

CHAPTER 3

KEY ISSUES

3.1 As indicated in Chapter 1, the committee received a large number of form letters, and variations on form letters, from individuals who either expressed support for, or opposition to, the provisions of the Evidence Bill relating to the compellability exception for de facto partners. For those who opposed the inclusion of this exception in the Evidence Bill, one of the arguments was that only married persons should be protected from being compelled to give evidence against each other since only marriage (between a man and a woman) is a union which comprises 'sworn obligations and commitments'.¹

3.2 The committee received 12 substantive submissions; some of these submissions provided comment on other aspects of the Evidence Bill, besides the compellability exception for de facto partners.

3.3 This chapter discusses some of the key issues raised during the committee's inquiry, including:

- general comments on the Evidence Bill;
- departure from some of the recommendations of the Uniform Evidence Law Report;
- the compellability exception for de facto partners.

General comments

3.4 The ALRC expressed its warm support for 'the great bulk' of the amendments contained in the Evidence Bill, and stressed the importance of consistency and uniformity in evidence laws across jurisdictions.²

3.5 At the public hearing, Professor Les McCrimmon from the ALRC told the committee that the ALRC is hopeful that the Evidence Bill will prompt other jurisdictions to enact the uniform evidence legislation to ensure 'that we have a truly uniform Evidence Act regime applying across the country' and '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'.³

1 See *Submissions f1, f2 and f3*. See also FamilyVoice Australia, *Submission 2*; Australian Family Association, *Submission 5*; Australian Family Association (SA), *Submission 9*.

2 *Submission 7*, p. 1.

3 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 2.

3.6 The Law Council of Australia (Law Council) submitted that it does not object to the passage of the Evidence Bill in its current form, despite the fact that some parts of the Evidence Bill do not accord with the position advanced by the Law Council during the ALRC's consultation process.⁴ The Law Council noted that 'the Bill is the product of a considered and transparent policy process to which interested stakeholders have had the opportunity to contribute'.⁵ Further:

...the Law Council recognises that the provisions of the model Bill have already been enacted in one jurisdiction and are likely to be introduced in others. Therefore, in the interests of achieving greater uniformity in evidence laws, the Law Council does not wish to urge upon Parliament any departure from the provision[s] of the model Bill.⁶

3.7 The Human Rights and Equal Opportunity Commission (HREOC)⁷ specifically welcomed aspects of the Evidence Bill relating to:

- same-sex couples and their children;
- evidence of traditional law and customs of an Aboriginal or Torres Strait Islander group; and
- children.⁸

3.8 The Commonwealth Director of Public Prosecutions (CDPP) informed the committee that it had been invited to provide input on a number of occasions during the drafting of the Evidence Bill, particularly in relation to section 128 which deals with the privilege against self-incrimination in other proceedings.⁹ The CDPP noted that subsection 128(10) of the Evidence Bill replicates the current subsection 128(8), in accordance with the CDPP's advice not to amend subsection 128(8) and, instead, to 'rely upon the very clear authority of *Cornwell [v The Queen [2007] HCA 12]*'.¹⁰

Departure from recommendations of Uniform Evidence Law Report

3.9 The ALRC commented that the Evidence Bill departs from the Uniform Evidence Law Report's recommendations in some respects, and expressed concern that 'if these issues are not addressed at the Commonwealth level, then the opportunity to realise a truly uniform evidence regime in Australia may be compromised'.¹¹

4 *Submission 10*, p. 2.

5 *Submission 10*, p. 2.

6 *Submission 10*, p. 2.

7 The committee notes that, on 4 September 2008, the Human Rights and Equal Opportunity Commission changed its name to the Australian Human Rights Commission.

8 *Submission 11*, p. 3.

9 *Submission 6*, p. 1.

10 *Submission 6*, p. 2.

11 *Submission 7*, p. 1.

3.10 In particular, the ALRC noted that the Evidence Bill does not include a professional confidential relationship privilege. In the Uniform Evidence Law Report, the Commissions expressed the view that it is in the interests of consistency and uniformity for the Evidence Act to adopt the NSW confidential professional relationship privilege provisions (with some minor amendments). In the ALRC's view, the enactment of a confidential relationship privilege within the Evidence Act would not be affected by any proposals for reform which would arise from the Federal Government's response to *Privilege in Perspective*.¹²

3.11 The ALRC also noted that the Evidence Bill does not extend the application of the privileges under the Evidence Act to preliminary proceedings of courts, as this is another issue that the Federal Government is considering as part of its response to *Privilege in Perspective*. While the ALRC considered that to be appropriate, it also emphasised the need for a nationally consistent approach to these matters. It noted that the model evidence provisions, the *Evidence Amendment Act 2007* (NSW) and the Evidence Amendment Bill 2008 (Vic) all extend the scope of the privileges to preliminary proceedings of courts, including a summons or subpoena to produce documents or give evidence, pre-trial discovery, non-party discovery, interrogatories, and a notice to produce.¹³

Compellability exception for 'de facto partners'

3.12 The committee heard evidence in relation to the Evidence Bill's provisions relating to the compellability of de facto partners, including the proposed change in terminology from 'de facto spouse' to 'de facto partner'.

3.13 Under paragraph 12(b) of the Evidence Act, a person who is competent to give evidence about a fact is compellable to give that evidence. Section 18 of the Evidence Act, which applies only to criminal proceedings, permits certain categories of witnesses to object to giving evidence against the accused. As explained in Chapter 2, a defendant's spouse or de facto spouse, a parent or a child of the defendant are currently included in the 'protected witness' category. Under section 18, the court has the discretion to excuse a witness from testifying – after balancing the risk of harm to the witness, or to the witness's relationship with the accused, against the importance of the evidence itself.

3.14 As the Commissions explained in the Uniform Evidence Law Report, the discretionary approach to compellability in the uniform Evidence Acts reflects the underlying rationale and competing policy considerations:

...on the one hand, the desirability, in the public interest, of having all relevant evidence available to the courts and on the other the undesirability in the public interest that:

12 *Submission 7*, p. 4.

13 *Submission 7*, p. 4.

- the procedures for enforcing the criminal law should be allowed to disrupt marital and family relationships to a greater extent than the interests of the community really require, and
- the community should make unduly harsh demands on 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.¹⁴

In-principle support

3.15 The ALRC commented that the Evidence Bill 'will ensure equality and avoid discrimination by according the same legal privileges in relation to compellability provisions to all those who are couples, irrespective of the sex of the parties involved'.¹⁵ Further, the ALRC noted that the approach taken in the Evidence Bill is consistent with the approach adopted in the *Evidence Amendment Act 2007* (NSW), the Evidence Amendment Bill 2008 (Vic), and under Tasmanian legislation.¹⁶

3.16 The ALRC also expressed support for the definition of 'de facto partner' in the Evidence Bill:

...this approach is less prescriptive because it does not require that the parties to a relationship live together. It caters for a range of situations in which a couple may not cohabit but may nonetheless have a relationship with many of the other characteristics indicative of a de facto relationship. For example, circumstances can be envisaged where parties in a relationship choose to maintain separate residences, or live apart while one party is in long-term care outside the home. In such cases, the circumstances of any cohabitation (or lack of it) are just one factor to be taken into account in determining whether a de facto relationship exists.¹⁷

3.17 HREOC expressed strong support for the proposed amendments in relation to same-sex couples. HREOC noted that the new definition of 'de facto partner' is based upon the definitions of 'de facto spouse' contained in state and territory legislation and is generally consistent with the definition recommended in HREOC's *Same-Sex: Same Entitlements* report.¹⁸

3.18 The Gay & Lesbian Rights Lobby (NSW) (GLRL) expressed its support for the proposed definition of 'de facto partner', and other related amendments. The GLRL argued that the Bill 'is truly a minimal change to the law' – since the right to object to

14 ALRC, *Evidence*, ALRC 38, 1987, p. 80 quoted in Uniform Evidence Law Report, p. 116.

15 *Submission 7*, p. 5.

16 *Submission 7*, p. 5.

17 *Submission 7*, p. 5.

18 HREOC, *Same-Sex: Same Entitlements*, Report of the National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits, April 2007, p. 6.

being compelled to give evidence currently extends to married spouses, heterosexual de facto spouses, parents and children – but that the proposed change is 'of enormous significance to same-sex partners who may face appearing as witnesses in some criminal Commonwealth trials'.¹⁹

3.19 The GLRL submitted that the proposed definition of 'de facto partner' is 'a simple reflection of long-established definitions existing under state and territory laws, which include same-sex couples for (almost) all purposes',²⁰ and that identical amendments to those proposed in the Bill (including the current definition of 'de facto partner') were passed in NSW in 2007. The GLRL also noted that the different treatment of same-sex couples and opposite-sex de facto couples is discriminatory, and in contradiction of Australia's human rights obligations.²¹

Inconsistencies with other federal legislation

3.20 At the public hearing, the committee pursued the issue of inconsistencies between the Evidence Bill's definition of 'de facto partner' and similar definitions in other bills before the committee and, indeed, with other federal legislation. At the time of the public hearing for the Evidence Bill, the committee was examining two other pieces of legislation – the Family Law Bill and the Same-Sex Superannuation Bill – which contain definitions of 'de facto relationship' and 'couple relationship' respectively.²²

List of factors to be taken into account by court

3.21 Inconsistent terminology and definitions are used in all three bills to capture similar or identical concepts. For example, while the definition of 'de facto partner' in the Evidence Bill is very similar to the definition of 'de facto relationship' in the Family Law Bill, the definition in the Family Law Bill contains two additional criteria which may be considered by a court when determining whether a de facto relationship exists. These additional criteria are listed in paragraphs 4AA(2)(c) and (g) of the Family Law Bill and relate to:

- whether a sexual relationship exists; and
- whether the relationship is or was registered under a prescribed law of a state or territory.

19 *Submission 8*, p. 5.

20 *Submission 8*, p. 4.

21 *Submission 8*, p. 5.

22 The committee tabled its report in relation to the Family Law Bill on 28 August 2008 and is scheduled to table its report in relation to the Same-Sex Superannuation Bill on 8 October 2008. See further Senate Legal and Constitutional Affairs Committee, *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008*, August 2008 and Senate Legal and Constitutional Affairs Committee, *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008*, October 2008.

3.22 The Same-Sex Superannuation Bill uses a definition of 'couple relationship', to replace the use of other terms such as 'marital relationship' in relevant superannuation legislation – for example, in the *Parliamentary Contributory Superannuation Act 1948*.

3.23 The definition of 'couple relationship' in the Same-Sex Superannuation Bill shares some similarities with the definition of 'de facto relationship' in the Family Law Bill. The Same-Sex Superannuation Bill and the Family Law Bill refer to, respectively, couples living together on 'a permanent and bona fide domestic basis' and 'on a genuine domestic basis'. However, the Evidence Bill does not contain any such requirement and, therefore, takes a broader approach.

3.24 In an answer to a question on notice relating to the Family Law Bill, the Department (Attorney-General's Department) advised that there is a range of other federal legislation containing definitions of terms other than 'de facto relationship' but which encompass de facto relationships (for example, the terms 'spouse', 'marital relationship' and 'member of a couple' can be found in various pieces of federal legislation).²³

Absence of particular indicia from list of factors to be considered by the court

3.25 A departmental representative noted 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'.²⁴ The departmental representative indicated that the definition in the Family Law Bill was based on that used in the Evidence Bill, with the addition of the two further criteria set out above.²⁵

3.26 The representative from the Department informed the committee that, in the development of the definition 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'.²⁶

3.27 The committee notes that the Commissions, in their Uniform Evidence Law Report, recommended only three specific matters that the court might take into account for the purpose of determining whether a relationship between two persons is to be considered a relationship as a couple, namely:

- the duration of the relationship;

23 Family Law Bill, *Answers to questions on notice*, received 20 August 2008, p. 3. See further *Income Tax Assessment Act 1997* (section 995-1), the *Parliamentary Contributory Superannuation Act 1948* (section 4B), the *Social Security Act 1991* (subsections 4(2)-(6A)), and the *Aged Care Act 1997* (section 44-11).

24 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 9.

25 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 9.

26 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 11.

- the extent to which the persons have a mutual commitment to a shared life; and
- the reputation and public aspects of the relationship.²⁷

3.28 At the public hearing, Professor McCrimmon commented that the ALRC does not consider it necessary to include, in the Evidence Bill, the additional criteria set out in the Family Law Bill since '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 [exists]'.²⁸

3.29 A departmental representative explained why the criterion relating to the existence of a sexual relationship had been specifically included in the Family Law Bill:

...we are limited to...the definition of 'de facto relationship' in the referring bill. Our advice is that the factors we have listed should reflect that definition to the maximum extent, and that is why paragraph C [which refers to the existence of a sexual relationship], for example, is in the definition.²⁹

3.30 Another representative from the Department explained the rationale for the exclusion of any requirements of co-habitation or a sexual relationship in the Evidence Bill's definition of 'de facto partner':

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...³⁰

3.31 As to the express omission of an exclusivity requirement in the definition contained in the Evidence Bill, a representative from the Department explained that:

(I)t is possible for somebody to be legally married and also in a de facto relationship with another person. Both relationships involving the same

27 Uniform Evidence Law Report, Recommendation 4-6, p. 122.

28 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 7.

29 *Committee Hansard, Family Law Bill*, 7 August 2008, p. 13. The Family Law Bill relied on referrals by the states to the Commonwealth under subsection 51(xxxvii) of the Constitution.

30 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 10.

person would be covered and protected in the context of the Evidence Bill.³¹

3.32 The Family Law Bill also has no requirement of exclusivity which, in that case, is again linked to the referral legislation from the states:

...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.³²

Rationale for inconsistencies

3.33 In response to questioning on the reasons for the various differences in approaches to the definitions, a departmental representative indicated that, in the context of the Evidence Bill, there was 'a concern with the SCAG working group that [the inclusion of certain] indicia may be interpreted to exclude some of the genuine de facto relationships'.³³

3.34 Another departmental representative noted that:

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.³⁴

3.35 Associate Professor Miranda Stewart from Melbourne Law School also offered an explanation as to why different statutes should be distinguished, with particular reference to the rationale for the broad approach in the Evidence Act:

(I)t must be acknowledged that in different statutes different things are provided, or the purpose of the couple definition serves a different purpose in the different statutes. So in the Evidence Act, it serves the purpose of ensuring that the other member of the couple does not give evidence. Just to give a couple of examples, the Evidence Act has the purpose of ensuring that a member of a couple cannot be required to give evidence. There is a good criminal law reason for that evidence prohibition: not only is it emotionally difficult for the member of the couple, but also the evidence is

31 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 12. See also Uniform Evidence Law Report, p. 121.

32 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 16.

33 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 10.

34 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 10.

not trustworthy. It is appropriate then to bring same-sex couples within exactly the same sort of regime and definition that is already applying for opposite-sex couples. There is a reason for that particular list of factors. We want to encompass all relationships that satisfy those factors.³⁵

3.36 A departmental representative suggested that, while it may be desirable for the Commonwealth to have a consistent approach across all relevant legislation, consistency is not the only consideration to be taken into account when determining such matters.³⁶ Indeed, there are specific public policy reasons behind the different tests:

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 [the Uniform Evidence Law Report].³⁷

3.37 Further:

The other difference between our provision and those [corresponding provisions in the Same-Sex Superannuation Bill and the Family Law Bill] 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 with the SCAG process.³⁸

35 *Committee Hansard, Same-Sex Superannuation Bill*, 6 August 2008, p. 6.

36 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 13.

37 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 17.

38 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 17.

3.38 Professor McCrimmon from the ALRC also emphasised the importance of achieving uniformity:

[The ALRC's] 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.

...

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.³⁹

3.39 Professor McCrimmon explained further:

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.⁴⁰

Suggestions to overcome inconsistencies

3.40 Some witnesses at the public hearings for the Same-Sex Superannuation Bill and the Family Law Bill suggested that a more consistent approach should be taken across all three bills, and indeed, all federal legislation. For example, Mr Wayne Morgan, Senior Lecturer in Law at the Australian National University, suggested that the ideal approach would be for the Commonwealth to adopt an 'umbrella' term (such as 'couple relationship'), which could be inserted into the *Acts Interpretation Act 1901* (Acts Interpretation Act) to include three broad categories of relationship:

- (a) a valid marriage under Australian law;
- (b) a de facto relationship; and
- (c) a registered relationship.

'De facto relationship' and 'registered relationship' would then be subject to further definitions.⁴¹

39 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 5.

40 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 7.

41 *Submission j59*, p. 5; and see also *Committee Hansard: Same-Sex Superannuation Bill*, 6 August 2008, p. 41.

3.41 Associate Professor Miranda Stewart responded to suggestions that a single uniform definition is the preferable approach to achieving consistency:

Some have suggested that having a single uniform definition of 'couple' might be the simplest way to go...that the word apply across all federal laws—because obviously we have nearly 100 laws that might refer to this notion. In some ways, I would support that. From a drafting perspective that would be simple. But I do acknowledge, and I think it is clear in these bills, that different federal laws have different definitions of 'couple' for different purposes and it is appropriate, then, to amend those specific definitions to remove the discrimination rather than necessarily change the whole structure of the federal law with one uniform definition. I do support the idea that we would have an amendment to the Commonwealth superannuation law's concept of 'couple', an amendment to the Evidence Act's concept of 'de facto relationship' and so on. I think that is appropriate.⁴²

3.42 As a fallback position, Mr Morgan considered that registration of a relationship under a state or territory law should be conclusive proof of the existence of a de facto relationship under Commonwealth law.⁴³ With specific reference to the Evidence Bill, Mr Morgan submitted that it should be amended to reflect a scheme that properly recognises registered relationships.⁴⁴

3.43 HREOC also noted that the Evidence Bill does not include registration of a relationship under a state or territory law as one of the factors to be taken into account in determining whether two people are in a de facto relationship. HREOC pointed out that the *Same-Sex: Same Entitlements* report recommended that such registration should be considered evidence of the existence of a de facto relationship, and that this approach is also consistent with that taken in the Same-Sex Superannuation Bill.⁴⁵

3.44 Accordingly, HREOC recommended that registration of a relationship under a state or territory law allowing for the registration of relationships should be included in the list of circumstances to be taken into account in determining whether two people are in a de facto relationship for the purposes of the Evidence Act.⁴⁶

42 *Committee Hansard, Same-Sex Superannuation Bill*, 6 August 2008, p. 2.

43 *Submission j59*, pp 6 and 8.

44 *Submission j59*, p. 8. However, the committee also notes evidence it received in the course of the inquiry into the Same-Sex Superannuation Bill in relation to the inconsistent availability of registration schemes throughout Australia. See further Senate Legal and Constitutional Affairs Committee *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008*, October 2008.

45 p. 6. As explained earlier in Chapter 3, the committee notes that the Family Law Bill also includes registration of a relationship under state or territory law as a factor to be considered in determining whether a de facto relationship exists.

46 pp 6-7.

Other issues – interdependent relationships

3.45 The Evidence Bill does not expressly exclude the category of 'interdependent relationships' from the ambit of the definition of 'de facto partner'. The committee notes that the definition contained in the Family Law Bill specifically requires that the relevant persons must not be related by family.⁴⁷ Again, this is because the definition in the Family Law Bill is derived from the definition of the term 'de facto relationship' in the state referral legislation, which does not include caring relationships.⁴⁸

3.46 When questioned by the committee in relation to the non-exclusion of this particular category of relationship in the Evidence Bill, Professor McCrimmon from the ALRC stated that it is conceivable that someone in an interdependent relationship could also be covered by the definition of 'de facto partner'.⁴⁹

3.47 A representative from the Department disagreed with Professor McCrimmon's view in this regard:

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.⁵⁰

3.48 However, the departmental representative conceded that, although the intention is that the definition only cover 'types of relationships where the two people have a relationship as a couple', as stated in the EM, there is no definition of 'couple' or 'couple relationship' in the Bill (or in the Evidence Act as it currently stands).⁵¹

3.49 A representative from the Department also confirmed that there is no definition of 'couple' in the Acts Interpretation Act. Therefore, the term 'couple' would have its ordinary meaning as interpreted and applied by the courts.⁵²

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

3.50 On 4 September 2008, the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008 (Same-Sex General Law Reform Bill) was introduced into the House of Representatives. On the same day, the Senate referred the provisions of the Same-Sex General Law Reform Bill to the

47 Proposed paragraph 4AA(1)(b).

48 EM to Family Law Bill, p. 11.

49 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 7.

50 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 11.

51 *Committee Hansard: Evidence Bill*, 7 August 2008, pp 11 and 12.

52 *Committee Hansard: Same-Sex Superannuation Bill*, 7 August 2008, p. 16.

committee, for inquiry and report by 30 September 2008. On 18 September 2008, the Senate agreed to extend the reporting date for this inquiry until 8 October 2008.

3.51 The Same-Sex General Law Reform Bill includes a new definition of 'de facto partner' which will be inserted into the Acts Interpretation Act. This definition will be gender neutral and will encompass members of both same-sex and opposite-sex de facto relationships.

3.52 Section 22A of the Acts Interpretation Act will require that an Act or a provision of an Act may specify that the definition in the Acts Interpretation Act applies to that Act or that provision. This means that the application of the definition of 'de facto partner' in the Acts Interpretation Act will have no effect unless it is 'triggered' by express provisions in the substantive Act to avoid 'any possibility of unintended consequences'.⁵³

3.53 Section 22A will prescribe two different circumstances in which a person will be considered to be the de facto partner of another person. Paragraph 22A(a) of the Acts Interpretation Act will provide that a person is a de facto partner of another person if the person is in a 'registered relationship' with another person under section 22B of the Acts Interpretation Act.⁵⁴ Paragraph 22A(b) of the Acts Interpretation Act will provide that a person is a de facto partner of another person if the person is in a 'de facto relationship' with that person under section 22C of the Acts Interpretation Act.⁵⁵

3.54 Section 22C of the Acts Interpretation Act will provide that, for the purposes of paragraph 22A(b) of the Acts Interpretation Act, a person is in a 'de facto relationship' with another person if the members of the couple are not legally married, are not related by family,⁵⁶ and have a relationship as a couple living together on a genuine domestic basis.⁵⁶

3.55 Subsection 22C(2) of the Acts Interpretation Act will provide that all the circumstances of the relationship between the persons are to be taken into account when determining whether two persons have a relationship as a couple for the

53 EM to Same-Sex General Law Reform Bill, p. 6.

54 Under section 22B, a person will be considered to be in a registered relationship with another person for the purposes of paragraph 22A(a) if the relationship is registered under a prescribed law of a state or territory as a prescribed kind of relationship. This will only apply to relationships that are registered under state or territory laws that are prescribed for the purposes of the Acts Interpretation Act and are of a kind that has been prescribed. For example, the EM states that provisions of state and territory laws that provide for registration of 'caring' or 'interdependent' relationships will not be prescribed as kinds of relationships that will be taken to be a registered relationship for the purposes of the Acts Interpretation Act: p. 6.

55 EM, p. 6.

56 EM, p. 7.

purposes of paragraph 22C(1)(c) of the Acts Interpretation Act, including any or all of the following relevant factors:

- the duration of the relationship;
- the nature and extent of their common residence;
- whether a sexual relationship exists;
- the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- the ownership, use and acquisition of their property;
- the degree of mutual commitment to a shared life;
- the care and support of children; and
- the reputation and public aspects of the relationship.⁵⁷

3.56 The committee notes that the definition of 'de facto relationship' to be inserted into the Acts Interpretation Act is identical to the definition of 'de facto relationship' contained in the Family Law Bill.

3.57 In an answer to a question on notice, the Department confirmed that the definition of 'de facto partner' in the Acts Interpretation Act will not apply in the context of the Evidence Bill or the Evidence Act due to the specific policy objectives:

(T)he Evidence Amendment Bill 2008 implements the Model Uniform Evidence Bill definition of de facto partner, which is defined in terms of a person in a de facto relationship. This provision was developed in consultation with the Standing Committee of Attorneys-General Working Group of State and Territory officials based on recommendations in the Australian, New South Wales and Victorian Law Reform Commissions' report on *Uniform Evidence Law*. The provision was then approved by SCAG as part of a uniform approach on compellability of witnesses. The Government will proceed with this provision of the Evidence Amendment Bill as drafted to promote and maintain harmonisation amongst jurisdictions on evidence law.⁵⁸

3.58 The interaction of the new definition of 'de facto partner' (and other relevant definitions) with existing definitions in the Same-Sex Superannuation Bill will be examined in the committee's forthcoming reports on the Same-Sex Superannuation Bill and the Same-Sex General Law Reform Bill.

Committee view

3.59 The committee agrees with the views expressed by the Commissions in the Uniform Evidence Law Report, and the views expressed by various organisations

57 EM, p. 7.

58 *Answer to question on notice*, received 15 September 2008, p. 1.

during the course of this inquiry, that harmonisation of the laws of evidence across all jurisdictions is important and should be pursued (unless there is good reason to the contrary).

3.60 The committee notes the extensive consultation process, undertaken over a number of years, which gave interested stakeholders the opportunity to contribute to the development of the model evidence provisions. The committee also notes that the model evidence provisions have been endorsed by SCAG, have already been enacted in New South Wales, and are likely to be introduced in other jurisdictions. The committee encourages all remaining jurisdictions to enact the model evidence provisions as soon as possible in order to ensure uniformity and consistency throughout Australia.

3.61 One of the significant issues in this inquiry, as well as in recent inquiries undertaken by the committee into the Family Law Bill and the Same-Sex Superannuation Bill, was the inconsistency of key concepts and terminology relating to 'de facto partner', 'de facto relationship', and 'couple relationship'. There is also a range of other federal legislation which contains definitions of terms other than 'de facto relationship' but which encompass de facto relationships (for example, the terms 'spouse', 'marital relationship' and 'member of a couple').

3.62 The committee is pleased to note relevant amendments contained in the Same-Sex General Law Reform Bill, particularly the proposed insertion of a definition of 'de facto partner' into the Acts Interpretation Act. According to the Attorney-General, the definition in the Acts Interpretation Act 'will become the standard definition for most Commonwealth laws' and 'will provide a more consistent and uniform approach to defining who is a de facto partner across a range of Commonwealth laws'.⁵⁹ The committee commends this approach but notes that the new standard definition will not apply across *all* Commonwealth laws.

3.63 In a broad sense, the committee expresses its preference for consistency and uniformity across federal legislation, and has reservations about the existence of inconsistent terminology and definitions in different federal statutes to describe identical or similar concepts. The committee intends to explore this issue further in its forthcoming reports relating to the Same-Sex Superannuation Bill and the Same-Sex General Law Reform Bill.

3.64 At the same time, however, the committee acknowledges the explanation provided by the Department in relation to the important public policy reasons for the slightly broader approach taken in the Evidence Bill. The committee recognises the value of establishing uniformity between federal, state and territory laws (as opposed to uniformity or consistency of definitions between the uniform evidence laws and other unrelated federal legislation). The committee also acknowledges and supports

59 The Hon. Robert McClelland MP, Attorney-General, Same-Sex General Law Reform Bill, Second Reading Speech, *House of Representatives Hansard*, p. 4.

the policy objective of protecting a broad range of relationships from the ambit of the compellability requirement, in line with the underlying rationale of the Evidence Act.

3.65 In any case, regardless of the form that the definition of 'de facto partner' takes in the Evidence Bill, it is ultimately a matter for the court to assess whether or not the relationship exists and whether, taking into account all the various factors, the discretion should be exercised to excuse a witness from being compelled to give evidence. While the Evidence Bill may allow a court to recognise a broader category of relationship, the court will then be required to consider the probity of the relevant evidence against the potential prejudice that could be done to the relationship. The committee is cognisant that this 'additional step' does not exist in the context of the Same-Sex Superannuation Bill or the Family Law Bill.

3.66 For these reasons, the committee is of the view that the Senate should pass the Evidence Bill unamended.

Recommendation 1

3.67 The committee recommends that the Senate pass the Evidence Bill.

Senator Trish Crossin

Chair