonable expectation to come into the world with both a mother and a father?

Mr Innes—It is fair to them to have—

Senator BARNETT—And that should be an easy yes or no answer.

CHAIR—Senator Barnett, let Mr Innes answer the question. You might not like the answer but he is answering your question.

Mr Innes—It is fair to them to have a reasonable expectation that the people who are functioning as their parents will be recognised by the law and are therefore not discriminated against, as they currently are by almost 100 federal laws.

Senator HANSON-YOUNG—I am interested in your recommendation No. 7 in relation to the Migration Act. Could you flesh that out a little bit for me, please?

Mr Innes—I might start and then let Ms Temby continue. The Migration Act currently does two things. It recognises same-sex couples in a de facto relationship, so it adopts the definition of ‘de facto relationship’ but then provides for regulations to restrict the number of people who will be recognised as parents. We are aware that there are some situations where that is in practice not the case. We recognise that there will be some pieces of legislation—and the family tax benefit legislation is one—where there needs to be some certainty and the family tax benefit can only be available to one parent of a child. However, it is our view that people could be disadvantaged if the numbers of parents are restricted in the way that the Migration Act proposes in this bill.

Ms Temby—The Migration Act very clearly says it will recognise the relationships using the ‘product of the relationship’ definition, and we support that. But then it says that a child may have no more than two people as a parent. We suspect that there may be circumstances where migration status might be adversely affected for some families because of that restriction, where a child may legitimately have more than two people in the place of a parent and, depending on the configuration of that particular family, their migration status may be adversely affected. It may be that in practice it is not such a significant problem because there might be other ways—say, if a child and one parent were able to achieve appropriate migration status then the other adult might be able to be recognised as a partner of the first adult and it may not be a significant problem in practice. But, in principle, we think that for something as important as migration status the reality of a child’s family relationships should be recognised.

Senator HANSON-YOUNG—How do you propose that we deal with that? Do we just remove the restrictions?

Ms Temby—Just remove those restrictions, yes.

Mr Innes—Still amend to allow the de facto partner definition, but remove those restrictions.

CHAIR—Mr Innes, I might ask some questions just to clarify some aspects of your submission. There are seven recommendations here. You have some concern that the Sex Discrimination Act is not being amended to the extent that you believe it ought to be. Is that correct?

Mr Innes—Yes, it is.

CHAIR—Could you just go through your recommendations 4 and 5 so that we are clear on why you believe that the Sex Discrimination Act should be amended in respect of these areas.

Mr Innes—At the moment the Sex Discrimination act is amended to provide that the discrimination against same-sex couples is removed as far as the provisions which apply to

family responsibility are concerned. But it is not removed as far as the provisions which apply to marital status are concerned. One type of marital status is that of a de facto couple. It is our concern that the lack of amendment of that provision means that people in a same-sex relationship can still be discriminated against because of their being a de facto couple. The example we set out in our submission is of people being refused accommodation in a hotel. It is our understanding that the reason that this has been done is that the government or the drafters were concerned that this would flow on and allow discrimination to be dealt with on the basis of being in a same-sex relationship. We say that the amendment would not do that—in other words, it would not introduce in an indirect way discrimination protection for people in same-sex relationships but it would only allow for discrimination protection if the discrimination was as a result of de facto couples being refused. So, if de facto couples of opposite sex were refused accommodation in the hotel, that would constitute discrimination. But, if same-sex people were refused accommodation, that would not constitute discrimination.

CHAIR—Yes, okay. I see.

Mr Innes—So it is our view that the law can make that distinction, and we feel that it is unfortunate that, when the government is going to such an extent to remove the discrimination from most Commonwealth laws, this would be left as a continuing example of discrimination. I am not sure if I have made it any clearer than in our submission.

CHAIR—No, that is useful. What about the requirement that the SDA should be amended to ensure equal coverage under the SDA for men and women, along the lines of the Disability Discrimination Act?

Mr Innes—That is, if you like, to allow the application of another international instrument which removes an existing anomaly from the Sex Discrimination Act, and it seems to us that there is an opportunity to do that here as part of these changes.

CHAIR—Sure. I will just go back to some comments that were made earlier about two sets of parents for two different reasons. Is it not the case now that, even in a marital relationship, if the woman has ART then that couple may never know the identity of the sperm donor?

Ms Temby—Yes, that is the case.

Mr Innes—That is the case. That is why I said that this is not a new situation. This is a situation which currently exists in our society.

CHAIR—So we do currently have a situation in this country where even children who are the product of a marital relationship can have two sets of parents for two separate reasons if you include the sperm donation.

Mr Innes—Yes, that is correct.

CHAIR—I just wanted to clarify that for the record. I take quite clearly your point that this extends the rights to people in situations where it currently exists. I suppose the point I want to comment on is that there is some view, I believe, that not passing this legislation and not

providing these rights will somehow lead to some sense that this will not happen in the future or that these situations will not arise in the future.

Ms Temby—Through our inquiry we frequently heard expressed the view that same-sex families have children and are raising children—it is the reality of many same-sex families—and that, whether or not one has a view that that is appropriate or the best way for children to be raised, the reality is that it is happening and that it is critical to those families to ensure that they have the same financial entitlements as other families so that the children in those families are not disadvantaged. That was one of the principal motivators for our recommendations.

CHAIR—In your inquiry, were there views put that if those rights were never recognised then there would be a hope or belief that some day these kinds of family situations would decline?

Ms Temby—I am not sure that it would go to that extent. Certainly we have repeatedly heard the view that it was not appropriate for children to be raised within same-sex families; that was put to us. However, the other side of that is that this is the reality. As Graeme said, there are thousands and thousands of same-sex families which do raise children, and it is important that the children in those families benefit from the same entitlements as the children in any other family.

Mr Innes—One of the provisions that we relied on was the ‘best interests of the child’ provision in the Convention on the Rights of the Child, so what we are saying here is in the interests of the children, not necessarily in the interests of the parents; it is a question of what is in the best interests of the children concerned.

CHAIR—So, in the best interests of the child, they need to know—

Senator BARNETT—Who their parents are.

CHAIR—Just let me finish, Senator Barnett. I do not think any of us interrupted you during your questioning, so we would like the same courtesies applied. So, in the interests of the child, the interest lies in knowing that the two people who, as parents, are raising them, be they male or female, two females or two males—those three sets of scenarios—have equal rights regardless of their sex, essentially.

Mr Innes—It is not so much in knowing; it is in the fact of those equal rights occurring so that the children are not disadvantaged either financially or in other ways. At the moment what is happening is that children in a situation where their two parents are in a same-sex relationship are facing major disadvantages. I will take one: the Medicare safety net. If the Medicare safety net couple benefits are not available to the parents, inevitably that disadvantage affects the child. So the principle of the ‘best interests of the child’ is one of the relevant principles we drew upon when we made our recommendations, and that is what the government’s decision to put these laws forward is based on.

Senator HANSON-YOUNG—Once these laws are passed and we have all the appropriate amendments, what is the best way, in your opinion—and I am wondering whether you got feedback on this from your own hearings—of informing the communities concerned that these

are their new rights. It is all very well and good to put these into legislation but if people do not know they can access them, what is the use?

Mr Innes—That is certainly one of the issues that was raised in our hearings, and it was recognised that there would need to be public education campaigns and activities. It is our understanding that government have recognised this and that the various agencies involved, mainly Centrelink but also other agencies, are, assuming the passage of this legislation, planning campaigns to work with same-sex couples to ensure that people are made aware of their rights. We have indicated our support for that and our preparedness to assist in that regard once the legislation is passed.

Senator HANSON-YOUNG—Are there particular areas either geographically or demographically in which you think people are less aware of what is going on?

Ms Temby—I think some really important issues have been raised in terms of implementation and education. As Graeme said, we understand that separate departments have been funded to educate as appropriate around the amendments. We would strongly support a central, probably web based, location for information about all the amendments so that people in same-sex couple relationships are not chasing around in circles trying to find out what the social security, tax and superannuation issues are and having to go to many different places. We would strongly support that and, with appropriate resourcing, we would be willing to play a role in the development of that central education platform.

Another thing to add is that we have heard there are particular concerns around implementation—there are certainly concerns for different demographics. A concern has been expressed to us about people in vulnerable situations—for instance, age pensioners, people on the disability support pension or people living with HIV-AIDS whose financial circumstances are going to be radically altered by these reforms—and that the implementation of the reforms be managed in a way that is sensitive to their particular needs. We have had some discussions with those groups about these matters.

Further, we have also heard of situations in rural and remote areas, for instance, where these reforms might present particular challenges—particularly if a couple is not out in their community. Their financial circumstances change, they may have to communicate with their Centrelink office and, if they do so, they are automatically outing themselves in their community, which may have negative repercussions for them. There needs to be mechanisms to get around that particular problem. We understand that there are ongoing discussions between the gay and lesbian organisations and the government about this and we are facilitating some conversations between some organisations that represent vulnerable groups and the government about these issues.

CHAIR—Thank you Mr Innes and Ms Temby for your time today and making yourselves available once again to appear before a committee. It is appreciated.

Ms Temby—It was a pleasure.

[9.41 am]

EGAN, Mr Richard John, National Policy Officer, FamilyVoice Australia

CHAIR—Welcome. We have received your submission, which we have numbered as No. 4. Would you like to make any amendments or alterations at all?

Mr Egan—In addition to the main submission, there is a point that we only picked up after that submission had gone in dealing with the amendments to the Migration Act. I have some written material on that and I have given copies to the secretariat.

CHAIR—Thank you very much. If you would like to make a short opening statement, we would welcome that, and then we will go to questions.

Mr Egan—I will say briefly, so as not to detain the committee too long on it, that FamilyVoice Australia is opposed to the underlying principle of this bill, which essentially would have the effect of amending 68 Commonwealth laws to treat same-sex couples identically to married couples and, in some cases, to prefer a same-sex partner to an undivorced spouse. We object to that in principle because we think that marriage is a unique institution, that more needs to be done than just preserve the name ‘marriage’, and the form of entering into marriage and the form of exiting marriage. If this bill and the other bills in the government’s package go through, all that will be left to distinguish marriage in Commonwealth law is the Marriage Act itself, which simply tells you how you can enter one, and the Family Law Act, which tells you how you can exit one. But apart from that, there will be no distinction at all in Commonwealth law, no single privilege, benefit or honour given to the unique institution of marriage under Commonwealth law. We think that is an unfortunate development.

On some specific points: we are very concerned about the definition being introduced by this bill into the Acts Interpretation Act of a de facto relationship that allows such a relationship to legally exist even if one of the parties is still married. Although it seems the drafters have in mind a particular subset of that possibility—where someone has deserted a spouse perhaps 20 years ago and has had an 18-year de facto relationship, and obviously I have got some sympathy for that position, that that may give rise to some interests on behalf of the de facto—the way the definition of de facto is drafted there is no qualifying period for length of time, you do not have to be sharing a joint residence and you may or may not have a sexual relationship. It is this list of nine factors, none of which is essential to a de facto relationship existing.

It is perfectly possible for decision makers, and there are a variety of people who will be making decisions under this act, including some who will be awarding pensions to various possibly contending claimants, to bring to bear a fairly wide-ranging set of criteria in evaluating whether a de facto relationship exists. I do not think it fanciful to suggest that it is possible that, for example, if a soldier goes overseas on a tour of duty—and perhaps has had a fight with their spouse, walked out on them and ‘shacked up’, if I can use that vulgar phrase, with a man or a woman for a couple of weeks before heading off to Iraq or Afghanistan—and is killed on the tour of duty then under the changes being made by this act there is a potential claim to the war widows or widowers pension from the very short-term de facto boyfriend or girlfriend and no

real guidance given as to why they ought not to be preferred to the spouse. It is almost as if it is skewed toward the most recent person you have had an intimate relationship with. That seems to me to very profoundly undermine the institution of marriage, and also to give some possible comfort to those who want to see a form of polygamy recognised in Australian law—not, of course, in full form, because you could only marry one person; but you could marry the first wife and the other women you persuaded to live with you in a shared household could have official de facto relationship status under this amendment.

I will move briefly to the issue of children. The definition of a child as the ‘product of a couple relationship’ in this bill is expanded beyond what we have seen in the earlier bill dealing with superannuation. This bill now gives explicit approval to surrogacy arrangements, and in very broad and ill-defined terms. In fact the definition says that if a surrogacy arrangement has taken place then those people who commissioned the surrogacy arrangement are the parents. It does not exclude commercial surrogacy. It does not require a parenting order from a state court. It does not require the consent of the birth mother to the relinquishing of that child. It just says ‘if the arrangement takes place’. So if somehow or other the commissioning parents end up with the child then they are now held under quite a number of Commonwealth laws—not 68 because they do not all deal with this issue—to be the parent.

I have two final points to make. I think the new definition of stepchild is a concern. At the moment you can only become a step-parent by marrying a full parent of the child. Under this legislation you become a step-parent by entering into a de facto relationship. Again, given that de facto relationships are so tenuously and vaguely defined in this bill, and given that the status of step-parent survives the break-up of the relationship with the person you are entering into a de facto relationship with, it becomes a permanent status in relation to the child. It does seem to me that, given the fragility of many de facto relationships, including same-sex relationships, a child could be accumulating a whole series of step-parents who have legal claims under the Family Law Act to demand contact with that child. They are not full parents but they have a right under the Family Law Act to seek contact orders. That seems to me an unfair burden to be placing upon a child.

Finally, I would like to briefly address the migration provisions. I may be misreading these, but on my reading of them they do open the possibility that a regulation could be made that recognises a same-sex marriage contracted overseas specifically as a married relationship for the purpose of the Migration Act. If we are going down this track at all, obviously there is room for recognising a same-sex marriage conducted overseas as a same-sex de facto relationship under the Migration Act—and, despite our overall objection to this bill, if the bill is going ahead then there would not be any particular reason to object to that provision. But to specifically have it called a marriage relationship under the Migration Act I think undermines the bipartisan passage through the parliament in 2004 of section 88E of the Marriage Act, which specifically says that a marriage contracted in a foreign country between a man and another man or a woman and another woman is not to be recognised under Australian law as a marriage. It does seem to me that this provision is potentially at odds with that very excellent bipartisan amendment to the Marriage Act.

Senator HANSON-YOUNG—I have a question regarding the overall tone of your submission. Am I right in understanding that your issue is, in fact, less to do with the rights of

same-sex couples and more to do with the rights of de facto couples, whether they be same sex or opposite sex?

Mr Egan—Our issue is to do the unique status of marriage. As I said in my opening remarks, I do not think that can be sufficiently honoured and preserved in a society if you simply have a law which states how to get into it and how to get out of it, but you do not do anything else. I have never seen it put better than by Peter Sprigg of the Family Research Council, who we quoted in our submission and who said:

Society does not give 'benefits' to marriage because individuals want them or would be helped by them. Society gives benefits to marriage because marriage gives 'benefits' to society.

All the research evidence that we cite in our submission addresses that point: marriage gives unique benefits to society and, therefore, ought to be benefited in return. The whole question of justice simply between married couples and same-sex couples or married couples and de facto couples simply does not arise because de facto and same-sex relationships are not the same as marriage; they do not give society the same benefits as marriage and therefore should not enjoy the same benefits in return.

Senator HANSON-YOUNG—Putting aside your concerns with marriage—

Mr Egan—I will try to imagine I am a Martian for a minute or two.

Senator HANSON-YOUNG—Yes, I can understand that must be very difficult. The objective that this package of amendments is meant to achieve is equality for same-sex de facto couples and opposite-sex de facto couples. Do you think that is actually okay?

Mr Egan—I think the difficulty with that is that, in fact, it seems with very little public debate, Commonwealth law over the last few decades has been amended so that male-female de facto couples are essentially rolled in with married couples in most of the 68 acts that are being amended here. So the equation of same-sex couples to be made equal to de facto couples is, in practice, becoming same-sex couples to be made equal to married couples; just on, if A equals B and B equals C, then A equals C. That is a simple, logical outcome.

Senator HANSON-YOUNG—We just heard from the Human Rights Commission that this is the reality: we have thousands upon thousands of de facto couples in the Australian community, regardless of whether they are the same sex or opposite sex. Surely we have an obligation as law makers to ensure that that section of the community are actually given rights and entitlements—

Mr Egan—I actually think if the parliament was looking at the best interests of people in de facto relationships you would be doing everything possible to create incentives towards marriage, which better protects everybody's longevity, mental health, physical health, social wellbeing, sexual happiness and all those things married couples score higher on than de facto couples. So why would you be rewarding the second-rate option?

Senator HANSON-YOUNG—I guess I can hear what you are saying. That leads me to say that then perhaps we should be offering same-sex couples the opportunity to marry, if that is

your line of argument. If it is about marriage being the institution that underpins and gives stability—

Mr Egan—Same-sex couples cannot marry because that is not what marriage is. Marriage is the union of a man and a woman to the exclusion of all others. It is like saying rabbits should have the right to be dogs. Everyone is a human being but there are two kinds of human beings: male and female. Marriage is the union of a male and a female. That is what it is. If you introduce something called ‘same-sex marriage’, it is no longer marriage; it is now something different. You are now using the word ‘marriage’ for a completely different reality.

Senator HANSON-YOUNG—I tend to completely disagree with you, but that is all right. You have concerns around polygamy, but when I read through the package of amendments the last thing that came to my mind was that that was what they were trying to encourage.

Mr Egan—It is only two lines, so it takes a careful eye to pick it. But it is there. It is often that these small things in law develop a life of their own. I am sure the drafters did not have in mind to give into the Muslim lobby and introduce polygamy. But it is there. If all these amendments go through, a de facto relationship would have very extensive official recognition under Commonwealth law. If it is said you can be married and in a de facto relationship simultaneously, then you now have that status—you have a married spouse and a de facto spouse or de facto partner, depending on which act you look at, and they enjoy equal status and your two relationships enjoy equal status in Commonwealth law.

Senator BRANDIS—Why do you say they enjoy equal status?

Mr Egan—Because it says you can be in both of them at the same time.

Senator BRANDIS—But that does not mean they enjoy equal status. Can I come in on this, Senator Hanson-Young?

Senator HANSON-YOUNG—Sure.

Senator BRANDIS—Mr Egan, as you know I am with you on most of the things you say. But take the case of somebody who is an observant Catholic—

Mr Egan—I addressed this point before you came in, but I will pick it up again.

Senator BRANDIS—Take the case of a person who is an observant Catholic and does not believe in divorce. There are more Catholics in Australia than there are people of any other religion, and a substantial proportion of them are strictly observant Catholics. But let’s say the Catholic marriage fails, the partners separate and one of them repartners in a de facto relationship but they never divorce. It is not that that partner is participating in two simultaneous domestic relationships. But it is the case that there is an existing marriage, albeit a marriage which for all practical purposes is defunct, and there is an existing and, let us say, healthy de facto relationship. It seems to me that that is the sort of circumstance which the clause contemplates. That does not equate the marriage with the de facto relationship as if to say they are the same thing. In fact, it underlines their difference. One is, to the mind of the observant

Catholic, a holy sacrament which cannot be undone. The other is an act of domestic relationship not solemnised by a holy sacrament.

Senator FEENEY—To interpose there, in fact it is the status quo in the Family Law Act at present that that circumstance can arise—that those two relationships can exist simultaneously.

Mr Egan—I said in my earlier remarks that I understand that that could be the kind of scenario that the drafters may have had in mind. But it does not seem to me that the words as drafted do anything to effectively limit the interpretation of a de facto relationship or the application of this provision, which is now going into the Acts Interpretation Act under this bill, to those circumstances, particularly when combined with the shift from the traditional definition of de facto as living in a bona fide domestic relationship with a person as a spouse, which seems to almost exclude the polygamous situation that I am talking about. We are now shifting to a far vaguer definition of de facto relationship with nine criteria, none of which is essential and none of which is adequate to establish that you are in one. The various decision makers—

Senator BRANDIS—There is a governing, though loosely expressed, concept and then there are nine indicia—

Mr Egan—There is, but then when you break down the nine and then when it says under that, ‘But none of these are necessary,’ it seems to me that—and given that the decision maker in the first place under many of these acts will not be a judge of the Family Court or someone with experience but a public servant or someone administering an act—there is certainly scope for confusion there. One way of dealing with this—our preferred amendment—is to knock it out altogether and to say that you cannot be married and in a de facto relationship. But I would think if one was not prepared to go that far—

Senator BRANDIS—In the case I posited that would—

Mr Egan—If one was not prepared to go that far, then I think one could add an amendment to this provision that said: ‘but only if you have not shared a joint residence with the spouse for the last two years’ or whatever period of time you think would narrow this to capture the situation you are talking about, for which I have some sympathy, but not allow in the kind of confusion and possible doorway into polygamy and some of those other circumstances which, again, I am sure neither the government nor the drafters have in mind but which I foresee as potentially following from this if left unamended.

Senator BRANDIS—It is not as uncommon as you might think. There was a very well known British Prime Minister of the 20th century who was married to his wife throughout his life but whose wife effectively lived for decades on a permanent domestic basis with one of his political colleagues.

Mr Egan—I am very happy to concede that subset of possibilities and that there could be some legitimate claim to justice under some of these acts, not necessarily under all of them. But I do not think the provisions as drafted limit themselves to the kind of situation that you have in mind.

Senator BRANDIS—I have one further point arising from Senator Hanson-Young's questions. I want to take the logical obverse of the proposition that Senator Hanson-Young advanced about gay marriage. It seems to me that, for socially conservative people, the mistake was made in equating de facto relationships with marriages. Now we even fall into this loose usage of calling them de facto marriages. To me, there is an enormous moral difference between a marriage and a de facto relationship. The evidence this committee had from the Institute of Family Studies demonstrated very powerfully that marriages do tend to be much more stable and enduring than de facto relationships. Do you accept that proposition?

Mr Egan—I do.

Senator BRANDIS—So it seems to me that the obverse of what Senator Hanson-Young was saying is this: the distinction that we should make is not a distinction between de facto heterosexual and de facto homosexual partnerships or couplings; the distinction we should make is between marriages, which, as you say, can only exist according to our cultural norms between a man and a woman, and all categories of de facto relationship. Would you agree with that proposition?

Mr Egan—That would certainly be my starting point.

Senator BRANDIS—So, if we take that step, then it seems to me that it presents no difficulty in eliminating discrimination against same-sex people in a partnership to say, 'You're no different from a de facto heterosexual couple for all practical purposes. What you are both very different from is a married couple.'

Mr Egan—Yes, but the difficulty is that because—in a view we seem to share—a mistake was made in extending to de facto couples all the benefits given under Commonwealth law to married couples other than the way of entering marriage and the way of leaving it, if that is a benefit—

Senator BRANDIS—I think, if I may say so with respect, a more accurate and more neutral word would be 'treatment' rather than 'benefit'.

Mr Egan—Sure, because there are responsibilities as well—and I wanted to make a point about that which I must remember to make. We are faced with these bills as they stand and, as they stand, the net effect of them will be that there are now no longer be any difference in treatment between married couples, de facto couples—which is now more loosely defined than before, so it is casting a wider net and potentially catching more relationships—and same-sex relationships, and they will all be treated equally. While what you are suggesting and what the government has used as the rationale for this bill and the HREOC rationale was for same-sex couples to be treated to equally to de facto couples, in practice because C is being treated equally to B and B is already being treated equally to A, C is now going to be treated equally to A.

Senator BRANDIS—You see that is where I say we made the mistake in B already being treated equally to A.

Mr Egan—Yes, I suppose I see it as compounding whereas—

Senator BRANDIS—Given that is where the social policy debate has reached, it seems to me almost an illogically impermissible step to say, ‘Just because we made a mistake years ago in treating B as equal to A, therefore it is now wrong to treat C as equal to B.’

Mr Egan—I suppose I am a conservative who thinks it is sometimes possible to go backwards. As GK Chesterton said, ‘What nonsense it is to say you cannot turn back the clock.’ You can turn back the clock at any time you please.

Senator BRANDIS—Why don’t we turn back the clock by saying A is not equal to B? Why don’t we turn back the clock by saying that marriage is intrinsically superior to any category of de facto relationship, but also say, conversely, de facto relationships between heterosexuals and homosexuals should be treated on an equivalent footing since I think we all accept it is wrong to discriminate against people on the basis of their sexuality?

Mr Egan—Well there is no proposition before the parliament at the moment to not treat A and B equally—marriage and de facto couples. So, in the absence of that, we have to say that we are not happy to have C treated the same as B because the effect of that will be to treat C the same as A—sorry to keep using A, B and C—same-sex couples the same as married couples.

Senator FEENEY—With respect to marriage, if we accept that marriage has a different and unique position then what do you say is the regulatory need to support marriage? It seems to me an underlying hypothesis in your submission that marriage is a fragile institution and that without the regulatory support of the state its standing will be in decline.

Mr Egan—I actually think marriage has shown itself to be a surprisingly robust institution. I think in the light of easy, no-fault divorce laws for 33 years, the sexual revolution and the rise of the possibility of cohabitation being socially acceptable, marriage has done surprisingly well. So I do think it is robust. I think it is actually written into our human nature as males and females and into the needs of the human child, who comes into the world helpless and dependent and needing two people to take care of it for a considerable period of time.

Senator FEENEY—At least for the first 50 years of its life!

Mr Egan—Yes, Senator, you have adult children, too, I see. I think marriage is quite robust, but I do think, though, the wider its benefits are shared the better—that is, the greater percentage of the community who participates in marriage and particularly participates in marriage as the first permanent relationship they enter into. We know that cohabitation before marriage decreases the length of a marriage and the break-up rate of marriage. That is a very serious thing. I think that when you then look at what has happened in the Scandinavian countries, the Netherlands and France, giving legal recognition to same-sex relationships, whether as marriage or as registered partnerships, has been associated with an increase in the heterosexual cohabitation rate. The thesis is that once you start to do that, you start to make it unclear what marriage is all about. So young men and women tend to opt for cohabitation and the end result of that is more broken relationships, more fatherless children and all the consequences that flow. I would not want to say marriage is fragile, but I think it is such an important, fundamental institution for society that the more we can do in Commonwealth law and in state law to buttress it the better we all will be.

Senator FEENEY—Let us talk about that buttressing. Aside from the reputation and public standing of a marriage, what benefits do you believe it should accrue that other relationships should not accrue, or perhaps, conversely, what discrimination do you think should prevail on other relationships that should not prevail on marriage?

Mr Egan—We are actually not giving a whole lot of benefits to marriage under our current arrangements. They are fairly thin even when you look through these 68 acts; many of them are actually putting a burden on marriage rather than a benefit.

Senator FEENEY—It is the recognition of a social institution rather than the creation of a social institution.

Mr Egan—Yes. I think, with Senator Brandis, that we made a mistake in giving de facto relationships the equal benefits. I would have kept a lot of the tax system and other things to benefit marriage, in distinction from de facto relationships, in a particular way.

Senator FEENEY—At point 4 of your submission, on page 4, you talk about the definition of ‘de facto partner’.

Mr Egan—Yes.

Senator FEENEY—There, it seemed to me, you were conceding some ground on that point.

Mr Egan—At 4? No, 4 makes no points.

Senator FEENEY—References to de facto partners—

Mr Egan—It just gives a section from the bill as a lead-in, really, to sections 5, 6 and 7—and 8, really—which all discuss our concerns with this definition. The definition given there is in two parts. I note here that this is a change from the previous bill. I have to say that I do think this is policymaking on the run, and I say that particularly with reference to the definitions of ‘child’ and ‘parent’ and the three separate treatments of surrogacy in the three bills that we have seen in the last few weeks. They are completely contradictory and, if they all pass in the form they are currently in, there is going to be a complete incoherence in the law. That is true here on de factos. In the previous bill, being in a registered relationship was just a possible indicator that you were in a de facto relationship; here it is a decisive thing, with no further inquiries to be made. That is a distinct development in the law between one bill and another in a couple of weeks of parliamentary sittings. Sorry; I am not sure I am addressing your question.

Senator FEENEY—I guess I found in your submission a dual personality, if you will: on the one hand you were contemplating the de facto relationship and seeking to have it better defined, and on the other hand, in your evidence now, you say that, in fact, your view is that it is a relationship that should be afforded at least less recognition, if not no recognition.

Mr Egan—Yes. I suppose the bill is the same-sex relationships bill. Although the issue of how you treat de facto relationships obviously comes up, the proposition of not treating them in the same way as marriage is not really before the parliament at the moment and therefore is only addressed—

Senator FEENEY—So you are being a pragmatist.

Mr Egan—No, I am addressing, as a submission must do, the terms of reference of the inquiry.

Senator FEENEY—I embrace pragmatism, Mr Egan!

Mr Egan—No, certainly in section 3 we say clearly that it is the uniqueness of marriage and that marriage should be the only relationship given benefits by society; it provides the best environment for raising children and so on. Then we directly address the point that same-sex relationships are not equal to marriage, because that is the point of this bill.

Senator TROOD—Thank you, Mr Egan, for coming this morning and helping us out with our inquiry. On the matter of the proposed amendment to the Migration Act, I think I understand your position but, just to clarify that, are you concerned that this amendment under the bill would actually provide clearly the opportunity to recognise same-sex marriages, or are you concerned that it might lead in that direction and hint in that direction, so that for more abundant caution you would want that clause that you have given us on this piece of paper included?

Mr Egan—Sure.

Senator TROOD—I am not quite clear on whether you are arguing that it actually effects a recognition or you just feel slightly concerned about it.

Mr Egan—I think that, like many senators, I might be concerned about regulation-making powers. Section 5F being inserted into the Migration Act is looking at a definition of ‘spouse’, and the flow-on of this is to get spouse visas and other things under the Migration Act, so it is who is a married person—a spouse.

Senator TROOD—Yes.

Mr Egan—There is a separate provision in the bill for de facto relationships—they are being dealt with in a separate section—so this is specifically dealing with married relationships. Subsection (2)(a) says:

(a) they are married to each other under a marriage that is valid for the purposes of this Act ...

So it is just looking at a validity for the purposes of the Migration Act. Subsection (3) allows regulations to be made in relation to the determination of whether the condition in paragraph (2)(a) exists, and it goes on to say the regulations may make different provision for different purposes. I read that as saying that the minister could make a regulation that said, ‘For the purposes of 5F(2)(a) of the Migration Act, a marriage between a man and another man or a woman and another woman that is valid in the country in which it was contracted is valid for the purposes of the Migration Act.’ I cannot see anything in this provision or elsewhere in Commonwealth law, including section 88E of the Marriage Act, that decisively excludes such a regulation from being made. If the intention is not to allow a sort of backdoor way to get around section 88E of the Marriage Act, it seems to me that my proposed subsection (4) would adequately take care of that concern.

Senator TROOD—I see that point. I see the argument you are making but I wonder whether or not your concerns are met by section 88E.

Mr Egan—It talks about the recognition of marriage under law in Australia without further definition or clarification, and it does not add ‘for any purpose’. I think if section 88E of the Marriage Act had said ‘may not be recognised for any purpose’—

Senator TROOD—It does say, though, that certain unions are not marriages.

Mr Egan—But this is talking about marriage for the purpose of the Migration Act. I am not a lawyer but I have read enough cases to make me think that it would be possible for a judge to say that marriage for the Migration Act is not marriage under law in Australia. You would not be married for any other purpose than getting a spouse visa. If it is the intent of the drafter to allow two people in a same-sex marriage to come into the country on a spouse visa, it seems to me that can be adequately taken care of in the de facto provisions without coming in under the name of a marriage relationship.

Senator TROOD—I understand your evidence on that point. You made a point about step-parents which I thought was interesting. The problem is now created by virtue of the definition of de facto relationship, as I understand it and as I understand your point. My question then is: would your concerns be met if the definition of a de facto relationship actually had a temporal dimension to it, if there was a time there? One of the definitions, of the three that we have now seen over these bills, referred to a de facto relationship having existed for, I think, two years. Would your concerns about step-parenting be met if there were a reference to a time for a relationship to exist before it could be regarded as a relationship?

Mr Egan—They might be getting nearer to the average break-up time it was two years.

Senator TROOD—Two years seems to me to perhaps be a bit too short a time.

Mr Egan—Yes. No, it would not meet my concern. I think this is actually a fairly radical change. This bill is about same-sex relationships, so why are we interfering with the definition of stepchild, which we have not done before—in fact, this has been one of the remaining distinctions between de facto relationships and marriage. Up till now, you could only become a step-parent by marrying the parent of a child. They are smuggling it in here because they are arguing that because same-sex couples cannot marry therefore they cannot become step-parents, so therefore we have to make all de factos step-parents so that same-sex partners can become step-parents.

Senator TROOD—Your argument is: well, that’s too bad!

Mr Egan—It is too bad. I think there are other ways of addressing the particular interests of the child, but this cumulation is a great concern to me. While your proposition would help to the extent that a boyfriend who only lasted five weeks may not get the step-parent claim, and that would be a good thing, it does not really eliminate the problem. If you were looking at a two-year duration, there are still people who can go through four or five of these relationships in the course of a child’s life, very sadly.

Senator TROOD—Indeed they can. Thanks, Mr Egan.

Senator BARNETT—Thank you, Mr Egan, for your evidence. It seems that you have a different opinion to the Australian Human Rights Commission on a range of matters, including same-sex marriage. There may be some agreement between you on a couple of things—that is, they do agree that there is an inconsistency between these laws and the Family Law Act.

Mr Egan—Yes.

Senator BARNETT—As a result of that, they concede that this is creating different parents for different purposes. Finally, there was a concession that you can have two mothers and a father.

Mr Egan—Sorry, what are they saying?

Senator BARNETT—That you can have two mothers and a father under this bill. I would like to see if we have your concurrence on those matters in terms of the inconsistency—to start with on different parents.

Mr Egan—Yes, I think the inconsistency is very clear. If we look at the range of bills we have examined in the last little while, the same-sex superannuation bill makes no reference to surrogacy arrangements, for example. So someone who had a surrogacy order in their favour would not be a parent under the same-sex superannuation provisions. The Family Law Act as it currently stands gives no recognition to surrogacy orders of any kind. In fact the jurisprudence of the Family Court says that it is not in the best interests of the child—significantly—to give immediate current cognisance to a surrogacy arrangement.

In the cases of *re Mark* in 2003 and *re Evelyn* in 1998 the court explicitly said that whether a surrogacy arrangement was legal in the relevant jurisdiction or not was irrelevant to their decision making, which required them to decide parenting on the basis of the best interests of the child. That jurisprudence is not reflected in the bill before us at the moment. The bill before us at the moment, I think, is recklessly drafted. I think that is not too strong a term. It talks about some—

Senator BARNETT—Let us just focus a bit more here. You have picked up surrogacy as an issue so let us have a look at that. Does this bill recognise and legitimise surrogacy arrangements in Australia? If so, can you explain how?

Mr Egan—Yes, it does so in a very loose and curious way that just talks about a surrogacy arrangement having been entered into and taking place. There is no further clarification as to any conditions on that surrogacy arrangement. So the provisions that we would be enacting into law—I am not sure how many laws; it may be 20 laws where that the provision will be written into through the Acts Interpretation Act—could be understood to countenance commercial surrogacy arrangements, where they in fact took place, and arrangements where the birth mother did not want to go ahead with the surrogacy but somehow or other the commissioning parents ended up with custody of the child or control of the child. Commonwealth law under these acts that are being amended makes those people the parents of the child for the purposes of these acts whereas they would not be the parents under the Family Law Act.

Senator BARNETT—And this is not withstanding the fact that in Australia today there is, you would say, at best, inconsistency in regard to any legislative framework for surrogacy. You could probably say that we do not have legislative arrangements across the states and territories.

Mr Egan—In Queensland it is a criminal offence to enter a surrogacy arrangement, even an altruistic one. There is a committee looking into that in the Queensland state parliament, but it is by no means certain which way they are going to go. Western Australia passed a surrogacy bill but with the election called when it was that bill has not been back through the legislative assembly to consider amendments from the upper house. New South Wales, as recently as December 2007, passed a law making all surrogacy arrangements void. That is still the law in Victoria, although there is bill there to allow explicitly male homosexual couples to procure a child through a surrogacy arrangement. So the law is in a great state of flux on this.

This bill does not help that. It subverts the process that I understand is going on through SCAG, the Standing Committee of Attorneys-General, where there is talk about a uniform surrogacy law. This is anticipating that without that discussion having come to any conclusion. In fact, the consultation paper from the SCAG process has not yet been made public.

Senator BARNETT—No, we have not had a debate or a discussion about surrogacy in Australia; it is pre-empting all of that. You are saying categorically that it officially endorses surrogacy arrangements or at least recognises them—

Mr Egan—It makes the commissioning parents of a surrogacy arrangement the parent or parents under a number of Commonwealth laws.

Senator BARNETT—We have heard your views on the Migration Act, and Senator Trood analysed that through his questioning and your answers. I think that certainly confirms the concerns I have in my mind regarding the recognition of foreign marriages under the migration law.

Mr Egan—It does seem to me that is something where the government, if the point is raised and there is no hidden agenda, ought to readily concede because the ‘to avoid doubt’ provision I am proposing would not do any other thing than stop the concern that has been raised. It would be a good test of the—

Senator BARNETT—Your concern is that they could promulgate a regulation which would recognise a foreign same-sex marriage?

Mr Egan—For a limited purpose of spouse migration under the name of a marriage relationship. That is a little chink in the bipartisan consensus that marriage would remain for man and woman only.

Senator BARNETT—On the issue of stepchildren, you said earlier that under the law in Australia today you actually have to marry someone to become the stepfather or stepmother.

Mr Egan—Yes, that is right.

Senator BARNETT—But under this law, is it because of the broader definition of ‘de facto’ or because they are simply making it that you can become a step-parent in a de facto relationship or in a homosexual relationship?

Mr Egan—There are explicit clauses that introduce a definition of stepchildren into a number of acts. These acts have limited purpose. I guess my biggest concern is that this way of thinking will flow into the Family Law Act, where the definition of stepchild and step-parent is of more concern, because a step-parent is defined as a species of relation under the Family Law Act. And a relation, under the Family Law Act, always has the right to apply to the court for contact time with a child; so a grandparent or whoever can do that. It just seems to me that somebody’s previous boyfriends, who were not ever the father of the child, really should not fit into that category. If they married and then that broke up there is more basis for a claim. But just because your mother slept with someone for a period of time, for them to get an ongoing claim on the child’s life just seems to me untenable and unfair.

Senator BARNETT—I would like to now touch on this issue of the parenting presumptions. Under this legislation you actually have different parents for different purposes, as distinguished from the presumptions under the Family Law Act, which is the overarching legislation at the federal level to provide parenting presumptions with a father and a mother. I am seeking your response to that analysis as to the difference under this legislation from the Family Law Act.

Mr Egan—This legislation has a different definition of the child than the same-sex super bill and than the current Family Law Act. And I am aware that there is an amendment tabled by the government to section 60H of the Family Law Act which has yet another definition. None of those four definitions are reconcilable with each other or coherent with each other. If all three bills pass, including with the government’s amendment, we will have three conflicting definitions of who is a parent and who is a child for different purposes. So to check whether you are a parent or not, you would have to look up the specific act and see whether you had the Acts Interpretation Act definition that is being introduced by this bill or the new section 60H that is being introduced by the Family Law Act amendment, if that were to get up, or the definition in the same-sex super bill, which is vaguer in its terms. That just seems to me to be bad law-making, aside from the policy questions.

With regard to the policy questions: for a child brought into the world through artificial insemination or IVF to a woman who at the time happens to be in a lesbian relationship, I think it is a big policy decision to structure the law so that the lesbian partner is made a full, permanent parent with all the rights of a parent in relation to that child. I think it is unfair to the child. Certainly, lesbian relationships break up much more quickly than marriages and de facto relationships. Many women go into a lesbian lifestyle and move out of it. For a child to have a woman who was never their mother but simply the sexual partner of their mother having a claim to joint parental responsibility and to equal decision making in how the child is brought up for the rest of the child’s life and so on seems to me to be an unfair burden on the child.

Senator BARNETT—Is that your major concern with section 60H, the amendment that you referred to?

Mr Egan—Certainly with that amendment to the family law, and with the rationale underlying the looser definitions in this bill.

Senator BARNETT—Thank you very much. You had one other thing you wanted to tell us?

Mr Egan—A very quick point, if I could—I am conscious of the time. It does seem to me that the social security provision in this bill—and it was touched on by the previous witness—could require people who are in a same-sex relationship to ‘out’ themselves when they do not wish to do so because they will have to sign social security forms saying whether they are in a sexual relationship. It seems to me we have come an extraordinary way from the beginning of the demand for homosexual rights to get the state out of our bedrooms. I think the same-sex lobby has done its constituency a grave disservice in now inviting the state back into the bedroom to ask two blokes who happen to be sharing a house together: ‘Are you in a same-sex relationship or not?’ They may not want to disclose that, but they will now have to disclose that under the Social Security Act and will potentially lose benefits as a result of that.

More significantly, instead of it being something private that they are just getting on and doing and not bothering anyone else with—and should be allowed to do it that way if they want to—they are going to have to declare that in official government forms. I think that is a grave violation of privacy and a betrayal of the constituency by the same-sex lobby. There have been some letters to that effect in some of their publications.

Senator FEENEY—But they will only have to declare it, will they not, Mr Egan, if they are interested in attracting benefits from the state?

Mr Egan—No, they have to declare it when they apply for unemployment benefits. If one of them were earning higher than the spouse means test that means they will not qualify for unemployment benefits.

CHAIR—If you are in a de facto relationship?

Mr Egan—Yes, indeed.

CHAIR—But isn’t your position that they should not exist at all, that you would prefer only marriages to occur? But now you are defending them.

Mr Egan—I am defending their right, if they choose to do so, to simply keep that quiet and do what they want to do without having to declare that to the state.

CHAIR—But if they want to, and recognise they are in a de facto relationship, they would need to do that.

Mr Egan—They have not up till now, they stand to lose by it, and they may have wanted to keep that entirely private. That is, two men were sharing a house and maybe to everyone else they were just mates, but in actual fact they are in a sexual relationship. If they wanted to keep it that way they should be entitled to. Now they will have to perjure themselves in filling out their social security forms if they want to keep it that way. It seems a straightforward point to me.

CHAIR—But this is about rights across the board where there will be some winners who get rights out this because they will—

Mr Egan—And more losers because the government say they are going to save \$60 million a year. That means you are robbing poor gays to give some benefits to rich gays.

CHAIR—Your pre-eminent position, though, is that marriage should sustain, rather than any de facto relationship.

Mr Egan—That is true, but this is a separate point I am making about one impact of this on some people whose interests I do not think have been properly taken into account.

CHAIR—Thank you, Mr Egan.

[10.34 am]

GARDINER, Mr Jamie, Vice-President, Liberty Victoria

Evidence was taken via teleconference—

CHAIR—Liberty Victoria has now lodged a submission with us. We have a version we got a bit earlier and another one you sent through today. Are there many changes to the submission you sent through today?

Mr Gardiner—I am hoping that the final signed one that you received today reads better, but I do not think there are any substantive changes between them. I have not kept a track-changes version, but it is essentially tidied up and, I hope, better written.

CHAIR—Thank you very much. I invite you to make a short opening statement. Then we will go to questions.

Mr Gardiner—Liberty Victoria are concerned, as we say in the submission, to promote human rights and in particular the rights which Australia has voluntarily agreed to implement under international law. The right to equality in the enjoyment of all rights is absolutely central to that. We see that there has been discrimination against lesbians and gay men—and bisexual and transgender people, for that matter—for much too long. One of the aspects of that discrimination is the discrimination against couples, that is to say both the refusal to recognise that same-sex couples are couples, bound by mutual ties of love, respect and commitment, and the consequence of that refusal, which is the denial of benefits and also the discrimination against their children, where they have children—and there have always been same-sex couples with children, whether or not modern technology has been involved in their birth.

The notion that children should be discriminated against because society disapproves of the relationships of their parents is abhorrent. It breaches Australia's obligations under the Convention on the Rights of the Child as well as the other conventions. In many ways the current situation with regard to children is exactly the same as the discrimination against illegitimate children that was finally abolished over 30 years ago by the various status of children acts.

Recognising same-sex couples as couples, recognising registered same-sex couples as having made a formal legal commitment and presumptively recognising those whose ability to make a formal legal commitment has not yet been implemented are good things. This bill obviously is part of a set of reforms all implementing the federal government's election commitment to remove discrimination. We hope that this committee will recommend the prompt passage of this bill. While there may well be bits and pieces in its vast breadth which could have been done better—that is perhaps always true of a very large bill—our principal concern is that it and its related bills should be passed through the parliament and brought into law as quickly as possible.

CHAIR—Thank you very much.

Senator BARNETT—Thank you very much for the submission. A number of concerns about a number of matters with the bill have been raised this morning and I am seeking your feedback on them. Firstly, have you had a look at the migration amendment? Are you equally concerned about that or not at all?

Mr Gardiner—I am afraid that we were unable to look through all the 68 and we did not look specifically through the migration one. I listened to part of that conversation this morning—through the marvels of modern technology and the webcast—and it seems to me that the concerns expressed by the previous speaker, without having studied the interconnections of the various pieces of legislation in any detail, are misplaced. As we note in our submission, the recognition of same-sex mixed nationality couples by Minister Hurford, 23 years ago this month, was a great and proper advance. If the effect of these amendments is to implement and broaden that advance then it is a very good thing. If people are recognised in other countries as being a couple, married or however it is defined, then they should be recognised in Australian law.

Senator BARNETT—So it is misplaced because you have a different view of recognising foreign, same-sex marriages?

Mr Gardiner—Yes.

Senator BARNETT—So you would support the recognition of foreign, same-sex marriages—is that correct?

Mr Gardiner—Yes. It is a matter of some astonishment that Australia has so glibly bowed out of, without going through formal procedure, the Hague convention on the recognition and celebration of foreign marriages, and it is a surprising insult to nations with which we are on friendly diplomatic terms.

Senator BARNETT—Do you support same-sex marriages in Australia as well as overseas?

Mr Gardiner—We believe that marriage should be non-discriminatory. If that is an inevitable result, discrimination is not appropriate. It violates international law. But equally, we recognise that, where we are at the moment, the Marriage Act amendments of 2004 are currently set in stone. The bill before the committee at the moment and the set of bills that the government has introduced work on the basis of dealing with the substantive discrimination while failing to deal with the symbolic issues involved in that particular question.

Senator BARNETT—There are a number of reasons for asking. I hope it is not a radical question for you, because we have different definitions in these bills in the Family Law Act and the Marriage Act, and you have referred to the Marriage Act yourself. You talked about removing discrimination, so you do support same-sex marriage being recognised in Australia?

Mr Gardiner—What I would prefer to say, is that I believe—and this is not a submission about marriage—it is undeniable that discrimination in the Marriage Act is regrettable. As we finish in the final version of the submission—if I could read paragraph 17; I do not think you have them numbered similarly—we state:

Admiral though the Government's purpose is in seeking to eliminate discrimination, and effectively though the Equal Treatment Bill does that in practical matters, there remains an inevitable lacuna. Liberty hopes that it will not be another 23 years before Australia joins South Africa, Canada, Belgium, the Netherlands, Norway, California and Massachusetts in ending the discrimination against couples who wish to marry but are of the same sex.

Senator BARNETT—Thank you very much. It does make your position clear. Can I move to the issue of surrogacy. Is it your understanding that the bill endorses surrogacy arrangements in Australia? Do you also accept that in this country, and certainly in the federal parliament, we have not had a debate about recognising surrogacy arrangements in Australia. There are different laws in different states with respect to surrogacy, but this bill essentially recognises surrogacy arrangements. I am asking whether you think that is appropriate and fair?

Mr Gardiner—To the extent that I have followed the complexities of the bill—and it is complex and I understand there are inconsistencies—I do support the bill. From my reading of it, it appears to acknowledge the realities, subject to the laws of the states. Certainly there are children who have come to live in families through surrogacy arrangements. I know of at least one such young woman who I suspect is now about 18 or 19. So it has been around for a while, and it seems to me entirely appropriate that a Commonwealth law should recognise the realities of people's lives. So far as I can tell, this is not a bill about creating recognition that is not already there or creating families that do not already exist; it is recognising what is and not discriminating, as I said in my opening remarks, against children because of society's disapproval or anxiety or, for that matter, preference for a particular family structure.

Senator BARNETT—Finally, the broadening of the definition of step-parents has caused some concern for some witnesses. It is obviously different in the Family Law Act, because this bill does not amend the Family Law Act. Under this legislation it seems that a step-parent now does not have to be married to the parent of the child; the definition is now extended to de facto couples and those in a same-sex relationship. Do you have a view with respect to the good sense, good law or good policy of doing that? Or should it be limited, as it currently is under the Family Law Act, to someone who is married to a parent of a child?

Mr Gardiner—I cannot give a definitive response to that because, although I listened to some of the earlier conversation, the degree to which step-parenting and step-children as a specific category of identity has legal ramifications is something I am not really familiar with. Obviously as a matter of language it is moderately well understood. The issue comes back, I suspect, as always, to the recognition that children should not have their rights impaired or discriminated against because of attitudes to their parents. I do understand the point that you are making about a shift which would affect children in families headed by mixed-sex couples. In a way, that does change the law for them. I have to say that I can express no opinion on that simply because I do not know the extent of the ramifications of being acknowledged as a step-child. But, in principle, if being a step-child is one way to describe a child in a family or in a set of family relationships, it should apply for family relationships that are real, and they can be real whether the parents are a same-sex couple or a mixed sex couple.

One other point is that I understand that some of the definitions have changed—for example, an amendment to section 60H of the Family Law Act was introduced into the House of Representatives last week. As I think you have remarked already this morning, Senator, some of

these issues seem to be in a slight state of flux but they are clearly moving towards a more satisfactory resolution through bills such as the present one.

CHAIR—Mr Gardiner, I have one question I want to ask you. On page 2 of your submission you go into replacing in the definition the term ‘de facto spouse’ with ‘de facto couple’ and I wondered if you wanted to be provided with an opportunity to explain why you believe that is better or more beneficial.

Mr Gardiner—The term ‘spouse’ is naturally connected with notions of marriage. The problem is that there are so many different terms. In the Victorian legislation in 2001 we created the term ‘domestic partner’ or ‘domestic relationship’. There are different terms in other states. We do have a problem—I hope our submission makes this clear—with the interconnection between legal meanings and popular meanings. De facto couples as a generalisation of de facto spouses should refer to those whose relationship is presumptive; it is effectively inferred by looking at how they are living their lives. In marriage and the registered relationships that can be made in Victoria—the law is not yet in force but it will be very soon; 1 December if not before—and Tasmania, the ACT and perhaps other states are going to follow, there is a formal legal relationship. It seems very odd to call that legal, or in Latin de jure, relationship de facto. However, I understand what is going on here, I suppose. It seems that it is very important that in expanding the categories of people who are recognised as being in a relationship for the purpose of the various common law benefit and obligations that the registered relationships be recognised emphatically rather than having to go through further inquiry, which is a good thing.

There is an issue which we draw attention to in that it is conceivable that couples who are currently recognised under federal definitions, specifically those in the 68 acts of this bill, may or may not—probably will but there is a slight possibility of a mismatch—actually sit within the definition now, and vice versa: there may be people who are not couples in their own minds or those around them but who might conceivably be caught as being couples—for good or ill—in the new definitions. I do see that it is a logical problem but it is probably not one which causes great harm or even great confusion except to those of us who like terms like ‘de facto’ and ‘de jure’ to keep their original meanings in relation to fact or law.

CHAIR—We have no more questions of you. I thank you for making yourself available this morning.

Mr Gardiner—I would like to make a couple of other points that we did not touch on in the submission but I know had we been able to we would have. One concern is the amendments to the Sex Discrimination Act which seem inconsistent in failing to adequately marry the definition of marital status with the new definition of de facto partner.

CHAIR—Yes, that was raised this morning by the Human Rights Commission.

Mr Gardiner—It seems to us that it is not something to hold up the bills but it is something that ought to be considered by the inquiry, which I believe you are also doing, into the Sex Discrimination Act along with the other issues that are raised in that inquiry. The definition of marital status in the Sex Discrimination Act should be extended to be quite clear that it applies to all couple relationships or former couple relationships. That was one thing I want to mention.

The other thing is to take up the point I made about registered relationships. The bill currently before the committee provides for state and territory registered relationships to be recognised. They are incongruously named 'de facto couple' when they are registered. But it seems to us that there is no reason to restrict the power to extend the reach of the definitions to the state and territory registers and that equivalent laws in other places, including in New Zealand and the United Kingdom and so on, ought to be included at the same time where people have actually gone to the trouble of expressing their formal commitment to each other under the law of another jurisdiction. We do not make them redo it here for a marriage and we should not make them redo it here for registered relationships of that sort, either. That is, I think, a lacuna in the bill. But, again, it is one that could be fixed later and should not be an opportunity to delay this bill and related bills.

CHAIR—Thank you, Mr Gardiner. That has certainly reinforced some of the ideas we have also heard this morning. Thank you for your time.

Mr Gardiner—Thank you.

CHAIR—I thank witnesses who have appeared this morning and the senators who have given up their Monday morning. I declare this public hearing of the Senate Standing Committee on Legal and Constitutional Affairs adjourned until tomorrow afternoon.

Committee adjourned at 10.56 am