CHAPTER 3

SAME-SEX DISCRIMINATION

> Superannuation is one of the main ways of saving for retirement. It is designed to provide financial security for individuals and their families in retirement; or when a person dies unexpectedly. Superannuation is often a person's largest asset apart from the family home. Most people expect that their superannuation entitlements will be inherited by a partner, children or other dependants. But for people in same-sex couples and families, this is not currently always the case.[1]

3.1 This chapter discusses the issue of same-sex discrimination in relation to key provisions of the Bill, including:

- same-sex discrimination in Commonwealth superannuation laws;
- Australia's international obligations regarding same-sex discrimination; and
- key provisions intended to eliminate same-sex discrimination in Commonwealth superannuation laws.

Same-sex discrimination in Commonwealth superannuation laws

3.2 Commonwealth superannuation (defined benefit) schemes currently provide reversionary benefits to married couples and opposite-sex de facto couples.[2] However, the primary eligibility criterion, 'marital relationship', does not include same-sex couples or their children.

3.3 Dr John Challis, convenor of the Comsuper Action Committee, described how such Commonwealth superannuation laws have affected him and his partner:

> I will be 80 in September. As a former ABC Senior officer I receive a Commonwealth Defined Benefit indexed pension, paid fortnightly. My partner Arthur Cheeseman is 76 and worked as a pharmacist under the Shop Assistant award, which did not include superannuation. If I die first he will not be entitled, under existing laws, to the 2/3 reversionary pension which a wife or heterosexual de facto partner would receive.
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> My partner and I have lived together since 1967 (over 40 years) and have always owned our residence in common and had joint bank accounts and mortgages. While we both worked we lived on Arthur's weekly cash wages

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1 Human Rights and Equal Opportunities Commission, *Same-Sex: Same Entitlements: National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits*, May 2007, p. 285.

2 The Commonwealth superannuation (defined benefit) scheme available to persons joining the public service after 1 July 2005 provides for same-sex couples and their children.

> so that my salary went into the bank to pay the mortgage and bills. I also paid extra money into superannuation so as to get the maximum pension. This means that my pension belongs to both of us. It is the core income we have to live on. If I predecease Arthur, before this new Bill is passed into law, he will lose this core source of income.[3]

3.4 Dr Challis's personal example illustrates the adversity and detriment experienced by same-sex couples in Commonwealth superannuation schemes. It also introduces an argument presented to the committee that the Bill is time critical.

> We are concerned that these changes happen as quickly as possible. There are people who have been struggling with this for a long time in their lives; there are people who have been affected as their partners die.[4]

3.5 The committee notes that various submissions and evidence requested that the Bill's operational date be backdated to 1 July 2008 (when Schedule 4 of the Bill was due to commence); 9 November 2007 (when the then Howard Government announced its election policy to recognise same-sex couples); or 22 June 2004 (when the Howard Government first announced its support for same-sex recognition in Commonwealth superannuation laws.)

3.6 There was considerable support for both the intent and provisions of the Bill. The main reason for this support was that there was no apparent reason to discriminate between opposite-sex and same-sex couples in the provision of reversionary pensions or death benefits to a surviving partner.

3.7 However, there were a number of submissions that opposed aspects of the Bill. The reasons for this opposition varied with some submissions objecting on social, religious or moral grounds. Many of these submissions considered that the provisions of the Bill would undermine the institution of marriage.

Australia's international obligations regarding same-sex discrimination

3.8 As detailed in chapter 2, the primary catalyst for the Bill was the HREOC *Same-Sex: Same Entitlements* report which found that Commonwealth superannuation (defined benefit) laws discriminated against same-sex couples and their families in breach of Australia's international obligations, namely, Article 26 of the International

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3 Comsuper Action Committee, *Submission 25*, pp 1-2. Also, see NSW Council for Civil Liberties, *Submission 20*, p. 2; and Ms Marita Linkson, Superannuated Commonwealth Officers' Association, *Committee Hansard*, Canberra, 7 August 2008, p. 1.

4 Reverend Elenie Poulos, Uniting Justice Australia, *Committee Hansard*, Sydney, 5 August 2008, p. 21. Also, see Ms Rosemary Budavari, Law Council of Australia, *Committee Hansard*, Sydney, 5 August 2008, p. 31; Ms Lisa Newman, CPSU, *Committee Hansard*, Sydney, 5 August 2008, p. 36; Dr John Challis, Superannuated Commonwealth Officers' Association, *Committee Hansard*, Canberra, 7 August 2008, p. 2; and Ms Patricia McCahey, *Submission m263*, p. 1.

Covenant on Civil and Political Rights (ICCPR), and Articles 2 and 3 of the Convention on the Rights of the Child (CRC).

3.9 Principle 13(a) of the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity is also relevant:

> States shall:
>
> (a) Take all necessary legislative, administrative and other measures to ensure equal access, without discrimination on the basis of sexual orientation or gender identity, to social security and other social protection measures, including employment benefits, parental leave, unemployment benefits, health insurance or care or benefits (including for body modifications related to gender identity), other social insurance, family benefits, funeral benefits, pensions and benefits with regard to the loss of support for spouses or partners as the result of illness or death.[5]

3.10 Several submissions referred to Australia's international treaty obligations. Representative of these views was that of Uniting Justice Australia (the justice and advocacy agency of the Uniting Church in Australia National Assembly), citing Article 26 of the ICCPR and Article 3(1) of the CRC:

> The current arrangements for superannuation death benefits and taxation treatment in the Acts proposed for amendment in the [Bill] do not meet Australia's international commitments…
>
> UN treaty bodies interpreting these provisions have agreed that the right to non-discrimination includes protection from discrimination on the grounds of sexual orientation…
>
> Accordingly, any superannuation or tax laws which exclude same-sex couples from entitlements and concessions available to heterosexual couples breach the right to equal protection of the law under the Conventions.[6]

3.11 The Human Rights Council of Australia considered it important for the Bill to be enacted with specific reference to Australia's international obligations.[7]

Key provisions intended to eliminate same-sex discrimination in Commonwealth superannuation laws

3.12 The Bill proposes to replace existing key terminology as part of the process of addressing same-sex discrimination in Commonwealth superannuation laws. 'Partner'

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5 The Yogyakarta Principles, Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, March 2006, Principle 13(a).

6 Uniting Justice Australia, *Submission 6*, pp 2- 3.

7 Human Rights Council of Australia, *Submission 21*, pp 1-2.

and 'couple relationship' will replace references to 'husband or wife' and 'marital relationship'. The definition of 'child' is also expanded.

3.13 The Bill does not propose to insert new definitions of 'de facto relationships' or 'de facto partners' into the affected Acts, notwithstanding that HREOC's preferred approach was to:

- retain current terminology;
- redefine current terminology to include same-sex couples; and
- insert new definitions of ‘de facto relationship’ and ‘de facto partner’ which include same-sex couples.[8]

3.14 It is important to note that HREOC, having critically examined the Bill, endorsed it as carrying out its recommendations.[9]

3.15 The following section of the report discusses the proposed new, or expanded, terminology used in the Bill in relation to:

- 'partner' and 'couple relationship'; and
- 'child'.

New definition of 'partner' and 'couple relationship'

3.16 A number of submissions and evidence agreed that the new definitions of 'partner' and 'couple relationship' will ensure that both same-sex and opposite-sex couples are included in the definition of a relationship for the purpose of the payment of reversionary pensions or death benefits.[10]

3.17 In addition, the Association of Superannuation Funds of Australia submitted that the provisions of the Bill will 'be capable of being administered by funds without undue complication.'[11]

3.18 Importantly, the Attorney-General's Department unequivocally stated:

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8 HREOC, 'Same-Sex: Same Entitlements: National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits', May 2007, p. 383.

9 Mr Graeme Innes AM, HREOC, *Committee Hansard*, Melbourne, 6 August 2008, p. 25; and HREOC, *Submission 34*, pp 6-8.

10 For example, HREOC, *Submission 34*, p. 5 & p. 7. HREOC noted that some Commonwealth superannuation legislation continues to discriminate on the basis of marital status: see HREOC, *Submission 34*, p. 8. Also, see Associate Professor Miranda Stewart, *Committee Hansard*, Melbourne, 6 August 2008, p. 1 and Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 7 August 2008, p. 24.

11 Mr Ross Clare, Association of Superannuation Funds of Australia, *Committee Hansard*, Sydney, 5 August 2008, p. 22.

> This new concept of couple relationships is not intended to change the treatment of married or opposite-sex de facto couples. It removes same-sex discrimination but does not change or re-define any other indicia of a relationship.[12]

3.19 HREOC agreed that the retention of the terminology of 'spouse' and 'eligible spouse' achieve this goal,[13] as did Associate Professor Miranda Stewart.

> This will ensure that the words 'husband' and 'wife' will apply only to a formally married opposite sex couple and will not be used to apply to other forms of de facto relationship (whether same sex or opposite sex). This exclusive use of 'husband and wife' for a married couple is accurate, simple and makes it clear that the reforms do not affect the status of a de jure married couple in Australia.[14]

3.20 However, the equal treatment, ease of administration, and clarity provided by these new provisions was not sufficient to persuade all submitters and witnesses that the Bill maintains the status quo of marriage and opposite-sex de facto couples.

The status of marriage

3.21 Many submissions expressed the view that in law marriage and the family are entitled to special recognition and protection,[15] and Article 16(3) of the Universal Declaration of Human Rights grounds this principle:

> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.[16]

3.22 In relation to the Bill, a range of submissions and evidence argued that the proposed terminology does not preserve the unique position afforded to marriage.

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12 Attorney-General's Department, *Submission 38*, p. 3. Also, see Ms Emily Gray, NSW Gay and Lesbian Rights Lobby, *Committee Hansard*, Sydney, 5 August 2008, p. 2.

13 HREOC, *Submission 34*, pp 6-7. Also, see Explanatory Memorandum, p. 6, pp 12-13, p. 18, and pp 23-24.

14 Associate Professor Miranda Stewart, *Submission 37*, p. 3.

15 For example, the Catholic Archdiocese of Adelaide, *Submission 26*, p. 5; FamilyVoice Australia, *Submission 3*, pp 2-3 & p. 7; and Australian Institute for Family Counselling, *Submission 17*, p. 1. There were also a few specific objections to the inclusion of same-sex relationships within the definition of 'couple relationship' alongside marital and opposite-sex de facto relationships: see for example, FamilyVoice Australia, *Submission 3*, p. 3 and Fatherhood Foundation, *Submission 39*, p. 1.

16 United Nations, Universal Declaration of Human Rights, Article 16(3) (Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948). Also, see Lutheran Church of Australia-Commission on Social and Bioethical Questions, *Submission 5*, p. 2.

3.23 The Australian Christian Lobby argued that the new terminology might create a presumption that all relationships are the same, thereby undermining the intent of the *Marriage Act 1961*:

> We are concerned that in removing any unjust discrimination that we do not set up a situation where we remove the terminology of marriage…Equal access for married, de facto and same-sex couples to benefits and entitlements can be achieved without eliminating marriage from Commonwealth law.[17]

3.24 Professor Patrick Parkinson agreed that there are 'good social reasons' for specially recognising marriage in law. Unlike Associate Professor Stewart, Professor Parkinson viewed marriage as 'almost entirely lost' in the Bill, adding:

> This is not the Bill in which to make a major social statement that the Government no longer considers marriage to be important...There must be a better time and place to debate that very important moral and social question.[18]

3.25 A view expressed in a large number of similarly worded submissions was that:

> Marriage should not be devalued by treating it as just another "couple relationship" along with same sex relationships.[19]

Undermining and devaluing marriage?

3.26 As has been suggested in preceding paragraphs, a number of submissions and witnesses were concerned that, essentially, the Bill undermines and devalues marriage. However, there were also a range of submissions which discounted the view that the Bill somehow undermines marriage. The committee notes that there is no proposal within this Bill to amend the *Marriage Act 1961*.[20]

3.27 Uniting Justice Australia submitted:

> The understanding of marriage as a heterosexual religious and social institution should not be used as a platform from which to discriminate against same-sex couples in areas where unmarried heterosexual couples, legally recognised by the State as having a relationship equivalent to that of

17 Mr Jim Wallace and Mr Lyle Shelton, Australian Christian Lobby, *Committee Hansard*, Canberra, 7 August 2008, p. 7. Also, see Australian Christian Lobby, *Submission 11*, p. 5.

18 Professor Patrick Parkinson, *Submission 14*, p. 4.

19 *Submission f4*. Also, see Australian Family Association (SA), *Submission 12*, p. 2.

20 *Submission f1*. Also, see Ms Emily Gray, NSW Gay and Lesbian Rights Lobby, *Committee Hansard*, Sydney, 5 August 2008, p. 2.

> a marriage, are able to access financial entitlements, and superannuation benefits.[21]

3.28 Associate Professor Stewart argued that the Bill does not change the legal recognition of either married or opposite-sex de facto relationships:

> Marriage is still a highly privileged legal category, and obviously a highly privileged social category as well…From a legal perspective, the category is still really quite separate from any couple relationship type category that is recognised in this amendment.[22]

3.29 Dr Challis rejected claims that the Bill undermines the centrality and status of marriage, telling the committee, 'We feel this really has been exaggerated and that there is not any evidence for this.'[23]

3.30 The Gay and Lesbian Equality (WA) Inc agreed that such claims are 'unfounded', describing them as 'nonsense' and identifying an ulterior motive:

> The true reason behind such religious groups pushing the idea of 'marriage sanctity' and 'devaluing marriage' is to deliberately try to exclude same-sex couples from equal treatment for their relationships and to perpetuate the discrimination faced by same-sex couples.[24]

Alternatives to 'couple relationship'

3.31 In addition to critiquing the new terminology, some submissions and evidence provided the committee with suggestions as to how the Bill might be improved.

3.32 Professor Parkinson described the definition of 'couple relationship' as a 'minefield', implying that the new definition was completely unnecessary.

> It is perfectly appropriate and sensible to redraft this bill in terms of a 'marital relationship', which is marriage, and a 'de facto relationship', which is a same-sex or heterosexual relationship, with people living together in an intimate relationship. Those terms are widely understood; they are understood by the courts and they are understood by everybody.[25]

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21 Uniting Justice Australia, *Submission 6*, p. 4. Also, see Reverend Elenie Poulos, Uniting Justice Australia, *Committee Hansard*, Sydney, 5 August 2008, p. 20.

22 Associate Professor Miranda Stewart, *Committee Hansard*, Melbourne, 6 August 2008, p. 5.

23 Dr John Challis, Superannuated Commonwealth Officers' Association, *Committee Hansard*, Canberra, 7 August 2008, p. 2.

24 Gay and Lesbian Equality (WA) Inc, *Submission 29*, p. 5.

25 Professor Patrick Parkinson, *Committee Hansard*, Sydney, 5 August 2008, p. 8. Also, see Professor Patrick Parkinson, *Submission 14*, pp 4-5; Dr John Challis, Superannuated Commonwealth Officers' Association, *Committee Hansard*, Canberra, 7 August 2008, p. 6; and HREOC, *Submission 34*, p. 7.

3.33 The Australian Christian Lobby agreed that the generic category of 'couple relationship' should be abandoned and 'replaced with references to "married or de facto relationship" and the associated terminology of "spouse or partner" throughout the bill.'[26]

3.34 The NSW Gay and Lesbian Rights Group did not have a preference for either 'marital' or 'couple' terminology, 'as long as same-sex couples are grouped with de facto heterosexuals.'[27]

3.35 The committee notes that these three distinct groups of witnesses supported the equal treatment of opposite-sex and same-sex de facto couples within the Bill. The committee notes also that there was support for 'de facto relationship' terminology rather than 'couple relationship' terminology.

3.36 The Attorney-General's Department informed the committee that it had considered using the 'de facto relationship' approach within the Bill, but ultimately rejected it on the basis that creating two distinct groups, marital and de facto, would:

> …leave it open for a court to conclude that different tests were intended and could create the potential for marital status discrimination to be introduced.[28]

3.37 In response to the question of why that risk could not be managed within the Bill, a representative from the Attorney-General's Department advised:

> It is really not the minimalist approach that we adopted. I suspect also that the other concern was that we also needed to deal with the issue of what happens if someone starts off in a de facto relationship and subsequently gets married…We would have to make sure we could find a way of managing those sorts of things. I am not saying it is insurmountable but it would be a lot more complicated than the approach that the bill takes at the moment.[29]

3.38 However, the Australian Christian Lobby did not agree that 'marital or de facto relationship' would be misinterpreted as suggested by the Attorney-General's Department, pointing out that such language is widely used throughout Australian law without any difficulties.

> Where an entitlement arises for people in a marital or de facto relationship, then falling within either definition will suffice, just as is the case where an

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26 Australian Christian Lobby, *Submission 11*, p. 6. Also, see Mr Lyle Shelton, Australian Christian Lobby, *Committee Hansard*, Canberra, 7 August 2008, p. 7.

27 Mr Ghassan Kassisieh, NSW Gay and Lesbian Rights Lobby, *Committee Hansard*, Sydney, 5 August 2008, p. 6.

28 Attorney-General's Department, *Submission 38*, p. 3. Also, see Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 7 August 2008, p. 18.

29 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 7 August 2008, p. 23.

> entitlement arises for 'men or women' or 'citizens or permanent residents', or 'people in same-sex or opposite sex relationships'. The language is plain and simple, and very unlikely to be misunderstood.[30]

3.39 The Association of Superannuation Funds of Australia concurred, noting also:

> Funds are very experienced in applying relevant criteria for establishing whether a de facto marriage was in place for a man and a woman. The same criteria should be able to be used when the parties to a couple are of the same gender.[31]

Expanded definition of 'child'

3.40 As indicated in chapter 2, the expanded definition of 'child' ensures that the children of same-sex couples are contemplated as eligible beneficiaries of a scheme member or former scheme member.

3.41 The Attorney-General's Department told the committee that a clear link needs to be established between a child and the same-sex partner of the child's mother or father. The Department submitted that this link is achieved by the requirement for at least one partner to be the biological parent or birth mother of the child, and the 'product of the relationship' requirement.[32]

3.42 These two requirements typically merge in a provision, which will read:

> A child cannot be the product of a relationship between two persons (whether the persons are the same sex or different sexes) for the purposes of this Act unless the child is the biological child of at least one of the persons, or is born to a woman in the relationship.[33]

3.43 The provision will serve a dual purpose: firstly, to clarify that the common-law definition of 'child' does not apply to the affected Acts; and second, to clarify that the children of previous relationships are not included as the children of the same-sex relationship.

> The phrase requires that the child be the product of a particular relationship in the sense of being the result of a joint undertaking by both parties to bring a child into their relationship. Where both parties agree to the procedure that brings the child into their relationship and to the raising of the child, the child will be the product of their relationship.[34]

3.44 The Attorney-General's Department submitted that the phrase 'product of the relationship' is flexible, allowing each case to be considered on its own merits. It was

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30 Australian Christian Lobby, *Submission 11*, p. 6.

31 Association of Superannuation Funds of Australia, *Submission 28*, pp 2-3.

32 Attorney-General's Department, *Submission 28*, pp 1-2.

33 Proposed subsection 10(5) of the Superannuation Industry (Supervision) Act 1993

34 Attorney-General's Department, *Submission 28*, p. 2.

also submitted that the new definition of 'child' is inclusive and non-discriminatory, covering children of both same-sex and opposite-sex families.[35]

3.45 However, responses to the proposed new definition varied, with most submissions and evidence applauding the intent of the Bill, but some criticising the phrase 'product of the relationship' for its lack of clarity and its questionable application to children born as the result of a surrogacy arrangement. These two issues are discussed in detail below.

Lack of clarity

3.46 Two independent legal experts commenting on the phrase 'product of the relationship' both agreed that the phrase is not sufficiently explained in either the Bill or the Explanatory Memorandum.

3.47 Associate Professor Stewart submitted that the lack of explanation made it difficult to determine the requirements of the new definition.

> An ordinary Dictionary meaning of "product", so far as it appears relevant, is "a result of an action or process" (Oxford English Dictionary, accessed 1 August 2008). A sensible interpretation would interpret the phrase to require an agreement, or joint action or process by the members of the couple in the relationship, which leads to the joint decision and action of bringing a child into the world and raising him or her. That is, it seems to be intended that consent or a joint intention to raise the child is required for the child to be a product of the relationship.[36]

3.48 Professor Parkinson shared Associate Professor Stewart's concerns, warning the committee that the lack of clarity could have adverse implications for same-sex couples and their families.

> The definitions used in the legislation do not provide any clarity about which children are meant to be included within the scope of the legislation and which are not. This lack of clarity is likely to lead to expensive litigation, perhaps involving resort to the appeal courts to make rulings on the meaning of the legislation. The Parliament should seek to avoid that by making its intent clear.[37]

3.49 In addition, Professor Parkinson queried whether the phrase 'product of the relationship' was even necessary. He illustrated his argument drawing on the *Judges' Pension Act 1968* by way of example:

> (i) The definition of children of a couple relationship is redundant: The definition of child of a marital relationship in the current version of the

35 Attorney-General's Department, *Submission 28*, p. 2.

36 Associate Professor Miranda Stewart, *Submission 37*, p. 6.

37 Professor Patrick Parkinson, *Submission 14*, p. 7. Also, see Gay and Lesbian Rights Lobby, *Submission 19*, pp 9-10; and Professor Jenni Millbank, *Submission 8*, p. 3.

> Judges' Pension Act appears to be entirely redundant. The term appears nowhere else in the Act. The concept of a child of a marital relationship has some utility in s.4AB, but the term is not actually used therein, and 'child' for these purposes is redefined there. So the definition in s.4 should really be repealed, not amended.
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> (ii) The term is not needed in s.4AB: The only reason that 'child' needs to be defined for the purposes of s.4AB is to provide one way of establishing whether the couple are in a committed relationship. It is really not necessary here, as there are plenty of other forms of evidence to which the section refers, that can establish the existence of a couple relationship.
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> (iii) It is not needed for the definition of an eligible child. The importance of establishing a parent-child relationship is really for the purposes of s.4AA. This defines an 'eligible child' who may benefit from a judge's pension entitlements. However, an eligible child is either a child of the judge or a child who qualifies because the Attorney-General is of the opinion that:
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> • at the time of the death of the deceased Judge, the child was wholly or substantially dependent on the deceased Judge; or
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> • but for the death of the deceased Judge, the child would have been wholly or substantially dependent on the deceased Judge.[38]

3.50 Professor Parkinson supported an approach based on 'nurture and dependence' rather than production.[39]

3.51 However, the Attorney-General's Department cautioned that such an approach might lead to discrimination between children of a same-sex relationship and biological children.

> One risk with that is what happens if a child is not financially dependent. In 99 per cent of circumstances it is very likely that the child would be dependent on the parent but in some situations, maybe because of separated parents or because a child has got their own job if they are 16 or 17- years-old and they might not be as dependent on that parent as they otherwise would be. I think that is an issue to bear in mind, particularly in terms of superannuation contribution schemes where some children might receive a benefit because of a biological link that they have with a parent and other children would have to rely on dependency. There is a slightly different treatment there, and where there is different treatment there is a risk of discrimination.[40]

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38 Professor Patrick Parkinson, *Submission 14*, p. 6. Also, see Mr Lyle Shelton, Australian Christian Lobby, *Committee Hansard*, Canberra, 7 August 2008, pp 7-8.

39 Professor Patrick Parkinson, *Submission 14*, p. 9. Also, see Dr John Challis, Superannuated Commonwealth Officers' Association, *Committee Hansard*, Canberra, 7 August 2008, p. 4.

40 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 7 August 2008, p. 24.

3.52 The Attorney-General's Department warned also that an approach based on 'nurture' would enable children not intended to fall within the scope of the Bill to indirectly become eligible for death benefits.

> The purpose of the Bill was to put children of same-sex couples on the same footing as those of opposite sex couples. However, this proposal may widen the scope of children that can be eligible beyond the policy, and include opposite-sex children that were not previously eligible. For example, an uncle may be looking after a child while their parent is in hospital. This child could be considered to be in the care and control of that relative and thus would obtain a benefit.[41]

3.53 In view of the preceding criticisms, the committee questioned the Attorney-General's Department on its approach to the new definition of 'child'. Officers told the committee that:

> We are in an environment where at a state and territory level there are inconsistent parenting presumptions and there is inconsistent approach to surrogacy legislation and the recognition of parents as well, so we had to find a way of making sure that we were taking into account these children who would otherwise not be included in the relevant definitions in the act. We also had to make sure that we dealt with the ordinary definition of 'child' that the common law would apply and that courts would interpret. The definition is taken to be inclusive. We are trying to ensure that we do not take any other children out…The term 'product of a relationship' is trying to capture the children who at the moment are not included.[42]

3.54 However, some submitters and witnesses expressly queried whether children born through surrogacy arrangements are actually included within the new definition of 'child'.

Application to children born through surrogacy arrangements

3.55 The lack of clarity regarding the phrase 'product of the relationship' appeared to be a complicating factor, as did inconsistent state and territory parenting presumptions. Among the legal experts, there was a difference of opinion on the precise problem with the definition.

3.56 Associate Professor Stewart felt that 'product of the relationship' would 'do the job' if some explanation were provided as to the meaning of the phrase. However, she acknowledged that it would be difficult to draft the phrase in such a way as to fully recognise all types of parents.[43]

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41 Attorney-General's Department, *Answers to questions on notice*, 29 August 2008, p. 2.

42 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 7 August 2008, p. 19.

43 Associate Professor Miranda Stewart, *Committee Hansard*, Melbourne, 6 August 2008, p. 3.

3.57 For Professor Jenni Millbank, the definition did not specify the requirement of consent to the conception of a child, or the point at which consent must be given.

> By way of example, if a woman become [sic] pregnant through ART while not in a de facto relationship, and then during the course of the pregnancy entered into a de facto relationship with another person, it is not clear whether a child would or would not be the "product of the relationship" under the Bill. Equally, if an embryo were created during the relationship but then was used without consent it is not clear whether the child would or would not be "product of the relationship".[44]

3.58 Professor Millbank suggested also that the definition is problematical as it might be both under and over inclusive in focussing on the birth mother or biological connection.

> An example of the term being over inclusive would be that it could generate four parents as both the birth mother and her partner and the commissioning parents (as long as one of them contributed gametes) would be parents under this definition even though the birth parents were not the intended parents, did not live with the child and did not have responsibility for the child. The definition may also be under inclusive in that it would exclude commissioning parents who were the intended parents when they were living with and caring for a child for whom they were unable to contribute gametes (for example if both members of the couple were infertile).[45]

3.59 More importantly, while further clarification could address these two issues, Professor Millbank argued that the definition has an even larger problem.

> The definition contains a fundamental contradiction: it reflects state and territory parentage presumptions for ART families (without however articulating them with the same precision) at the same time as it contradicts them by granting ad hoc coverage of commissioning parents in surrogacy arrangements, without actually according them parental status.[46]

3.60 Professor Millbank suggested that it was not possible for the Bill to define the parent-child relationship, and that a 'real rethink' of the parent-child relationship in Commonwealth law is required.

> We could have a very quick and dirty audit of federal legislation and 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'

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44 Professor Jenni Millbank, *Submission 8*, p. 2. Also, see Association of Superannuation Funds of Australia, *Submission 28*, p. 4.

45 Professor Jenni Millbank, *Submission 8*, p. 2. Also, see Gay and Lesbian Rights Lobby, *Submission 19*, p. 10.

46 Professor Jenni Millbank, *Submission 8*, p. 3.

> means the definition in the Family Law Act or the Acts Interpretation Act. I think it is time we did that.[47]

3.61 Professor Parkinson commented also on the need to consider the wider implications of endorsing commercial surrogacy in the Bill.

> There are huge debates about commercial surrogacy. What are the human rights implications if the surrogate mother was living in a third world country and entered into the surrogacy arrangement under physical or economic duress? There is no indication that the Government has considered the moral and social issues involved in commercial surrogacy before preparing this legislation, yet if it endorses it implicitly by this legislation, it will be very hard for the Commonwealth to argue against it in other contexts that may arise in future.[48]

3.62 The committee notes the evidence received concerning a possible lack of clarity in the definition of 'child', particularly as regards children born through surrogacy arrangements, and that the definition contradicts state and territory parenting presumptions. The committee notes also the suggestion that the parent-child relationship needs to be comprehensively reviewed and consistently defined in Commonwealth legislation.

Alternative approaches to 'child'

3.63 Some submissions and evidence addressed the issue of how the definition of 'child' might yet be improved within the Bill. As indicated in preceding paragraphs, interpretive assistance only was suggested by more than one person. Other suggestions focussed upon more complex definitions, and the alternate approach of providing recognition for the children of same-sex relationships via the parenting presumptions contained in the *Family Law Act 1975*.

3.64 The NSW Gay and Lesbian Rights Lobby proposed a tiered definition of 'child', including categories for children born through Artificial Reproduction Technology (ART), parentage transferral schemes, surrogacy and 'in loco parentis':

> Why we have outlined 'in loco parentis' as the last catch-all category is not to capture the cases that we can define, such as children born through assisted reproductive technology and through surrogacy, children that are adopted or children that are conceived through intercourse. What we put is that 'in loco parentis' should be used where there is no other category to recognise that parent-child relationship and only in certain laws.[49]

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47 Professor Jenni Millbank, *Committee Hansard*, Sydney, 5 August 2008, p. 14.

48 Professor Patrick Parkinson, *Submission 14*, pp 9-10.

49 Mr Ghassan Kassisieh, NSW Gay and Lesbian Rights Lobby, *Committee Hansard*, Sydney, 5 August 2008, p. 3. Also, see NSW Gay and Lesbian Rights Lobby, *Submission 19*, p. 15.

3.65 Mr Ghassan Kassisieh from the NSW Gay and Lesbian Rights Lobby submitted that this proposal not only provides an immediate solution, but is consistent with suggested amendments to the *Family Law Act 1975*. Mr Kassisieh hypothesised:

> If you did amend section 60H, for example, and you had a parentage presumption which included a co-mother as well as a co-father in an assisted reproductive technology context, you would have a child that is recognised under that presumption [as well as the tiered definition].[50]

3.66 Other legal experts who commented on this aspect of the Bill did not favour attempting to amend the definition of 'child'. Instead, they suggested amending section 60H of the *Family Law Act 1975*.

3.67 Associate Professor Stewart suggested that this would be an appropriate and easy way to recognise all ART families.

> At the moment the government appears not to have done that. It has not amended section 60H in relation to children and parents and in terms of parental responsibility. It has done it just to give the Family Court recognition of those families for property division purposes between the couple…In addition to the 'product of the relationship' reforms that are in the super bills, it would be appropriate to extend that parenting presumption.[51]

3.68 Professor Millbank agreed that the existing parenting presumptions would suit both opposite-sex and same-sex couples.

> Fitting [lesbian families having children,] into existing categories of the parenting presumptions that were devised around heterosexual couples works completely, because the same factors are present. It is about intention, consent and giving care to the child as a joint family unit afterwards.[52]

3.69 The committee notes that amending the parenting presumption in section 60H of the *Family Law Act 1975* to express gender neutral language would allow for

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50 Mr Ghassan Kassisieh, NSW Gay and Lesbian Rights Lobby, *Committee Hansard*, Sydney, 5 August 2008, p. 7. The existing parentage presumptions in the Family Law Act 1975 incorporate the notion of consent and have already been judicially considered.

51 Associate Professor Miranda Stewart, *Committee Hansard*, Melbourne, 6 August 2008, p. 3.

52 Professor Jenni Millbank, *Committee Hansard*, Sydney, 5 August 2008, p. 16.

recognition of ART children born to same-sex relationships, avoiding any need to define an ART 'child' for the purposes of the Bill.