CHAPTER 3

KEY ISSUES

3.1 This chapter discusses the key issues raised in relation to the Bill during the committee's inquiry, including:

- the need for, and impact of, the Bill;
- the definition of 'de facto relationship';
- the definition of a 'child of a de facto relationship';
- the workload of the Family Court;
- constitutional issues and the position of the states; and
- other legal and drafting issues.

Need for, and impact of, the Bill

3.2 As detailed in Chapter 2, the primary purpose of the Bill is to enable the federal family courts to deal with both financial and child-related matters arising for separated de facto couples in the one proceeding. As a result, the Bill aims to avoid the unnecessary additional costs and inconvenience on de facto couples, as well as reduce the administrative burden on the federal and state court systems.[1]

3.3 In general, many submissions and witnesses were strongly supportive of the Bill. A key reason for this support was because it would streamline processes for both same-sex and opposite-sex de facto couples, and allow them access to the specialised forum of the Family Court (including its mediation procedures) to resolve property and maintenance disputes at the same time as child-related proceedings.[2] Of those who supported the Bill, many raised drafting issues, but nevertheless urged the government to proceed with the legislation as a 'matter of priority'.[3] Those who objected to the Bill outright generally raised concerns about the Bill's impact on the status of marriage and/or the perceived extension of marriage rights to de facto couples.[4]

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1 The Hon Robert McClelland, MP, Attorney-General, *House Hansard*, 25 June 2008, p. 1.

2 See, for example, Women's Legal Services Australia (WLSA), *Submission 9*, p. 1 and Ms Natascha Rohr and Ms Heidi Yates, WLSA, *Committee Hansard*, 7 August 2008, p. 1; NSW Council for Civil Liberties (NSW CCL), *Submission 11*, pp 1-2; Australian Institute of Family Studies (AIFS), *Submission 17*, p. 1; Mr Corey Irlam, Australian Coalition for Equality, *Committee Hansard*, 6 August 2008, p. 26; Mr Graeme Innes, HREOC, *Committee Hansard*, 6 August 2008, p. 16; Law Council, *Submission 20*, p. 4; NSW Law Society, *Submission 7*, p. 6.

3 See, for example, Law Council, *Submission 20*, p. 4.

4 See, for example, *Submission f1*; FamilyVoice Australia, *Submission 10*, pp 2-5; Lone Fathers Association (Australia), *Submission 13*, p. 1.

3.4 The Family Law Section of the Law Council of Australia (Law Council) described itself as 'a vigorous supporter of the objective that family law should apply in a consistent and uniform way to married and de facto relationships nationally'.[5] The Law Council argued that this 'much-needed and socially advantageous legislation' is:

> …long overdue given the high and ever-increasing percentage of Australians who live — regardless of gender — in marriage-like relationships in preference to formal marriage.[6]

3.5 Mr Ian Kennedy, Chair of the Family Law Section of the Law Council summarised some of the problems with the current system:

> In more recent years, of course, [de facto] couples have been able to have issues relating to their children determined under the Family Law Act. The paradox of that is that it has compounded the impact on them as the Family Law Courts have not had the power to deal with the financial consequences of relationship breakdown. So non-married couples have had to have their issues resolved in two different jurisdictions—the federal jurisdiction for their children and the state jurisdiction for financial issues—at very significant additional cost and with stress on the families.[7]

3.6 Similarly, Women's Legal Services Australia (WLSA) were strongly supportive of the Bill. Ms Heidi Yates of the WLSA explained that it wants to ensure that the justice system produces the most just and equitable outcome for women and their children:

> At present, the Family Court, as a specialist court, with particular ability to look at the future needs of the primary caregiver and their ability to care for the children, provides the most just and equitable outcome and therefore it would be most appropriate if both de facto and married couples could use that federal system. It also promotes consistency, simplicity of advice and I think amongst the community members a more consistent understanding of what their rights and obligations are.[8]

3.7 Another reason WLSA supported the Bill was from a children's rights perspective. WLSA believed that, under the current system, the limited coverage and inconsistent features of state and territory schemes means that children of de facto couples currently receive less protection compared to children of married couples.[9] Ms Heidi Yates of WLSA explained:

> It is essential that when distributing property the court consider the future needs of the parties, specifically the resources required by the primary caregiver to housing care for the children after separation…only some of

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5 *Submission 20*, p. 1; see also Mr Ian Kennedy, *Committee Hansard*, 6 August 2008, p. 9.

6 *Submission 20*, p. 2.

7 *Committee Hansard*, 6 August 2008, p. 9 and see also p. 13.

8 *Committee Hansard*, 7 August 2008, p. 4.

9 *Submission 9*, p. 3.

> the existing state and territory de facto schemes allow for consideration of future needs.[10]

3.8 Ms Yates continued:

> Further, when it comes to spousal maintenance, the Family Law Act requires a party to financially maintain their ex-partner if that partner is unable to support themselves because they are caring for the children. We also submit that spousal maintenance orders can support a child's right to an adequate standard of living upon separation by providing the primary caregiver with additional income. At present a primary caregiver cannot access maintenance payments in some jurisdictions[11] and in others can only receive such payments until the children become 12 years of age.[12]

3.9 The Australian Institute of Family Studies (AIFS) also supported the Bill. It outlined some of the research it had undertaken, which shows that:

- cohabitation has become an increasingly common family form (the 2006 census data shows that 15% of all persons living with a partner were 'cohabiting'); [13]
- the number of children being born into cohabiting relationships is also increasing;
- children living with cohabiting parents appear to be less well-off than those living with married parents; and
- children living with cohabiting parents appear to be more likely to experience parental separation.[14]

3.10 In response to further questioning on the duration of marriages compared to cohabiting relationships, the AIFS informed the committee that:

> The probability of a marriage ending in divorce appears to have been increasing…33% of all marriages that began in 2000-2002 could be expected to end in divorce, compared with 28% of all marriages that began in 1985-1987. However, the estimated expected duration of marriages that end in divorce has increased...[A]mong men who obtained a divorce from their first marriage, the average expected duration of their marriage

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10 *Committee Hansard*, 7 August 2008, p. 1.

11 South Australia, Queensland and Victoria: see *Committee Hansard*, 7 August 2008, p. 3.

12 *Committee Hansard*, 7 August 2008, p. 1. Note those jurisdictions are New South Wales and the ACT: *Committee Hansard*, 7 August 2008, p. 3; and see also Mr Ian Kennedy, Law Council, *Committee Hansard*, 6 August 2008, pp 12-13.

13 Dr Matthew Gray, *Committee Hansard*, 6 August 2008, p. 2; see also AIFS, *Answers to questions on notice*, received 20 August 2008, pp 4-5.

14 *Submission 17*, p. 3. For further research and statistics, see also AIFS, *Committee Hansard*, 6 August 2008, pp 2-4 and AIFS, *Answers to questions on notice*, received 20 August 2008.

> increased from 11 years for those who married in 1985-1987 to 14 years for those who married 2000-2002.[15]

3.11 In contrast, the AIFS informed the committee that the median duration of a cohabiting relationship for those who separated was around 2 years (excluding first cohabitation following marriage).[16]

3.12 The committee notes that data from the Australian Bureau of Statistics also shows that, for those people who got married in 1985–1987 and 2000–2002, the expected average duration of their total married life remained unchanged at around 32 years.[17]

3.13 Other information from the AIFS showed that:

- 'cohabiting relationships are far more likely to dissolve than marriages'; and
- 'regardless of the period in which cohabitation or marriage began, the likelihood of a cohabiting relationship ending in separation within five years was at least three times the likelihood of a marriage ending in divorce within five years (25–38% vs 7–9%).'[18]

3.14 Based on its research, the AIFS supported the Bill, concluding that:

> Given the increasing prevalence of cohabiting relationships, and the increasing number of children cared for in such relationships, the removal of legal distinctions between the post-separation financial regulation of cohabiting and married relationships appears justified.[19]

3.15 As a representative of the AIFS told the committee:

> The primary rationale for the institute's support is that the scheme has the potential to alleviate some of the family stress associated with relationship breakdown.[20]

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15 AIFS, *Answers to questions on notice*, received 20 August 2008, p. 4, referring to: Australian Bureau of Statistics, *Australian Social Trends 2007*, Catalogue No. 4102.0, "Lifetime Marriage and Divorce Trends", available at: http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/26D94B4C9A4769E6CA25732C00207644?opendocument (accessed 26 August 2008).

16 AIFS, *Answers to questions on notice*, received 20 August 2008, pp 4-5.

17 *Australian Social Trends 2007*, Catalogue No. 4102.0, "Lifetime Marriage and Divorce Trends", available at: http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/26D94B4C9A4769E6CA25732C00207644?opendocument (accessed 26 August 2008).

18 AIFS, *Tabled Document: Snapshots of Family Relationships by Lixia Qu and Ruth Weston (May 2008)*, 6 August 2008, p. 12.

19 *Submission 17*, p. 4.

20 *Committee Hansard*, 6 August 2008, p. 2.

3.16 However, some submissions opposed to the Bill argued that same-sex and de facto couples can use the current state systems and/or contracts and 'civil law' to protect their interests and to access property and maintenance settlements. For example, FamilyVoice Australia argued that the Bill was 'redundant' and that:

> It is open to the parties in a de facto relationship, and to the parties in a same-sex relationship, to enter into civil contracts to protect their individual interests in property. Any such contracts should be governed by State and territory law. There is no need for them to be included within the purview of the *Family Law Act 1975*.[21]

3.17 However, as outlined above, the committee heard a great deal of evidence pointing out the problems with the current system, which included duplication, inconsistency, cost and inconvenience. For example, Mr Ian Kennedy of the Law Council pointed out that, although states and territories do regulate the financial aspects of de facto relationships:

> …there has not been any consistency in the nature of the rights conferred, and the types of couples whose interests are protected vary from jurisdiction to jurisdiction. So couples in different jurisdictions may have quite different entitlements. Their financial affairs may be dealt with in quite different ways…The problems are compounded by where the parties just happen to live or where their assets happen to be. The impact of that is to leave a large segment of the community, especially women, without adequate legal protection and to cause many, particularly older women, to be severely disadvantaged on relationship breakdown.[22]

Impact on the status of marriage

3.18 For those opposed to the Bill, a key objection was that the Bill would undermine and/or devalue the institution of marriage by extending similar rights to de facto relationships.[23]

3.19 For example, Professor Patrick Parkinson, Professor of Law at the University of Sydney, considered that the Bill 'raises fundamental moral and social questions that have not been properly considered'. Professor Parkinson recommended that the Bill be withdrawn until consultation and research is conducted on issues including:

> Whether [the Bill] undermines marriage (which the Government ought to be promoting because of its much greater stability), to treat marriages and de facto relationships as being entirely equivalent.[24]

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21 *Submission 10*, p. 2 and Mr Richard Egan, *Committee Hansard*, 6 August 2008, pp 24-25; see also *Submission f1*; and Fatherhood Foundation, *Submission 23*, p. 1.

22 *Committee Hansard*, 6 August 2008, p. 9.

23 See, for example, *Submission f1*; FamilyVoice Australia, *Submission 10*, pp 2-5; Lone Fathers Association, *Submission 13*, p. 1; Australian Family Association (South Australian Branch), *Submission 15*, p. 1; Shared Parenting Council of Australia, *Submission 22*, pp 2 and 6.

24 *Submission 6*, pp 1-2.

3.20 FamilyVoice Australia was similarly concerned that the Bill would undermine marriage, and suggested that there are good reasons to distinguish marriage from other relationships:

> Firstly, marriage provides the best environment for raising children. Secondly, marriage regulates the relationships between men and women in a way that benefits both men and women as well as society.[25]

3.21 Others disputed these sorts of arguments. Mr Ian Kennedy of the Law Council told the committee that, in his view, 'there is no real substance' to concerns that the Bill undermines marriage, and that this argument 'has long since been overtaken by the reality of our society'. He pointed out that one in seven Australian families are not in a marriage relationship, and that this 'does not seem to have undermined our social fabric to any noticeable degree'.[26]

3.22 Mr Graeme Innes AM, Human Rights Commissioner, from HREOC responded in the same vein to the committee's questions on this issue:

> …in no way does this legislation undermine or threaten the institution of marriage. The level of keenness and desperation that I heard from a range of the same-sex couples who wish to become married and join that institution would suggest that in fact it is supported by those views rather than undermined by them.[27]

3.23 In response to the committee's questions as to whether the institution of marriage continues to 'hold people's affection' despite increases in de facto relationships, the AIFS told the committee that its research showed that marriage is still 'viewed favourably'.[28]

3.24 As to suggestions that marriage is a more stable institution and a better environment for raising children and therefore should be promoted, the AIFS acknowledged that its research demonstrated that de facto relationships are less stable than marriage, and that developmental outcomes for children in de facto relationships were not as good as for children in marriage. However, the AIFS told the committee that these differences were 'largely explained' by differences in characteristics between marriage and cohabitation, including that 'those who cohabit are more likely to be younger and to be of a lower socioeconomic status'.[29] The differences are also

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25 *Submission 10*, p. 3 and Mr Richard Egan, *Committee Hansard*, 6 August 2008, p. 23; see also Shared Parenting Council of Australia, *Submission 22*, pp 9-10; and Fatherhood Foundation, *Submission 23*, p. 1.

26 *Committee Hansard*, 6 August 2008, p. 12; and see also Mr Corey Irlam and Mr Rodney Croome, Australian Coalition for Equality, *Committee Hansard: Same-Sex Superannuation Bill 2008*, 6 August 2008, pp 38 and 40.

27 *Committee Hansard*, 6 August 2008, p. 19.

28 *Answers to questions on notice*, received 20 August 2008, p. 3.

29 Dr Matthew Gray, *Committee Hansard*, 6 August 2008, pp 2 and 5; see also Ms Ruth Weston, *Committee Hansard*, 6 August 2008, pp 6-7.

influenced by a combination of other factors 'relating to economic resources of the family, parenting practices of the family, mothers' mental health and mothers' perception of the relationship quality with their partners'. Ms Ruth Weston of the AIFS concluded:

> The key question is: are children better off in marriage because their parents are married, or is it related to the differences between the parents who do marry and the parents who do not? That is very hard to identify...[30]

3.25 The AIFS told the committee that it had not done any research on any differences between same-sex and opposite-sex de facto relationships, or development outcomes for children in those relationships.[31] However, the NSW Gay and Lesbian Rights Lobby pointed to a range of research which 'demonstrated that children raised by lesbians and gay men are just as happy and well adjusted as children raised in other familial structures'.[32]

3.26 In response to the committee's questions on this issue, a representative of the Department responded that the government's position was that the bill does not undermine the institution of marriage:

> The government's position is very clear on the importance of marriage, and the Attorney and the Prime Minister have made a number of statements in that regard. Clearly the government does regard marriage as a fundamental institution…They are separate things, the de facto relationship and the marriage relationship, in this legislation. It may be that they are treated in a very similar way, but they are separate things in the legislation.[33]

3.27 The committee also notes that paragraph 43(a) of the Family Law Act (which is not being amended in any way by the Bill) provides that the family courts must have regard to 'the need to preserve and protect the institution of marriage'.

Treatment of de facto relationships compared to married relationships

3.28 Professor Patrick Parkinson argued that the Bill will effectively treat:

> …de facto relationships (whether heterosexual or same-sex) in exactly the same way as marriages for the purposes of property division and spousal maintenance if relationships break down.[34]

3.29 Professor Parkinson explained further during the committee's hearing in Sydney his concerns that:

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30 *Committee Hansard*, 6 August 2008, p. 7.

31 Dr Matthew Gray, *Committee Hansard*, 6 August 2008, p. 4; and Ms Ruth Weston, *Committee Hansard*, 6 August 2008, p. 6.

32 *Submission 14*, p. 18.

33 *Committee Hansard*, 7 August 2008, p. 18.

34 *Submission 6*, p. 1.

> …this bill is taking the marriage paradigm—the idea of marriage as a lifelong socioeconomic partnership—and applying it to people who have never chosen that, who had a free choice whether to choose it and who would be shocked to know that they are being treated as if they are married when they are not…[35]

3.30 Similarly, Mr Richard Egan of FamilyVoice Australia agreed that the Bill 'imposes on de facto couples…the assumption that they have entered into the same kind of union as a married couple'.[36]

3.31 In response to arguments that de facto couples make a deliberate choice not to be married, Ms Ruth Weston of the AIFS noted that:

> …people have different interpretations of the cohabiting relationship. Some would see it as a no-strings-attached relationship, others have not really thought about it and are just taking it one day at a time and others see it as a trial marriage.[37]

3.32 Dr Matthew Gray of the AIFS also observed that:

> …while there is general lack of quality data available about how cohabiting couples arrange their financial matters, the data that does exist suggests that cohabiting couples may have a different financial profile to married couples.[38]

3.33 Mr Egan of FamilyVoice Australia argued that 'in the absence of more understanding of how cohabiting couples dealt with financial matters, some caution should be exercised before this bill proceeds'.[39]

3.34 Professor Parkinson similarly believed that the Bill should be withdrawn until further research and consultation has been conducted as to:

> Whether the proposed laws discriminate against people in heterosexual de facto relationships who have chosen not to marry by depriving them of the fruits of that choice.[40]

3.35 Professor Parkinson explained further:

> …we have simply not asked the Australian people whether they want marriage to be treated the same as cohabitation, and we have not asked heterosexual de factos whether they want that. Most of the sociological

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35 *Committee Hansard*, 5 August 2008, p. 6.

36 *Committee Hansard*, 6 August 2008, p. 21.

37 *Committee Hansard*, 6 August 2008, p. 5.

38 *Committee Hansard*, 6 August 2008, p. 2.

39 *Committee Hansard*, 6 August 2008, p. 24.

40 *Submission 6*, pp 1-2; Mr Richard Egan, FamilyVoice Australia, *Committee Hansard*, 6 August 2008, p. 24, see also p. 23; and Shared Parenting Council of Australia, *Submission 22*, p. 2.

> evidence is against it. Most of the sociological evidence I have read suggests that there are quite significant differences between people who have chosen to marry or intend to marry and those who have not. What we are doing in this bill is wiping out all those differences and treating everybody as 'married'.[41]

3.36 In contrast, the Law Society of New South Wales (NSW Law Society) submitted that the Bill was consistent with community attitudes:

> Overall, the reform proposed by the de facto property settlement provisions is consistent with the changes in attitudes within the community reflected in the viewpoint that the law should treat the economic consequences of the breakdown of de facto opposite sex relationships and same sex relationships in the same way as the economic consequences of the breakdown of marital relationships.[42]

3.37 In this context, at least in terms of same-sex couples, it is noted that research and consultation conducted by the NSW Law Reform Commission indicated that members of the gay and lesbian community believed that same-sex relationships should be treated the same as marriages.[43]

3.38 In response to the suggestion that the Bill applies the principles of marriage to people who have chosen not to marry, the Department stated:

> The primary purpose of the marriage and de facto relationship property settlement regimes in Australia is remedial, addressing injustice if property held by couples at the end of their relationship is distributed according to their rights under the general law.[44]

3.39 Ms Natascha Rohr of WLSA also argued that 'this horse has already bolted, so to speak…in all states de facto relationships are in fact recognised presumptively'.[45]

3.40 Several witnesses also pointed out that de facto couples can 'opt out' of the Family Law Act by making a binding financial agreement, which can be done before, during or after the relationship.[46] Ms Heidi Yates of WLSA explained:

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41 *Committee Hansard*, 5 August 2008, p. 6.

42 *Submission 7*, p. 6 and see also p. 1.

43 NSW Law Reform Commission, *Relationships*, Report 113, June 2006, at pp 192-193; see also NSW Law Society, *Submission 7*, p. 8; Professor Patrick Parkinson, *Committee Hansard*, 5 August 2008, p. 6.

44 *Answers to questions on notice*, received 20 August 2008, p. 5.

45 *Committee Hansard*, 7 August 2008, p. 6.

46 See, for example, Professor Jenni Millbank, *Committee Hansard*, 5 August 2008, p. 11; Mr Ian Kennedy, Law Council, *Committee Hansard*, 6 August 2008, p. 15; Ms Heidi Yates, WLSA *Committee Hansard*, 7 August 2008, p. 6; and see also Attorney-General's Department, *Answers to questions on notice*, received 20 August 2008, p. 5.

> If it was always the intention of both parties not to be subject or treated in the same way as a married couple, many couples reach an agreement on what they think is fair and just given their joint understandings of the nature of the relationship and the intentions of the parties coming in. Some of them choose to formalise that in a binding financial agreement and others have that mutual understanding and are able to reach an agreement based on that.[47]

3.41 When questioned as to whether de facto couples would be aware of the need to enter into a financial agreement, Mr Kennedy of the Law Council told the committee that:

> My members from around the country tell me that that is certainly the case—that there are many, many queries at the moment, because of the publicity about the bill, as to when it is starting, whether they can have an agreement and what legislation they have to do it under. So there is certainly a lot of community awareness about it.[48]

3.42 Nevertheless, Professor Parkinson suggested that the Bill could be amended so that the provisions only apply where a de facto couple has a child, have made substantial contributions or are in a registered relationship:

> …we should treat people as married for property division and maintenance if they have had a child from the relationship; if they have registered their relationship, which means they have made a choice and they have some information about what the consequences of that are; or if they have made substantial contributions to the relationship which would not be recognised if they were not given rights under the Family Law Act.[49]

3.43 However, in response to this suggestion, the Attorney-General's Department pointed out that 'none of the State and Territory property settlement regimes apply only to de facto relationships where children are involved.'[50]

3.44 In an article in the *Sydney Morning Herald* published during the committee's inquiry, Professor Parkinson also detailed his concerns in relation to the differences between NSW's system for de facto couples and the federal family system for married couples:

> The big difference, in NSW at least, is that the courts only divide the property based on an assessment of the parties' contributions to that property (including contributions as a homemaker and parent). For married couples, the court also looks at the future needs of each partner and their financial resources…

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47 *Committee Hansard*, 7 August 2008, p. 6.

48 *Committee Hansard*, 6 August 2008, p. 15.

49 *Committee Hansard*, 7 August 2008, p. 7.

50 *Answers to questions on notice*, received 20 August 2008, p. 5.

> There are also big issues about property owned before the relationship began. The Family Court treats marriage as a socio-economic partnership and, the longer it lasts, the less weight it gives to whoever brought the property into the relationship. Yet that can be quite at odds with the intentions of people in de facto relationships…
>
> Add to that the delays, expense and uncertainty of the family law system.[51]

3.45 In relation to differences between the federal system and other states, Professor Parkinson told the committee that Victoria also applies different principles on the break up of a de facto relationship when compared to the regime proposed by the Bill.[52] However, the Department subsequently informed the committee that, in April 2008, Victoria passed the *Relationship Act 2008* (yet to be proclaimed), which would bring Victoria much closer to the principles of the Family Law Act.[53] Other states and territories, such as Queensland, Tasmania, WA and the ACT have regimes which are closer to the Family Law Act's regime for married couples.[54]

3.46 However, as Professor Millbank stated, 'it does not make sense to me to have different regimes operating'.[55] Similarly, the Department responded to Professor Parkinson's concerns about the differences between the Bill and state laws as follows:

> The desirability of uniformity in the laws applying across the States and Territories on property and spouse maintenance issues between de facto couples was one of the key considerations bearing on the references of power given by the States to the Commonwealth…
>
> Any single law, enacted by the Commonwealth pursuant to the State references, on financial matters between de facto couples will necessarily depart from one or more of the current regimes, where they vary from State to State.[56]

3.47 Several witnesses strongly disagreed with the arguments put forward by Professor Parkinson. These witnesses addressed Professor Parkinson's concerns by arguing that the Bill is a major improvement on the current system, in particular because the proposed system is simpler, cheaper, less traumatic, offers greater

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51 Professor Patrick Parkinson, "De facto choice deserves respect", *Sydney Morning Herald*, Monday 4 August 2008, p. 13; see also Professor Parkinson, *Committee Hansard*, 5 August 2008, p. 7.

52 Attorney-General's Department, *Answers to questions on notice*, received 20 August 2008, p. 5. Professor Patrick Parkinson, *Committee Hansard*, 5 August 2008, p. 7.

53 Attorney-General's Department, *Answers to questions on notice*, received 20 August 2008, p. 5.

54 Attorney-General's Department, *Answers to questions on notice*, received 20 August 2008, p. 5. Professor Patrick Parkinson, *Committee Hansard*, 5 August 2008, p. 7; see also Ms Natascha Rohr, WLSA, *Committee Hansard*, 7 August 2008, p. 6; Professor Jenni Millbank, *Committee Hansard*, 5 August 2008, p. 11.

55 *Committee Hansard*, 5 August 2008, p. 11 – and see further for Professor Millbank's explanation of the historical reasons for the differences in the NSW system.

56 *Answers to questions on notice*, received 20 August 2008, p. 5.

privacy,[57] and protects vulnerable parties in de facto relationship breakdowns, particularly children.[58]

3.48 For example, Mr Ian Kennedy of the Law Council described the arguments raised by Professor Parkinson as 'drawing a very long bow indeed'. In his view, the Bill's aim:

> …is to protect the interests of people who are disadvantaged as a result of being in a relationship…[and to] provide a conduit to unravel the more complex issues that arise from a domestic relationship where one person is disadvantaged from the breakdown of the relationship and their rights are not recognised and their entitlements, in terms of their contribution, or the impact of that relationship on their financial future are not currently recognised.[59]

3.49 Mr Kennedy gave an example of case he was currently involved in:

> I am acting for a woman who is 58 years old. She has been in a relationship for almost 18 years. All of the assets are in the male's name. He is a very senior professional with a high earning capacity. She has managed his practice for much of that time and improved it significantly. But he has left the relationship. She is now 58 years old. She is unemployed because she cannot work in the practice any more. Her entitlement to a share of assets under state law is very uncertain indeed. So what we are doing tomorrow is trying to mediate that and to come to some agreed outcome. Again, to fight that sort of case in the Supreme Court would be a hideously expensive and time-consuming process for her. So there are two types: families that have children can be seriously disadvantaged; and older women in particular tend to be seriously disadvantaged.[60]

3.50 Professor Millbank described Professor Parkinson's arguments as a 'furphy':

> It makes absolute sense to put de facto and married couples in the same property regime. It does not remove people's choice; it protects the vulnerable party in an economic and emotional relationship...[E]conomic interdependence and dependence happens and should be recognised.[61]

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57 See especially s.121 of the Family Law Act, which restricts publication in relation to court proceedings under the Family Law Act. See also, for example, NSW Council for Civil Liberties, *Submission 11*, p. 2; Michael Smith and Warren Fuge, *Submission m3*, pp 1-2; *Submission j1*, p. 2.

58 See, for example, Mr Kassisieh, NSW Gay & Lesbian Rights Lobby, *Committee Hansard*, 5 August 2008, p. 2; Mr Corey Irlam, Australian Coalition for Equality, *Committee Hansard*, 6 August 2008, p. 26; Professor Jenni Millbank, *Committee Hansard*, 5 August 2008, p. 11; Mr Ian Kennedy, Law Council, *Committee Hansard*, 6 August 2008, p. 15; Ms Heidi Yates and Ms Natascha Rohr, WLSA, *Committee Hansard*, 7 August 2008, pp 2 and 6; see also Dr Matthew Gray and Dr Rae Kaspiew, AIFS, *Committee Hansard*, 6 August 2008, p. 4.

59 *Committee Hansard*, 6 August 2008, p. 15.

60 *Committee Hansard*, 6 August 2008, p. 13.

61 *Committee Hansard*, 5 August 2008, p. 11.

3.51 Professor Millbank also suggested that the federal family court system is actually 'cheaper, easier and simpler to use':

> The New South Wales system in particular is really antiquated and the process burden on parties is $20,000 or $30,000 to argue over very minor property matters. So the family law regime is a better one to use, a more streamlined one to use and the additional scope of the jurisdiction to separate superannuation is going to give you fairer results…[62]

3.52 In relation to Professor Parkinson's concerns about differences between NSW law and the federal family law system, the committee notes that the NSW Law Reform Commission, in its inquiry into the operation of the *Property (Relationships) Act 1984* (NSW), actually recommended that relevant provisions in that NSW legislation be amended to bring it into line with the Family Law Act.[63]

3.53 The committee further notes that HREOC, in its *Same-Sex: Same Entitlements* report considered the federal family law system, in particular the property division regime, to have a number of advantages over state regimes. In HREOC's view, one of these advantages was the Family Law Act's broader consideration of future needs as well as past contributions when making property adjustments. HREOC concluded that:

> …the federal property division regime covers a larger pool of the couple's shared assets, can divide such assets with a far greater degree of flexibility, and takes into account a wider range of factors and circumstances of the parties during and after the relationship in making any adjustments.[64]

3.54 Ms Natascha Rohr of the WLSA also outlined a number of reasons why a de facto party, including a more economically powerful party, might prefer the jurisdiction of the Family Court over state jurisdictions. This included:

- the availability of superannuation splitting in the Family Court – which may mean 'there would be no need to sell or split other assets for a just and equitable outcome to be entered into';
- reduced costs: 'because of the greater expenses of proceedings in state courts, particularly if there are also parenting proceedings on foot, it may be preferable even for the more financially strong party to pay a future needs component to their former partner rather than a similar amount in additional legal fees to lawyers';

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62 *Committee Hansard*, 5 August 2008, p. 11.

63 NSW Law Reform Commission, *Relationships*, Report 113, June 2006 – for example, recommendations 27-30, 35-39 and discussion in Chapters 7 and 10; see also Attorney-General's Department, *Answers to questions on notice*, received 20 August 2008, p. 5 for discussion on the differences between the NSW law and the regime proposed by the Bill.

64 HREOC, *Same-Sex: Same Entitlements* report, p. 273. A list of other advantages is also provided on this page.

- 'access to mediation and conciliation processes, which again could create a net saving despite the different substantive provisions with respect to future needs'; and
- 'the process of obtaining consent orders in the Family Court is far simpler and cheaper than in most state courts'. With access to a greater body of precedent couples might have a greater degree of certainty with respect to possible outcomes, which again could assist in negotiation when compared with the position in state courts around Australia.[65]

Definition of 'de facto relationship'

3.55 One of the key concepts in the Bill is the definition of 'de facto relationship' in proposed section 4AA, which includes both same-sex and opposite-sex couples.

3.56 Issues raised in relation to the definition included:

- consistency of the definition with other federal legislation;
- inclusion of same-sex couples;
- recognition of state and territory relationship registers;
- recognition of interdependent relationships; and
- other issues.

3.57 These issues are discussed further below.

Consistency with other federal legislation

3.58 The committee is currently inquiring into two other Bills: the Evidence Amendment Bill 2008 and the Same-Sex Relationship (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008 (Same-Sex Superannuation Bill) which contain definitions of 'de facto partner' and 'couple relationship' respectively. These definitions differ from the definition of 'de facto relationship' in this Bill. Concerns were expressed during the committee's hearings about consistency of the definition of 'de facto relationship' in this Bill and the other Bills currently before the committee, and indeed, with other federal legislation.

3.59 For example, the definition of 'de facto partner' in the Evidence Amendment Bill 2008 does not contain the criteria listed in paragraphs 4AA(2)(c) and (g) relating to (c) whether a sexual relationship exists and (g) whether the relationship is or was registered under a prescribed law of a state or territory.[66]

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65 *Committee Hansard*, 7 August 2008, p. 2.

66 For other differences in the definition, see further Attorney-General's Department, *Answers to questions on notice*, received 20 August 2008, p. 2.

3.60 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*. Again, these definitions are different to the definitions used in this Bill and the Evidence Amendment Bill 2008.

3.61 In answers to questions on notice, the Attorney-General's Department advised that:

> A range of other Commonwealth Acts contain definitions of terms other than 'de facto relationships' covering relationships including de facto relationships. Examples include:
>
> • s.995–1 of the *Income Tax Assessment Act 1997* (definition of 'spouse')
>
> • s.4B of the *Parliamentary Contributory Superannuation Act 1948* ('marital relationship')
>
> • s.4(2) to (6A) of the *Social Security Act 1991* ('member of a couple'), and
>
> • s.44-11 of the *Aged Care Act 1997* (definition of 'member of a couple', differently defined).[67]

3.62 Some witnesses 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'[68]), which could be inserted into the *Acts Interpretation Act 1901* to include to three 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.[69]

3.63 However, Associate Professor Miranda Stewart, of Melbourne Law School, observed that:

> 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

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67 *Answers to questions on notice*, received 20 August 2008, p. 3.

68 Note that this term is used in the Same-Sex Superannuation Bill.

69 *Submission j59*, p. 5; see also *Committee Hansard*: *Same-Sex Superannuation Bill*, 6 August 2008, p. 41; and Professor Jenni Millbank, *Committee Hansard*, 5 August 2008, p. 14.

> 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.[70]

3.64 In response to questioning on the reasons for the differences in the three bills before the committee, a representative of the Department responded that 'there are different public policy reasons behind the different tests'.[71] Another departmental representative further explained that the reason for the different definition in this Bill relates to the referral legislation from the states:

> Our legal advice was that there was a need to reflect in the definition that we put in the legislation a definition that was as similar as possible to the definition that was put within the references of power acts.[72]

3.65 A departmental representative explained that, for example, the *Commonwealth Powers (De Facto Relationship) Act 2003* (NSW) defines 'de facto relationship' as a marriage-like relationship (other than a legal marriage) between two persons.[73] The representative explained further that:

> What we are limited to is 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, for example, is in the definition.[74]

3.66 When pressed further, the representative repeated that:

> …our advice is that the definition that you have seen within the legislation now gives us the strongest link, if you like, constitutionally.[75]

3.67 In answers to questions on notice, the Department reiterated this reason – that is, the definition:

> …limits the application of the Commonwealth's new property settlement and spouse maintenance regime to relationships over which New South Wales, Queensland, Victoria and Tasmania have referred power to the relationships covered by each relevant State Reference Act. Each of the four States has referred power limited to particular matters arising on the

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

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

72 *Committee Hansard*, 7 August 2008, p. 12.

73 See subsection 2(3) and *Committee Hansard*, 7 August 2008, p. 12. Note also that other state referring legislation uses the same definition of de facto relationship: see for example, subsection 3(1) of the *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld) and the *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic). See also Attorney-General's Department, *Answers to questions on notice*, 20 August 2008, p. 2.

74 *Committee Hansard*, 7 August 2008, p. 13.

75 *Committee Hansard*, 7 August 2008, p. 13.

> breakdown of 'a marriage-like relationship (other than legal marriage) between two persons'.[76]

3.68 The committee also notes HREOC's submission that the definition of de facto relationship in the Bill is essentially the same as the model definition recommended in its *Same-Sex: Same Entitlements* report.[77]

Same-sex couples

3.69 Many submissions were particularly supportive of the inclusion of same-sex couples in the definition of 'de facto relationship' on the basis that it would remove discrimination against same-sex couples in the area of family law, and therefore implement aspects of the HREOC same-sex inquiry.[78]

3.70 Mr Graeme Innes stated that HREOC supported the definition of 'de facto relationship' contained in the Bill 'because it brings equality to same-sex and opposite-sex couples'.[79] As noted earlier, in HREOC's view, the definition of de facto relationship in the Bill is essentially the same as the model definition recommended in its *Same-Sex: Same Entitlements* report.[80]

3.71 Similarly, the Law Council commented that it was pleased that the rights of unmarried couples (including same-sex couples):

> …will now be able to be determined in specialist courts on a nationally consistent basis throughout the country rather than by a quirk of geography (dependent upon where they happen to live or where a disputed property is located) or as a consequence of gender.[81]

3.72 A standard submission provided to the committee received from 41 individuals stated:

> Allowing same-sex couples to have access to the Family Court will minimise the cost and trauma involved with a relationship breakdown, whilst increasing privacy of those undertaking proceedings. I strong[ly]

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76 Attorney-General's Department, *Answers to questions on notice*, 20 August 2008, p. 2.

77 *Submission 19*, p. 5.

78 See, for example, Let's Get Equal Campaign, *Submission 8*, p. 1; Office of the Anti-Discrimination Commissioner (Tasmania), *Submission 8*, p. 1; NSW CCL, *Submission 11*, pp 1-3; NSW Gay & Lesbian Rights Lobby, *Submission 14*, pp 6-7 and also Mr Kassisieh, *Committee Hansard*, 5 August 2008, p. 2; HREOC, *Submission 19*, p. 5; Law Council, *Submission 20*, p. 2; Victorian Gay & Lesbian Rights Lobby, *Submission 21*, p 2; Tasmanian Gay and Lesbian Rights Group, *Submission 24*, pp 3-4; *Submission j1*, p. 1; cf Lone Fathers Association (Australia), *Submission 13*, pp 2-3; Shared Parenting Council of Australia, *Submission 22*, pp 2 and 6.

79 *Committee Hansard*, 6 August 2008, p. 16.

80 *Submission 19*, p. 5.

81 *Submission 20*, p. 2.

> urge the Senate to support this inclusive reform for all defacto couples, including same sex couples.[82]

3.73 Lesbian and Gay Solidarity (LGS) Melbourne supported the Bill, describing it as a 'step forward', but expressed regret that same-sex couples were still not being treated as equals with married couples:

> …same-sex couples will still have to prove they are in a genuine de facto relationship by conforming to a set of standards listed in this Bill…It is still not equality with married couples despite a same-sex relationship being a loving partnership. Surely, the government needs to revise its objection to a legal document (officially recorded and similar to a marriage certificate) which unites a same-sex couple if they so wish.[83]

3.74 In contrast, the Shared Parenting Council of Australia claimed that the Bill was 'a clear attempt to advance the concept and realisation of same-sex marriage (de facto marriage) by legislative stealth'.[84]

Recognition of relationship registers

3.75 Proposed paragraph 2(g) of the definition of de facto relationship provides that one of the circumstances that a court may consider in determining whether or not a de facto relationship exists is 'whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship'.

3.76 Several submissions suggested that registered relationships should be treated as a completely separate category to de facto relationships, or at the very least, a registered relationship should be conclusive proof of a de facto relationship.[85]

3.77 For example, Mr Rodney Croome of the Tasmanian Gay and Lesbian Rights Group expressed the view that:

> …a registered relationship is neither a de facto relationship with a certificate nor marriage by another name. A registered relationship is a new kind of legally recognised relationship…when couples choose to enter into these formalised relationships, they are choosing to no longer to be considered a de facto couple. That would seem to be a mischaracterisation of their relationship.[86]

3.78 WLSA also suggested that the Bill should be amended to recognise the 'unique status of registered relationships'. WLSA argued that:

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82 *Submission j1*, p. 2.

83 *Submission 9*, p. 1.

84 *Submission 22*, p. 6.

85 See, for example, Mr Corey Irlam, Australian Coalition for Equality, *Committee Hansard*, 6 August 2008, p. 26; Mr Wayne Morgan, *Submission j59*; WLSA, *Submission 9*, p. 5.

86 *Committee Hansard*: *Same-Sex Superannuation Bill*, 6 August 2008, p. 37.

> …it is inappropriate that relationships which have been registered under a prescribed law of a State or Territory be subsumed back into the category of 'de-facto' relationships under federal law…[R]egistered relationships should be recognised as an independent, third category of relationship under federal law, along with marriage and de facto relationships.[87]

3.79 Alternatively, WLSA advocated that, at the very least, if a de facto relationship is registered under a state or territory scheme, this should be conclusive proof of a de facto relationship:

> This approach would promote certainty and reduce the court resources and legal costs that might otherwise be required to determine the legal status of the registered relationship.[88]

3.80 As noted earlier, Mr Wayne Morgan suggested that the ideal approach would be for the Commonwealth to insert an 'umbrella' term (such as 'couple relationship'[89]), into the *Acts Interpretation Act 1901*, which would treat a 'registered relationship' as a separate category to a marriage and a de facto relationship.[90] As a fallback position, Mr Wayne Morgan again 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.[91]

3.81 In response to suggestions that a registered relationship should be conclusive evidence of a de facto relationship, a representative of the Department informed the committee that its legal advice indicated that the Commonwealth does not have the power to make a registered relationship determinative of a de facto relationship due to the nature of the state referring legislation:

> …our advice is that the breadth of relationships that could be registered under state law means that they may be relationships that would not otherwise be regarded as a de facto relationship, and therefore our power does not extend that far.[92]

3.82 The representative further explained that:

> What the Commonwealth has done, in its view, is to extend to registered relationships a recognition, to the extent that it can, firstly, by making that a factor…[T]here are effectively two hurdles for someone to get through

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87 *Submission 9*, p. 5; see also Ms Heidi Yates, WLSA, *Committee Hansard*, 7 August 2008, p. 2.

88 *Submission 9*, p. 5; see also Ms Judy Harrison, *Submission 16*, p. 2 and Mr Wayne Morgan, *Submission j59*, p. 6.

89 Note that this term is used in the Same-Sex Superannuation Bill, albeit with different criteria to the definition in this Bill.

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

91 *Submission j59*, pp 6 and 8.

92 *Committee Hansard*, 7 August 2008, p. 19.

> before they get an order from the court. One is that they have a de facto relationship. The second is that they have either a de facto of two years, there are children of the marriage or unjust hardship, or there is a registered relationship. That is conclusive. Once you have got through the 'de facto definition', then a registered relationship is enough.[93]

3.83 In relation to proposed paragraph 2(g), LGS went further, asserting that the Federal Government should provide its own genuine same-sex relationship legal register which is the equivalent of the marriage licence, and that:

> As with hetero (different sex) couples who prefer not to marry but live together in a de facto relationship, there would be plenty of same-sex couples who would prefer to do the same. Just as many same-sex couples, though, would be committed to a licensed federal partnership. It is therefore unfair of the federal government to refuse them equality with a woman and man's married partnership.[94]

3.84 In contrast, FamilyVoice Australia objected to proposed paragraph 2(g) due to concerns about its impact on the status of marriage (as discussed elsewhere in this chapter).[95]

Interdependent relationships

3.85 Committee members questioned several witnesses on whether the definition of de facto relationship in the Bill should cover 'interdependent' relationships, such as two elderly friends or siblings living with, and caring for, each other.[96]

3.86 Ms Natascha Rohr of WLSA responded that they were 'not aware of' any need for legal advice or representation to women following the breakdown of interdependent relationships.[97] In response to further questioning, Ms Heidi Yates of WLSA told the committee that:

> WLSA supports the most flexible and broadest possible capacity for recognition of different types of relationships, both conjugal and caring relationships, whether people [choose] to marry or choose not to marry, and recognises that you need to have legal remedies available in situations where the breakdown of those relationships is likely to result in inequity…[W]e have focussed our submissions on conjugal de facto relationships, both same sex and opposite sex, simply because that is where our expertise lies. In our experience the greatest need has come from those

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93 *Committee Hansard*, 7 August 2008, p. 19. See also proposed section 90SB.

94 *Submission 9*, p. 2.

95 *Submission 10*, pp 8-9; see also Mr Richard Egan, FamilyVoice Australia, *Committee Hansard*, 6 August 2008, p. 21.

96 As outlined in chapter 2, proposed paragraph 4AA(1)(b) of the definition requires that the persons must not be related by family.

97 *Committee Hansard*, 7 August 2008, p. 4.

> groups, but that would not stop us, of course, from supporting recognition of interdependent relationships.[98]

3.87 However, Ms Rohr warned that people in interdependent relationships may not necessarily want to be recognised in federal law – for example, they may be 'horrified to know that their social security payments could be impacted upon by being considered interdependent'.[99]

3.88 HREOC considered the issue of 'interdependent' relationships in its *Same-Sex: Same Entitlements* report, and concluded that interdependent relationships should be dealt with separately.[100]

3.89 The committee notes that this issue also came up in its inquiries into the Same-Sex Superannuation Bill and the Evidence Amendment Bill 2008. In relation to this Bill, the Department's advice was that the definition in this Bill is restricted by the referral legislation from the states. As the EM states, paragraph 4AA(1)(b) of the definition of 'de facto relationship' – which excludes persons related by family – is derived from the definition of the term 'de facto relationship' in the state reference legislation, which does not include caring relationships.[101]

Other issues with the definition

3.90 Submissions also raised other issues with the definition of 'de facto relationship' in proposed section 4AA.

3.91 For example, the NSW Gay & Lesbian Rights Lobby believed that the definition should be amended to clarify that two people may still be in a de facto relationship if they temporarily separate.[102] Mr Ghassan Kassisieh pointed out that the model definition of 'de facto relationship' recommended in the HREOC *Same-Sex: Same Entitlements* report contained a provision stating that 'two people may still be in a de facto relationship if they are living apart from each other on a temporary basis'.[103] He explained further that this proposed amendment would 'clarify that if a longer

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98 *Committee Hansard*, 7 August 2008, p. 5.

99 *Committee Hansard*, 7 August 2008, p. 5.

100 HREOC *Same-Sex: Same Entitlements* report, p. 69 and see further pp 67-69 for the reasons behind this conclusion. See also discussions in relation to the interdependent category of relationship during hearings on the Same-Sex Superannuation Bill: eg: Mr Graeme Innes, Human Rights Commissioner, HREOC, *Committee Hansard: Same-Sex Superannuation Bill*, 6 August 2008, p. 24; see also, for example, Tasmanian Gay and Lesbian Rights Group, *Submission 24*, pp 4-5; Mr Wayne Morgan, *Submission j59*, pp 6 and 8.

101 p. 11; see also Attorney-General's Department, *Committee Hansard*: *Evidence Amendment Bill 2008*, 7 August 2008, p. 16; Mr Wayne Morgan, Australian Coalition for Equality, *Committee Hansard*: *Same-Sex Superannuation Bill*, 6 August 2008, p. 41.

102 NSW Gay & Lesbian Rights Lobby, *Submission 14*, p. 11.

103 *Committee Hansard*, 5 August 2008, p. 5; and see paragraph 4.6.2(b)(5) of the model definition at p. 80 of the HREOC *Same-Sex: Same Entitlements* report.

relationship does separate in the middle it should not be treated as two; it should be treated as one'. He also observed that this suggestion reflects the current common law approach in NSW and the position in WA.[104]

3.92 The Department responded to this suggestion as follows:

> While the concept of two persons 'living together' or who 'live together' is contained within the definitions of the relationships to which the de facto property settlement legislation of five States (NSW, Qld, Victoria (*Property Law Act 1958*), WA and SA) applies, none of the definitions contain a provision stating that they may still be in a de facto relationship if they temporarily separate.
>
> Two cases decided under the NSW legislation separations (*Hibberson v George* (1989) DFC 95-064 and *Mao v Peddley* (2002) DFC 95-249) indicate that courts have not had any particular difficulty with the issue of temporary separation, and that persons can continue to live together through occasional separations, for example, because of work responsibilities, holidays taken separately or periods in hospital.[105]

3.93 LGS suggested that the definition should be amended to provide that a de facto relationship can exist even if one or both of the persons is/are transsexual/transgender or in the process of realignment.[106] However, in response to a question on notice on this issue, the Department confirmed that:

> A de facto relationship can exist even if one or both of the persons are transsexual, transgender or in the process of realignment. The sex of that person or those persons will be determined in accordance with the principles enunciated in the Full Family Court of Australian decision in *In Re Kevin (Validity of marriage of transsexual)* (No 2) [2003] FamCA 94. The sex of the person will be that given at birth or, in the case of post-operative transsexuals, as men or women in accordance with their sexual reassignment.[107]

3.94 FamilyVoice Australia submitted that the definition of de facto relationship is vague and flawed and that it would be difficult to establish the existence of a de facto relationship, which could in turn lead to 'grave injustices' and leave the provisions 'open to fraudulent claims'.[108] FamilyVoice Australia was particularly concerned with paragraph 4AA(5)(b), which provides that 'a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship',

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104 *Committee Hansard*, 5 August 2008, p. 5.

105 *Answers to questions on notice*, received 20 August 2008, p. 6.

106 *Submission 9*, p. 2.

107 *Answers to questions on notice*, received 20 August 2008, p. 6.

108 *Submission 10*, pp 6-7; see also Mr Richard Egan, *Committee Hansard*, 6 August 2008, p. 21.

which in turn could undermine the status of marriage in Australia. FamilyVoice Australia felt that this provision condones adultery and polygamy.[109]

3.95 Others, however, were very supportive of paragraph 4AA(5)(b). For example, the NSW Gay & Lesbian Rights Lobby argued that a significant number of people in de facto relationships were still married, and that 'it is important that the de facto definition recognises the diversity of people and relationships which may come before the court'.[110]

3.96 Similarly, Ms Heidi Yates of WLSA argued that this provision 'reflects the reality of people's lives'. She told the committee that WLSA's clients often found themselves in circumstances where a de facto partner had separated from their married spouse but has 'just never got around to divorcing'. She told the committee that:

> Those cases are incredibly complex, because it could be that the first partner, the spouse, could make claims…At present when those situations arise it may be that they are caught in two proceedings, one in the Family Court and one in their local Supreme Court. The complexity of running two cases in that regard, compared with the current bill which provides for the court to take account of the circumstances of all the parties in one room…means that there is a much higher likelihood of a fair and just outcome than the present situation...[111]

3.97 Ms Yates further pointed out that:

> There is nothing preventing de facto relationship proceedings being brought in Supreme Courts when one of the parties was at the time of the de facto relationship still married. The difference will be a practical difference. It will be the difference that both proceedings can be heard in one court and perhaps even in one proceeding.[112]

3.98 Once again, the Department advised that this aspect of the definition reflected the state referring legislation. For example, a representative of the Department told the committee that the NSW referring legislation:

> …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.[113]

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109 *Submission 10*, p. 7; also Mr Richard Egan, *Committee Hansard*, 6 August 2008, pp 21 and 24.

110 *Submission 14*, p. 10; see also NSW Council for Civil Liberties, *Submission 11*, p. 2.

111 *Committee Hansard*, 7 August 2008, pp 7-8.

112 *Committee Hansard*, 7 August 2008, p. 8.

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

Definition of the 'child of a de facto relationship'

3.99 Another major concern related to the Bill's approach to the definition of 'child of a de facto relationship', and particularly the relationship between this definition and the existing section 60H of the Family Law Act.[114]

3.100 As outlined in chapter 2, proposed paragraph 90RB(1)(c) defines 'child of a de facto relationship' to include a child who is a child of the parties to the de facto relationship under the existing subsection 60H(1) of the Family Law Act.

3.101 Section 60H makes presumptions about who are the 'parents' of a child born as a result of assisted reproductive technology (ART) for the purposes of the Family Law Act. Section 60H effectively recognises a birth mother and the male partner of a birth mother as parents. However, a female partner of the birth mother (lesbian co-mother) and a male partner of a birth father (a gay co-father) are not considered to be parents. As HREOC pointed out in its *Same-Sex: Same Entitlements* report, a child born to a same-sex couple will often have only one legal parent for the purposes of the Family Law Act.[115]

3.102 Proposed subsection 90RB(3) of the Bill provides that subsection 60H(1) applies to same-sex de facto couples in a corresponding way to the way in which it applies to opposite-sex de facto couples. The EM states that 'this provision extends the application of subsection 60H(1) to both opposite-sex and same-sex de facto couples'.[116]

3.103 However, during the committee's inquiry, proposed subsection 90RB(3) was variously described as 'convoluted',[117] 'illogical and iniquitous',[118] and 'unduly complex'.[119] In particular, several submissions pointed out that it would mean that lesbian co-parents would be recognised under the Family Law Act, but only in relation to property matters and not matters regarding children.[120] Or, as the NSW Gay & Lesbian Rights Lobby submission put it:

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114 See especially Professor Jenni Millbank, *Submission 5*; HREOC, *Submission 19*, pp 6-10; and NSW Gay & Lesbian Rights Lobby, *Submission 14*, pp 12-19.

115 See further HREOC *Same-Sex: Same Entitlements* report, pp 90-94, 274 and HREOC, *Submission 19*, p. 9.

116 p. 23.

117 Mr Graeme Innes, Human Rights Commissioner, *Committee Hansard*, 6 August 2008, p. 16.

118 Professor Jenni Millbank, *Submission 5*, p. 2; see also HREOC, *Submission 19*, p. 9.

119 Association Professor Miranda Stewart, *Submission 25*, p. 7.

120 See, for example, HREOC, *Submission 19*, pp 7 and 9; also Mr Graeme Innes, Human Rights Commissioner, *Committee Hansard*, 6 August 2008, p. 16; Professor Millbank, *Submission 5*, p. 2 and *Committee Hansard*, 5 August 2008, p. 9.

> …lesbian co-mothers will only be mothers for the purposes of property-related proceedings but not for the purposes of being mothers![121]

3.104 HREOC was concerned that 'this inconsistency will disadvantage same-sex couples when it comes to determining parental responsibility'.[122] As Mr Graeme Innes pointed out, 'in some cases property matters and issues dealing with children are inseparable; they are fundamentally connected'.[123]

3.105 Professor Jenni Millbank submitted that the Bill's approach to section 60H was its 'major failing'. Professor Millbank expressed the view that:

> It makes no sense to acknowledge the existence of a parent-child relationship for the purpose of property division but not for the purpose of child support or child maintenance, parental responsibility, or for decisions about time with children.[124]

3.106 Professor Millbank explained further during the committee's hearing:

> We have a quite crazy position where children are children for the purposes of assessing contributions—homemaker and care-giving contributions—through the course of a relationship. Children are children for the purposes of being assessed for future needs provision if one parent is the primary caregiver for the children after separation, but children are not children for the purposes of being children. They are not children for the purposes of parental responsibility or for the presumptions or guidelines in the division of time with children when parents separate. For lesbian couples who have children through ART, that is a completely unnecessary burden…[125]

3.107 Similarly, Mr Kassisieh of the NSW Gay & Lesbian Rights Lobby explained to the committee:

> So the mother is a mother for the purposes of who gets the house, who gets the car and the future needs of the children. She is not a mother to her children for the purposes of where the children will live and who the children will spend time with.[126]

3.108 Associate Professor Miranda Stewart similarly agreed that the approach to section 60H in this Bill is 'illogical':

> Why recognise for property division purposes but not for parental responsibility purposes that this couple is raising a child? It is a gap, I think,

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121 *Submission 14*, p. 13.

122 *Committee Hansard*, 6 August 2008, p. 16.

123 *Committee Hansard*, 6 August 2008, p. 16.

124 *Submission 5*, p. 2 and *Committee Hansard*, 5 August 2008, p. 9; see also HREOC, *Submission 19*, p. 9.

125 *Committee Hansard*, 5 August 2008, p. 9.

126 *Committee Hansard*, 5 August 2008, p. 5 and see also p. 2.

> in the bill, and I would submit that…it would be appropriate to extend that parenting presumption.[127]

3.109 She further observed that:

> The bulk of children of same-sex relationships at the moment, I think the statistics make clear, are born to and raised by lesbian couples. In most cases, obviously, there is donor insemination generating these new families. An appropriate and easy way to recognise all of those families would be to amend section 60H of the Family Law Act...[128]

3.110 HREOC had other concerns about the reliance of subsection 90RB(3) on section 60H of the Family Law Act. HREOC pointed out that the application of section 60H 'is uncertain due to judicial interpretation' – for example, different cases have found both that a donor father is not a parent and that a donor father is to be considered a parent.[129] HREOC also pointed out that extension of section 60H to same-sex couples does not ensure parental status for gay fathers whose child is born through a surrogacy arrangement.[130]

3.111 Similarly, Professor Millbank suggested section 60H 'has been crying out for amendment for the past 15 years' as it is 'confusing, inconsistent with state law, uncertain in operation and discriminatory'.[131]

3.112 Indeed, the committee heard that section 60H of the Family Law Act and the approach in this Bill is inconsistent with the majority of states and territories. The committee was told that in WA, the Northern Territory, the ACT, New South Wales and under proposed Victorian legislation, a female de facto partner of the birth mother is also accorded parental status.[132]

3.113 Some witnesses noted that it was possible for certain gay and lesbian co-parents to go 'through a complicated legal process to be recognised as parents under the law'.[133] That is, they can go to state courts, or apply to the Family Court in its cross-vesting jurisdiction to apply territory law, for recognition as a parent. They can then use section 69S of the Family Law Act, which provides that, where an order

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127 *Committee Hansard: Same-Sex Superannuation Bill*, 6 August 2008, p. 3.

128 *Committee Hansard: Same-Sex Superannuation Bill*, 6 August 2008, p. 3.

129 *Submission 19*, p. 7, referring to *Re Patrick* (2002) 28 Fam LR 579; *Re Mark* (2003) 31 Fam LR 162.

130 *Submission 19*, p. 6.

131 *Submission 5*, p. 2.

132 Professor Jenni Millbank, *Submission 5*, p. 2 and *Committee Hansard*, 5 August 2008, p. 9; Mr Ghassan Kassisieh, NSW Gay & Lesbian Rights Lobby, *Committee Hansard*, 5 August 2008, pp 2 and 4.

133 Mr Ghassan Kassisieh, NSW Gay & Lesbian Rights Lobby, *Committee Hansard*, 5 August 2008, p. 3.

has been made that someone is a parent in another court, this order is conclusively binding on the Family Court. However, it was argued that this is a costly and cumbersome legal process and not in the best interests of children.[134]

3.114 For example, Professor Millbank explained that:

> For intact lesbian couples, it is incredibly important that both parents have parental responsibility for their children. In all states and territories, if they are having kids through donor insemination at home or through a clinic or IVF, there is no legal father and there is one legal mother—the one who had the child. The other mother in that household does not have parental responsibility over her child, despite the fact that she is a functional and intended parent of that child and is caring for that child. That is terribly difficult for families while they are intact. Many lesbian mothers now go to the Family Court to seek orders by consent to get themselves parental responsibility. It is not as though the law has made that impossible; it has just made it very hard, expensive and available only to the people who have the gumption to pursue it.[135]

3.115 Professor Millbank further explained that the current section 60H causes problems in related provisions in the Family Law Act and related legislation.[136] For example, several witnesses pointed out that the definition of parent in the *Child Support (Assessment) Act 1989* (Cth) relies on the definitions in the Family Law Act. This causes further disadvantages to same-sex parents, which would not be removed by this Bill.[137]

3.116 Most submissions and witnesses suggested that a preferable approach would be to amend section 60H directly so that it is expressed in gender neutral language.[138] As Ms Heidi Yates of WLSA told the committee: 'no child should suffer discrimination because of the gender of the parents'.[139]

3.117 The Victorian Gay and Lesbian Rights Lobby supported the 'limited extension of section 60H' in the Bill, but urged that its application be extended 'to all

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134 Mr Ghassan Kassisieh, NSW Gay & Lesbian Rights Lobby, *Committee Hansard*, 5 August 2008, p. 3; see also Professor Jenni Millbank, *Committee Hansard*, 5 August 2008, p. 10; referring to *Kemble & Ebner* [2008] FamCA 579 (28 May 2008).

135 *Committee Hansard*, 5 August 2008, p. 9.

136 *Submission 5*, pp 3-4; see also NSW Gay & Lesbian Rights Lobby, *Submission 14*, p. 13.

137 *Submission 19*, p. 4; see also Professor Jenni Millbank, *Submission 5*, pp 3-4; and NSW Gay & Lesbian Rights Lobby, *Submission 14*, p. 13; and Mr Graeme Innes and Ms Kate Temby, HREOC, *Committee Hansard*, 6 August 2008, pp 17-18

138 Professor Jenni Millbank, *Submission 5*, p. 2; HREOC, *Submission 19*, p. 7; see also NSW Gay & Lesbian Rights Lobby, *Submission 14*, pp 12-19 and Mr Ghassan Kassisieh, *Committee Hansard*, 5 August 2008, pp 2 and 4; Associate Professor Miranda Stewart, *Submission 25*, p. 7.

139 *Committee Hansard*, 7 August 2008, p. 3.

circumstances to ensure that children of same-sex couples are protected without limitation like every other child in Australian families'.[140]

3.118 Professor Millbank suggested that section 60H also needs to be amended to 'make it clear how 60H fits into the Family Law Act as a whole'.[141] In addition to amending section 60H, Professor Millbank considered that the definition of 'parent' in section 4 of the Family Law Act should also be amended.[142]

3.119 However, the Human Rights Commissioner, Mr Graeme Innes, pointed out that, even if section 60H were amended to use gender neutral language, 'there will be no protection of a child born through a surrogacy agreement to gay fathers'. Currently, a gay co-father of a child born following an ART procedure is not considered to be a parent under Part VII of the Family Law Act.[143] Mr Innes suggested that an amendment of section 60H would need to be accompanied by 'uniform reform of state surrogacy laws'. In the absence of such reform, HREOC's preferred approach was the 'more inclusive definition' of child as a 'product of a relationship' contained in the Same-Sex Superannuation Bill.[144]

3.120 In contrast, Professor Millbank felt that the definition of child as a 'product of a relationship' in the Same-Sex Superannuation Bill was a mistake and should not be used elsewhere.[145] Professor Millbank was concerned that there is a range of different definitions of child across federal legislation. She suggested a 'quick and dirty' audit of federal legislation with a view to developing a 'uniform, simple definition', that is:

> …a simple conceptual basis of the parent-child relationship that is put into either the Family Law Act or the Acts Interpretation Act and then mirrored out to all the other acts. So every other act could say that 'parent' or 'child' means the definition in the Family Law Act or the Acts Interpretation Act. I think it is time we did that. I do not think it is that hard a thing to do. That is what I would like to see come out of some of this process, rather than this kind of ad hoc approach of: 'Oops, we've got this problem. We've got some people who are left out. Let's toss in another thing.'[146]

3.121 Professor Millbank agreed that there would still then need to be reform of surrogacy laws. She acknowledged that:

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140 *Submission 21*, p. 2; see also NSW Law Society, *Submission 7*, p. 2.

141 *Submission 5*, p. 2 and *Committee Hansard*, 5 August 2008, p. 10.

142 *Submission 5*, p. 4 and *Committee Hansard*, 5 August 2008, pp 10-11.

143 HREOC, *Submission 19*, p. 9.

144 Mr Graeme Innes, *Committee Hansard*, *Committee Hansard*, 6 August 2008, p. 16; and see also Ms Kate Temby, HREOC, *Committee Hansard*, 6 August 2008, pp 17 and 19-20; and HREOC, *Submission 19*, pp 4 and 9.

145 *Committee Hansard: Same-Sex Superannuation Bill*, 6 August 2008, p. 14.

146 *Committee Hansard*: *Same-Sex Superannuation Bill*, 6 August 2008, p. 14; see also p. 15.

> HREOC and I have disagreed a little about this. They favour the 'product of the relationship' category because they are concerned about the coverage of gay men who have children through surrogacy…I do not want to exclude gay men who have children through surrogacy, but there are issues with how they have children. The issues around consent and so on are the very same issues that heterosexual families who have children through surrogacy have, and that should be reformed through the reform of surrogacy law… [T]he issues are very similar and should be dealt with across the board rather than through ad hoc messing with the existing presumptions.[147]

3.122 Similarly, Mr Kassisieh of the NSW Gay & Lesbian Rights Lobby also suggested that 'where gay men have children there needs to be other types of reform, particularly in surrogacy'.[148] Ms Kassisieh and Ms Gray noted that surrogacy reform was needed in the context of heterosexual couples as well, and that this issue was perhaps outside the scope of this Bill.[149]

3.123 When questioned by the committee as to why section 60H of the Family Law Act had not been directly amended by the Bill to use gender neutral language, a representative of the Department responded:

> …in relation to the issue of parentage presumptions more generally the Commonwealth's position is that it is currently considering a request by state and territory ministers to consider amending subsection 60H of the Family Law Act to allow children of same sex relationships to be recognised as a child of the relationship for the purpose of the section.[150]

Burden on the Family Court

3.124 Many submissions were concerned that extending the Family Law Act to opposite and same-sex de facto couples would increase the workload of the Family Court. This was one of the objections raised by those opposed to the Bill — that it would increase the burden on the 'already overstretched' Family Court.[151]

3.125 Even those who supported the Bill, such as WLSA, were concerned that the Bill, if passed, would 'substantially increase demand in the family law system', including demand on the courts and community-based family dispute resolution

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147 *Committee Hansard: Same-Sex Superannuation Bill*, 6 August 2008, p. 15.

148 *Committee Hansard*, 5 August 2008, p. 4.

149 *Committee Hansard*, 5 August 2008, p. 4.

150 *Committee Hansard*, 7 August 2008, p. 14; see also Standing Committee of Attorneys-General, *Communiqué*, 25 July 2008, paragraph 2.c, available at: http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2008_ThirdQuarter_25July2008-Communique-StandingCommitteeofAttorneys-General (accessed 13 August 2008).

151 See, for example, *Submission f1*, p. 1.

services (FDR), Family Relationship Centres and other FDR providers. It also believed that:

> …there is likely to be a substantial increase in the proportion of de facto and registered couples who will consider using the courts to resolve their disputes. This is because parties may have more confidence in the family law system and more to gain from the range of expert services and outcomes available under the Act, in comparison to those available in state and territory courts.[152]

3.126 Ms Heidi Yates of WLSA was further concerned that:

> In WLSA's experience, a large number of opposite sex de facto couples who are separating and looking at property settlements simply do not pursue proceedings in their local, state or Supreme Court because of the expense, the complication and the lack of certainty in terms of the limited precedents available. We are concerned that not only matters that are currently in state and Supreme Courts transfer across but perhaps an increased volume of cases will want to be using the Family Court processes, which are more efficient and which provide for mediation and conciliation. The volume overall across both courts will in fact increase.[153]

3.127 WLSA submitted that the government should allocate appropriate resources to the federal family law system to ensure that waiting times and delays are minimised and that 'all parties can access dispute resolution and obtain the requisite FDR certificates in a timely way'.[154]

3.128 As noted in Chapter 2, the Financial Impact Statement in the EM states that:

> The Bill will confer additional jurisdiction on federal courts and the Government will monitor, in consultation with the courts, the impact of the new jurisdiction created by the Bill. Additional resources were provided to the courts in the 2007-08 Budget to deal with the increased workload.[155]

3.129 A representative of the Department also confirmed that:

> …there will be four additional magistrates made available to the Federal Magistrates Court and one additional Family Court judge to deal with the additional workload.[156]

3.130 The consultation statement in the EM also states that the Family Court of Australia and the Federal Magistrates Court of Australia were consulted about the financial impact of additional workload generated by the proposed amendments.[157]

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152 *Submission 9*, p. 6.

153 *Committee Hansard*, 7 August 2008, p. 2.

154 *Submission 9*, p. 6.

155 p. 3.

156 *Committee Hansard*, 7 August 2008, p. 14.

Other legal and drafting issues

3.131 Some submissions raised a number of other legal and drafting issues in relation to specific provisions of the Bill. For example, the Law Council stated that, while it strongly supported the policy objective of the Bill:

> …there are a number of areas where the drafting could be improved to provide greater clarity and to rectify what are largely technical defects which may lead to unintended consequences or unnecessary complication.[158]

3.132 Both the Law Council and the NSW Law Society called for the Family Law Act to be renumbered. The Law Council submitted that its provisions should be rearranged in a 'more logical and accessible form':

> As a result of numerous amendments over 30 years the structure and numbering in the Act have become unwieldy and unnecessarily complicated and increasingly difficult to navigate for experienced practitioners let alone the general public.[159]

3.133 The NSW Law Society similarly suggested that the general structure of the Bill is not 'user friendly' and that it was a 'missed opportunity' to renumber the Family Law Act 'to avoid having numbers which have triple letters after them'.[160]

3.134 Other drafting issues raised are discussed further below.

Transitional arrangements

3.135 The transitional provisions in Division 2 of Part 2 of Schedule 1 provide that the new Act will not apply to de facto relationships which broke down before commencement. Ms Judy Harrison of the Australian National University's College of Law described these provisions as 'very harsh'. Both Ms Harrison and WLSA suggested that de facto couples should be able to 'opt in' to the new Act by mutual agreement where their relationship breaks down before commencement and their maintenance or property matters have not been finalised before commencement.[161]

3.136 The Department responded to this suggestion as follows:

> The application of the Bill to relationships that have already broken down provides a clear test relating to the relationships to which the new regime

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157 p. 3.

158 *Submission 20*, p. 2.

159 *Submission 20*, pp 3-4 and see also Mr Kennedy, *Committee Hansard*, 6 August 2008, p. 10.

160 *Submission 7*, p. 1.

161 *Submission 9*, p. 5; see also Ms Judy Harrison, *Submission 16*, pp 4-5 and Ms Natascha Rohr, WLSA, *Committee Hansard*, 7 August 2008, p. 2 for reasons as to why couples might prefer to submit to the jurisdiction of the Family Court.

> will apply. It also reflects the same approach taken by each State and Territory, with the exception of the Northern Territory, when its property settlement regime was introduced. The suggestion that couples should be able to 'opt in' to the new regime by mutual agreement, particularly where they 'opt in' for an adjudicated determination of issues between them, would need to be accompanied by safeguards, to ensure informed choice and also to protect those in an unequal bargaining position.[162]

3.137 The committee notes that WLSA and Ms Harrison did suggest a safeguard requirement that an eligible party certify in writing that they have given informed consent after receiving independent legal advice.[163] WLSA and Ms Harrison also state that no time limit would be necessary on this 'opt in' arrangement, as a 2 year limit will effectively be imposed by another item in the Bill:

> If the opt in provision is included, it would not be necessary to limit this to parties whose relationship ended within a specified time before commencement because this is already achieved by item 36 [of Schedule 1] which would amend section 44 of the Act. The new section 44 would in effect provide that an application can be made to the court within a period of 2 years from the date the relationship ended and an application can only be made after that date if the court grants leave based on hardship or inability to support themselves.[164]

3.138 The NSW Law Society was concerned about the impact of section 90RC (which deals with the relationships with state and territory laws) and the transitional provisions[165] on the validity of agreements made before the commencement of the Bill. The NSW Law Society pointed out that many parties have entered into agreements under NSW law. It was also concerned that the Bill should include a specific provision to ensure that a party will not be able to set aside such agreements 'simply because the legislation has changed'.[166]

3.139 The Department noted the NSW Law Society's concerns, but responded that:

> The Law Society of NSW in its submission to the Committee suggests that the ground in new section 90UM(1)(f) might apply to set aside an agreement made under NSW law. It is difficult to see how a change in the law, subsequent to the making of an agreement, about how property settlements between de facto couples are determined, would make it impracticable to carry it out. New section 90UM(1)(f) is in equivalent terms to sections 90K(1)(c) and 79A(1)(b) of the Family Law Act 1975, applying to binding financial agreements and property alteration orders between married couples. The Department notes that the test of impracticability in

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162 *Answers to questions on notice*, received 20 August 2008, p. 7.

163 Ms Judy Harrison, *Submission 16*, p. 4; WLSA, *Submission 9*, p. 6.

164 WLSA, *Submission 9*, p. 6 and Ms Judy Harrison, *Submission 16*, pp 4-5.

165 See item 93 in Part 2 of Schedule 1.

166 See further *Submission 7*, pp 3 and 10.

> section 79A(1)(b) of the Act has been discussed in cases before the Family Court of Australia… [167]

Residence requirements

3.140 Proposed section 90SD sets out the geographical requirements in relation to maintenance orders. The NSW Law Society was concerned about the requirement in paragraph 90SD(1)(b)(ii) that both parties to the de facto relationship were ordinarily resident in a participating jurisdiction during at least a third of the de facto relationship. The NSW Law Society submitted that:

> …the reference to one third rather than a substantial period may lead to situations where parties are unable to [avail] themselves of this legislation because of their relationship being conducted across several states. People have become increasingly mobile. By referring to a substantial period rather than a set period the Court still has discretion.[168]

3.141 The Department explained the reasons for the approach taken in proposed section 90SD as follows:

> The residence requirement in the Bill provides a clear test, while the discretion implicit in the test suggested by the Law Society of NSW would not encourage parties to settle outside litigation. The geographical connection in section 90SD reflects the requirements under the property settlement legislation of most jurisdictions (NSW, Victoria, WA, ACT, NT and Norfolk Island). The 'substantial period' test applies in NSW, although couples are taken to satisfy the test if they have lived together in the State for one third of their relationship. SA requires couples to have lived in the State for the whole or a substantial part of the period of their relationship. Queensland and Tasmania do not have a residence requirement.[169]

3.142 A similar issue was identified by the Law Council in relation to proposed section 90UA, which provides that a financial agreement can only be made 'if the spouse parties are ordinarily resident in a participating jurisdiction when they make the agreement'. The Law Council pointed out that this requirement seems 'unduly restrictive and confusing':

> It is unclear whether the provision as drafted contemplates the requirement that both parties reside in the same participating jurisdiction; or whether they can be in separate jurisdictions; or if it is necessary for only one party to be in a participating jurisdiction.

3.143 The Law Council recommended that section 90UA be clarified, recognising that there may be restrictions contained in the power conferred by the referring

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167 See further *Answers to questions on notice*, received 20 August 2008, p. 7.

168 *Submission 7*, p. 3.

169 *Answers to questions on notice*, received 20 August 2008, p. 7.

legislation.[170] Ms Judy Harrison of the Australian National University's College of Law identified the same issue in relation to proposed section 90UA. She noted the contrast with other proposed provisions, such as proposed sections 90RG which refers to 'one or both' people being ordinarily resident in a participating jurisdiction. Ms Harrison suggested that the ambiguity could be resolved by inserting the words as underlined below:

> …are ordinarily resident in a participating jurisdiction, <u>being the same or a different participating jurisdiction</u>, when they make the agreement.[171]

Cessation of spousal maintenance

3.144 The Law Council noted that proposed section 90SJ provides that a maintenance order ceases to have effect upon the death or marriage of the party.[172] The Law Council commented that, under subsection 82(4) of the Family Law Act, maintenance orders for married couples cease on the re-marriage of the party (unless a court otherwise orders in special circumstances). The Law Council recommended that proposed section 90SJ be amended to provide that maintenance orders cease if a party re-partners by entering into another de facto relationship (unless a court otherwise orders in special circumstances) — in the same way that re-marriage is a terminating event for married couples.[173]

Duty of court to end financial relations

3.145 Proposed section 90ST relates to the duty of the court to end financial relations and avoid further proceedings between parties to the de facto relationship. The NSW Law Society submitted that there is a 'strong argument' that proposed section 90ST is 'superfluous'. This provision reflects the existing section 81 under Family Law Act. The NSW Law Society commented that 'family law academics have long doubted the public policy basis and need for s81'.[174]

Other drafting issues

3.146 The NSW Law Society also made some suggestions for technical amendments to the transitional provisions for 'consistency and clarity' and pointed out a possible typographical error in item 69 in proposed subsection 90MP(5).[175]

3.147 The Law Council also noted that it had identified various other technical issues in relation to a number of other provisions that it was working on with the

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170 *Submission 20*, p. 3.

171 *Submission 16*, p. 3.

172 See further subsections 90SJ(1) and (2).

173 *Submission 20*, p. 2; see also Mr Ian Kennedy, *Committee Hansard*, 6 August 2008, p. 14.

174 *Submission 7*, p. 5.

175 See further *Submission 7*, pp 7-9.

Department. This included a 'detailed list of the provisions which require clarification or correction'. However, Mr Ian Kennedy of the Law Council advised the committee that none of these were major issues.[176]

Constitutional issues: position of the states

3.148 As noted in Chapter 2, the Bill relies on referrals from the states to the Commonwealth. NSW, Victoria, Queensland and Tasmania have referred powers in this area to the Commonwealth, and the Commonwealth has the territories power in relation to the ACT, Northern Territory and Norfolk Island. Western Australia has not enacted referring legislation, but administers its own Family Court.

3.149 In relation to South Australia, which has also not referred any powers to the Commonwealth at this stage, a representative of the Department told the committee that 'the Attorney-General is still in discussion and consultation with the South Australian counterpart'.[177]

3.150 Mr Ian Kennedy of the Law Council noted that it would eventually like to see 'complete national consistency'. He gave the example of a current case he is working on where:

> …there is property in Darwin, Melbourne and rural New South Wales. At the moment, technically, for the person who does not control the property to get any share of it they need to be litigating in three different jurisdictions. That is just crazy. We do not want Western Australia hanging out there in the same position. We are a very mobile country; people move around a great deal. Indeed, when relationships break down they tend to move back interstate or to other parts of the country or perhaps out of the country.[178]

Western Australia

3.151 The WA Attorney-General, the WA Family Court and the Law Society of WA all queried why the Commonwealth had not taken up the opportunity to provide the WA Family Court with power to make superannuation splitting orders.[179]

3.152 The WA Attorney-General explained that the *Family Court Act 1997* (WA) enables de facto partners (both same-sex and opposite-sex) to use the WA Family Court in property and other disputes. The WA Family Court explained that the WA legislation 'effectively replicates almost all of the property provisions of the

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176 *Submission 20*, p. 3 and *Committee Hansard*, 6 August 2008, pp 9-11. Note that the Law Council undertook to provide on notice further details to the committee on the other technical issues it had identified. Unfortunately these had not been received at the time of writing.

177 *Committee Hansard*, 7 August 2008, p. 15 and also p. 18; see also Mr Ian Kennedy, Law Council, *Committee Hansard*, 6 August 2008, pp 11-12.

178 *Committee Hansard*, 6 August 2008, p. 14.

179 WA Attorney-General, *Submission 1*, p. 2; WA Family Court, *Submission 10*, p. 2; Law Society of WA, *Submission j24*, p. 2.

[Commonwealth] Family Law Act'.[180] The WA Attorney-General was pleased that the Bill would provide the same benefits to de facto couples in other Australian jurisdictions that 'WA legislation already provides to similar persons in this State'.[181]

3.153 However, the WA Attorney-General was concerned that the Bill does not implement WA's reference of powers to the Commonwealth in the *Commonwealth Powers (De facto Relationships) Act 2006* (WA). The WA Attorney-General explained that this law refers powers over superannuation matters arising out of the breakdown of de facto relationships (both same-sex and opposite-sex). The WA Attorney-General was concerned that, by not implementing the WA reference of power, WA de facto partners will be discriminated against, 'in comparison to those in other Australian jurisdictions in superannuation matters'.[182]

3.154 Similarly, the WA Family Court pointed out that the court is currently unable to make 'superannuation splitting orders' in cases involving de facto couples and that:

> State Parliament lacks the necessary constitutional authority to enact legislation that would allow the Court to make such orders and hence parties to de facto marriage relationships in this State do not have the flexibility afforded to married couples to resolve disputes in cases involving superannuation.[183]

3.155 The WA Family Court felt that the Bill's failure to deal with this issue is:

> …unfortunate as the passage of the proposed legislation affords what would appear to be a suitable opportunity to provide the Family Court of Western Australia with this additional jurisdiction.[184]

3.156 In response to questions on notice as to why the Bill does not deal with the reference of powers from WA, the Department explained that:

> Implementation of the narrower reference from WA would leave jurisdictional issues arising in 'cross-border' cases involving WA and any State outside the scheme, where different laws applying in those States will affect outcomes in cases…
>
> WA is not able, under its own de facto property settlement and spouse maintenance law, to oust the jurisdiction of the other States, as the Commonwealth is able to do, to the extent that it has power to do so.
>
> Implementation of the narrower reference from WA would also require duplication by WA of future amendments to the Commonwealth's regime relating to the making of orders altering interests in non-superannuation

180 *Submission 10*, p. 1.

181 *Submission 1*, pp 1-2.

182 *Submission 1*, p. 2; see also Law Society of WA, *Submission j24*, p. 2.

183 *Submission 10*, p. 1.

184 *Submission 10*, p. 2.

> property held by de facto partners. Otherwise, the Family Court of Western Australia, in proceedings between de facto partners with superannuation (as most couples will have), would need to take into account one set of considerations, under the *Family Law Act 1975*, in considering whether to make a superannuation splitting order, and another set of considerations, under WA law, in considering whether it is appropriate to make an order altering interests in their other property.[185]

Committee view

3.157 This Bill gives effect to a decision at the November 2002 meeting of the Standing Committee of Attorneys-General and is supported by many of the key stakeholders. The Bill also implements important aspects of the HREOC *Same-Sex: Same Entitlements* report. In this context, the committee strongly supports the inclusion of same-sex couples in the definition of 'de facto relationship' and considers that the removal of discrimination on the basis of sexuality in the family law system is long overdue. The committee commends HREOC for its excellent work in this area.

3.158 The committee considers that it is important to recognise the reality that increasing numbers of Australians are living in de facto relationships, and that there is a need to streamline legal processes for such couples if their relationship breaks down. It makes sense to provide a consistent national scheme to enable de facto couples to access the federal family law system for all proceedings, instead of the current process of federal court access for child-related matters and state and territory courts for financial matters. In turn, the committee agrees that this will reduce the costs and inconvenience for de facto couples, as well as reduce the administrative burden on the federal and state court systems. The committee considers that this is particularly important where there are children involved in the breakdown of a de facto relationship. The committee accepts that it is not the objective of this Bill to undermine the institution of marriage in any way.

3.159 For the above reasons, the committee supports the Bill and believes it should be passed as a matter of priority.

3.160 At the same time, the committee is mindful of concerns and suggestions for improvements in relation to the Bill. Some of the main concerns related to key definitions in the Bill – the definitions of 'de facto relationship' and 'child of a de facto relationship'.

3.161 The committee believes the definition of 'de facto relationship' contained in this Bill is broadly appropriate and notes in particular that the definition is largely consistent with the model definition proposed by HREOC. However, the committee acknowledges that there is an issue of the consistency of this definition with related definitions in other federal legislation, including other legislation currently being inquired into by the committee. In this context, the committee recognises the evidence

185 See further *Answers to questions on notice*, 20 August 2008, p. 4.

from the Department that the Commonwealth is limited in some respects in this Bill by the referring legislation from the states. For example, the committee respects the Department's advice that it did not have the power under the state referring legislation to make a relationship registered under state or territory law conclusive proof of the existence of a de facto relationship for the purposes of the definition in proposed section 4AA of the Bill. In any case, the committee imagines that a court would look very favourably upon such registered relationships when determining whether a de facto relationship exists.

3.162 However, the committee is troubled by the approach taken in the Bill to the definition of 'child' and the parenting presumptions currently contained in section 60H of the Family Law Act. While proposed section 90RB of the Bill is at least an improvement on the current situation, the committee is concerned that this approach still leaves room for discrimination and uncertainty. In particular, it does not seem to make sense for lesbian co-parents to be recognised under the Family Law Act only in relation to property matters and not matters regarding children. The committee therefore recommends that section 60H of the Family Law Act be directly amended to use more gender neutral language. Indeed, the Commonwealth is currently considering a request from state and territory Ministers to consider amending section 60H of the Family Law Act to allow children of same-sex relationships to be recognised as a child of the relationship for the purposes of this section.

3.163 The committee considers that this Bill is an ideal opportunity to make this amendment. However, the committee is aware that further reforms will still be required to remove all discrimination and uncertainty, particularly in the area of surrogacy. In this context, the committee notes that, until appropriate surrogacy reforms are realised, HREOC preferred the definition of 'product of the relationship' used in the Same-Sex Superannuation Bill 2008, which is also currently being considered by the committee.

3.164 In addition, the committee recognises the importance of consistency and uniformity across federal legislation. The committee notes, for example, suggestions that a consistent definition of 'de facto relationship' and 'child' be inserted into the *Acts Interpretation Act 1901* and/or the Family Law Act. For this reason, the committee recommends that the government review the definitions of 'de facto' or 'couple' relationship and related definitions, as well as definitions of 'child' and related definitions, including parenting presumptions, across all relevant federal legislation with a view to ensuring a consistent terminology is used wherever appropriate.

3.165 The committee also notes that the Law Council is liaising directly with the Department in relation to number of technical drafting issues which may need to be resolved in relation to the Bill. The committee hopes a sensible resolution of these issues can be reached in a timely manner, and that amendments will be made to the Bill where appropriate. In this context, the committee also recommends that the government renumber the Family Law Act in subsequent legislation in order to make it less complex and more user-friendly and accessible.

3.166 In relation to technical amendments put forward during the inquiry, the committee was persuaded by the suggestion that de facto couples should be able to 'opt in' to the new Act by mutual agreement where their relationship breaks down before commencement and their maintenance or property matters have not been finalised before commencement. This amendment would need to be accompanied by appropriate safeguards, such as a requirement that an eligible party certify in writing that they have given informed consent after receiving independent legal advice.[186] The committee notes that no time limit is required on this 'opt in' arrangement, as a 2 year limit will effectively be imposed by item 36 of Schedule 1 of the Bill.

3.167 Finally, the committee is mindful of concerns about the Bill's potential to increase the workload of the federal family court system. The committee is reassured that additional resources have been provided to the federal family courts in the 2007-08 Budget to deal with the increased workload. Nevertheless, the committee encourages the government to continue to monitor the family law system, including the impact of the new regime created by the Bill, and to continue to ensure that the federal family law system is adequately resourced and funded.

Recommendation 1

3.168 The committee recommends that the definition of 'child of de facto relationship' in proposed section 90RB of the Bill and the parenting presumptions in section 60H of the *Family Law Act 1975* be amended to allow children of same-sex relationships to be recognised as a child of the relationship for the purposes of the entire *Family Law Act 1975*. In making this recommendation, the committee recognises that the interests of the child must be of paramount consideration.

Recommendation 2

3.169 Without derogating from the independent and privileged status of marriage, the committee recommends that the Federal Government undertake a review of all federal legislation containing definitions of:

- **'de facto' and 'couple' relationship and 'de facto partner' and all related definitions; and**
- **'child' and 'parent', including parenting presumptions, and all related definitions;**

with a view to ensuring consistent concepts and terminology are used wherever appropriate.

Recommendation 3

3.170 The committee recommends that the Federal Government renumber the *Family Law Act 1975* in subsequent legislation.

186 See paras 3.135-3.137 of this chapter.

Recommendation 4

3.171 The committee recommends that the transitional provisions in the Bill be amended to enable de facto couples to 'opt in' to the new regime by mutual agreement, subject to appropriate safeguards, where their relationship breaks down before commencement and their property or maintenance matters have not been finalised before commencement.

Recommendation 5

3.172 Subject to the preceding recommendations, the committee recommends that the Bill be passed.

Senator Trish Crossin

Chair