

CHAPTER 5

CHILDREN AND LEGISLATIVE CONSISTENCY

5.1 Chapter 5 discusses the issues specifically related to children and legislative consistency, including:

- the status of children within the Bill;
- the legal and fiscal implications of the definitions of 'child' and 'child of a couple relationship';
- same-sex de facto relationships;
- the General Law Reform Bill; and
- consistency in legislation.

Status of children within the Bill

5.2 In referring the Bill, the Senate requested that the committee inquiry into the legal and fiscal implications of the definitions of 'child' and 'child of a couple relationship', particularly as they relate to the rights, obligations and liabilities of co-parents (i.e., the parent in a couple relationship that does not have a biological connection to a child of that relationship).¹

5.3 Some of these issues are discussed in chapter 3 where it was especially noted that the Bill will enable the surviving child (or children) of a same-sex relationship to receive death benefits (lump sum or reversionary pension) from a non-biological parent.²

5.4 The committee notes that, despite any other objections to the Bill, the majority of submissions supported this objective.

Children should not be penalised because of the relationship between the adults in their lives, therefore financial entitlements to a child cared for by a same-sex couple should mirror the entitlements to a child of a heterosexual couple.³

1 Parliament of the Commonwealth of Australia, Journals of the Senate, No. 16, 18 June 2008, Terms of Reference (v) and (vi), pp 509-510.

2 HREOC, *Submission 34*, p. 12.

3 Australian Christian Lobby, *Submission 11*, p. 4. Also, see Uniting Justice Australia, *Submission 6*, p. 4; Dr John Challis, Superannuated Commonwealth Officers' Association, *Committee Hansard*, Canberra, 7 August 2008, p. 2.

5.5 The next section discusses Terms of Reference (v) and (vi) in relation to specific issues not directly related to the objectives of the Bill but which arose in submissions and evidence.

Legal and fiscal implications of the definitions of 'child' and 'child of a couple relationship'

5.6 There were two concerns raised during the inquiry: firstly, the legal status of children born through either surrogacy arrangements or Artificial Reproduction Technology (ART); and second, children who are not a 'child of the couple relationship'.

Children born through surrogacy arrangements or ART

5.7 At common law and under existing parenting presumptions, a child's parents are deemed to be his or her birth mother and biological father.

5.8 Professor Jenni Millbank submitted that, as a matter of principle and practicality, it makes sense to focus the 'axis of recognition' around the birth mother, but that this approach does not work in all cases.

Parentage presumptions work well for most families and reflect the intended and social or caregiving parent-child relationships. However, they do not fit the exceptional circumstance in which the birth mother is not the intended parent and will not be a residential caregiver of the child through a surrogacy arrangement.⁴

5.9 A further complication is that there is no consistent state or territory approach to the legal recognition of a child conceived with the assistance of ART. The Attorney-General's Department noted that this problem is receiving attention.

The Standing Committee of Attorneys' General has agreed to 'develop a unified framework for the legal recognition of parentage achieved by surrogacy arrangements' and that the unified framework would contain the following feature: court orders will be available recognising the intended parents as the legal parents where the surrogacy arrangement meets legal requirements and is in the best interests of the child.⁵

4 Professor Jenni Millbank, *Submission 8*, p. 2. Also, see HREOC, *Submission 34*, p. 19 where it was emphasised that same-sex parenting arrangements often involve more than two people.

5 HREOC, *Submission 34*, p. 17. Also, see Attorney-General's Department, *Submission 28*, p. 2.

5.10 In the meantime, only in Western Australia, the Northern Territory, New South Wales and the ACT are a birth mother's female partner currently recognised as the parent of a child born through ART.⁶

5.11 Some submissions and evidence questioned whether the Bill achieves its purpose with the proposed definition of 'child' in relation to children born through surrogacy arrangements and ART. This is due partly to the lack of clarity regarding the phrase 'product of the relationship', which is discussed in chapter 3, and partly to the confusion regarding a child's legal parentage.

5.12 Both HREOC and Professor Millbank submitted that the confusion must be eliminated, and they supported the ACT model which allows for the transfer of parental status after birth through court order, a system which operates upon the dual principles of informed consent and the child's best interests.⁷

5.13 Professor Millbank cautioned against addressing the current problem in an ad hoc fashion which might lead to increased inconsistency and confusion in 'federal-state parental status'. Instead, she recommended that state and territory laws attend to severing the legal status of the genetic father and birth mother, and implementing a formal transfer process. Then:

Federal law can reflect this transfer process, again through a definition in the Acts Interpretation Act 1901 (Cth), or through amending s60H of the Family Law Act 1975 (Cth). However the main drive for recognition must be at state level

...

While transfer of parental status processes are being introduced at state level federal law can accommodate the needs of such families through for example, granting rights to adults who have consent orders of parental responsibility through the Family Law Act 1975 (Cth). Such orders are commonly sought by commissioning parents.⁸

5.14 Professor Patrick Parkinson called for a review of this area of law:

6 Attorney-General's Department, *Submission 28*, p. 1. Also, see Professor Jenni Millbank, *Submission 8*, pp 1-2. Victoria has announced that it will similarly update its ART and surrogacy legislation based on recommendations made by the Victorian Law Reform Commission: see Victorian Attorney-General, *Submission 40*, p. 2.

7 Professor Jenni Millbank, *Committee Hansard*, Sydney, 5 August 2008, p. 15 and HREOC, *Submission 34*, pp 17-18. The ACT's approach will shortly be adopted in both Victoria and Western Australia, and is being considered in South Australia.

8 Professor Jenni Millbank, *Submission 8*, pp 2 & 4. Also, see HREOC, *Submission 34*, p. 19 and Professor Patrick Parkinson, *Submission 14*

What is really needed is a thorough review of family policy in Australia, looking at how family relationships are defined and for what purposes across Australian law in order to have a consistent approach.⁹

Children outside the 'couple relationship'

5.15 As previously indicated, this section discusses the concern that children from a previous relationship are not encompassed by the proposed definition of 'child'.¹⁰ A relatively small number of submissions addressed this issue.

5.16 The Association of Superannuation Funds of Australia, for example, submitted that there would be few such cases in any given year and were confident that trustees would be able to determine whether a child was a 'child of the couple relationship' or not.

A trustee should generally be able to rely on a statutory declaration from the biological parent or birth parent of the child as to whether the child was a product of the couple relationship. If another party seeking to claim all or part of the death benefit disputed that the child was a product of the relevant couple relationship then the trustee could make further enquiries as to the circumstances in which the child was born.¹¹

5.17 Furthermore, if there were a question of entitlement, "most superannuation funds would drop back to the definition of financial dependant because that is far easier to apply."¹²

5.18 If the Bill is passed, there will be four categories of dependants:

- spouses (including same-sex and opposite-sex de facto couples)
- children (including adopted, ex-nuptial and step-children, and children who are the product of a person's relationship with another person where the child is the biological child of at least one party to the relationship or born to the woman in the relationship);
- financial dependants (as held in *Faull v Superannuation Complaints Tribunal* [1999] NSWSC 1137); and
- persons in an interdependency relationship (as defined in section 10A of the SIS Act and section 20A of the RSA Act).¹³

9 Professor Patrick Parkinson, *Submission 14*, p. 9. Also, see Professor Patrick Parkinson, *Committee Hansard*, Sydney, 5 August 2008, pp 10-11 and Professor Jenni Millbank, *Committee Hansard*, Sydney, 5 August 2008, p. 14.

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

11 Association of Superannuation Funds of Australia, *Submission 28*, p. 4.

12 Mr Ross Clare, Association of Superannuation Funds of Australia, *Committee Hansard*, Sydney, 5 August 2008, p. 27.

13 Law Council of Australia, *Submission 31*, p. 8.

5.19 Accordingly, without further clarification, it might not be so easy to properly categorise individuals for death benefit distribution purposes. As highlighted by the Law Council of Australia, proper categorisation is relevant to determining how a superannuation death benefit distribution is to be taxed.¹⁴

5.20 Associate Professor Miranda Stewart concurred that the concept of dependant and the death benefit category is a highly contested area in superannuation law, and one in which trustees would prefer more rather than less certainty.

As an example, if you look at the kinds of decisions that the Superannuation Complaints Tribunal has to deal with, around 30 per cent of those decisions relate to death benefits and who is an appropriate dependant. So you can see already this area is a bit tricky for the trustees. The decisions that they make might well be contested or controversial.¹⁵

5.21 The committee notes that the *Superannuation Industry (Supervision) Act 1993* specifically includes stepchildren. However, the Association of Superannuation Funds of Australia and HREOC rejected that this necessarily results in stepchildren not being financially disadvantaged compare to children of the couple relationship.

As the term [step child] is not defined in the legislation itself, it will likely be interpreted to exclude a child under the care of his or her biological parent's same-sex partner. This is because courts have interpreted the term to mean that the child's biological parent must marry the intended step-parent. That interpretation discriminates against same-sex couples and opposite-sex de facto couples.¹⁶

Same-sex de facto relationships

5.22 During the inquiry, discrimination between opposite-sex and same-sex de facto couples clearly attracted far more attention than marital discrimination. One of the most common issues for submitters and witnesses was the question of why the Bill did not simply place same-sex couples within the de facto relationships category instead of redefining all marital and de facto relationships, including same-sex relationships as 'couple relationships'.

5.23 Ms Emily Gray and Mr Ghassan Kassisieh from the NSW Gay and Lesbian Rights Lobby argued that opposite-sex and same-sex couples are objectively identical, as did many other witnesses.

14 Law Council of Australia, *Submission 31*, p. 6. Also, see UniSuper, *Submission 35*, p. 1.

15 Associate Professor Miranda Stewart, *Committee Hansard*, Melbourne, 6 August 2008, p. 4. Also, see Industry Funds Forum Inc. *Submission 42*, p. 1.

16 HREOC, *Submission 34*, p. 15. Also, see Mr Andrew Charaneka, Law Council of Australia, *Committee Hansard*, Sydney, 5 August 2008, p. 32; and Associate Professor Miranda Stewart, *Committee Hansard*, Melbourne, 6 August 2008, p. 7.

All the same factors of a de facto relationship apply to same-sex couples as they do to heterosexual de facto couples. So they are more properly grouped with de facto heterosexual couples.¹⁷

5.24 When asked by the committee what difference there might be between opposite-sex and same-sex de facto couples, Dr John Challis from the Superannuated Commonwealth Officers' Association responded:

In actual day-to-day living of the relationship there is really no difference. Our friends, I am sure, simply look upon us as a de facto couple like any other de facto couple.¹⁸

5.25 One of the legal experts giving evidence, Professor Parkinson, could not imagine any issue of social policy, including superannuation, where you would need to distinguish between opposite-sex and same-sex de facto relationships.¹⁹

5.26 A number of witnesses also commented favourably on the history of de facto legislation and its judicial consideration in state and territory law. Mr Kassisieh from the NSW Gay and Lesbian Rights Lobby, for example, compared the Commonwealth legislation with that of the states and territories, and observed that there is inconsistency in the approach to defining 'de facto' relationships.

It is slightly different at the federal level because there are very many de facto definitions across the laws as opposed to states and territories which tend to have one de facto definition which is cross-referenced in various acts. Either it is centrally located or, as in New South Wales, it is in one act and cross-referenced in other definitions to that one definition...There is considerable common law now that has developed around that definition.²⁰

5.27 The committee acknowledges, however, that there were also submissions and evidence presenting the opposite view: same-sex couples should be treated distinctly from other 'marital type' relationships, including opposite-sex de facto relationships. This view was essentially based on the need to preserve legal and social distinctions.

17 Ms Emily Gray and Mr Ghassan Kassisieh, NSW Gay and Lesbian Rights Lobby, *Committee Hansard*, Sydney, 5 August 2008, pp 2 & 4. Also, see Ms Lisa Newman, CPSU, *Committee Hansard*, Sydney, 5 August 2008, p. 38; Dr John Challis, Superannuated Commonwealth Officers' Association, *Committee Hansard*, Canberra, 7 August 2008, p. 2; Mr Lyle Shelton, Australian Christian Lobby, *Committee Hansard*, Canberra, 7 August 2008, p. 8; Mr Corey Irlam, Australian Coalition for Equality, *Committee Hansard*, Melbourne, 6 August 2008, p. 36; Associate Professor Miranda Stewart, *Committee Hansard*, Melbourne, 6 August 2008, p. 4; and Mr Richard Egan, FamilyVoice Australia, *Committee Hansard*, Melbourne, 6 August 2008, p. 33.

18 Dr John Challis, Superannuated Commonwealth Officers' Association, *Committee Hansard*, Canberra, 7 August 2008, p. 5. Also, see Ms Pat McCahey, *Submission m263*, p. 1.

19 Professor Patrick Parkinson, *Committee Hansard*, Sydney, 5 August 2008, p. 9.

20 Mr Ghassan Kassisieh, NSW Gay and Lesbian Rights Lobby, *Committee Hansard*, Sydney, 5 August 2008, p. 4. The NSW legislation has an umbrella category of 'domestic relationships' which includes de facto relationships and close personal relationships.

5.28 Ms Angela Conway from the Australian Family Association argued that the Bill confounds the correct distinctions between marital and other relationships.

There is longstanding legal jurisprudence around marriage, recognising marriage as a special relationship in society, recognising that it needs special accommodation and special provisions in the law.²¹

5.29 Mr Richard Egan from FamilyVoice Australia expressed concern over the potential erosion of marriage as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.'

If this bill is followed, as announced by the Rudd government, by changes to all 100 federal laws that mention marriage except the Marriage Act and if in every single one of those laws the benefits and treatment of married couples is now extended to same-sex couples on the identical terms then it would seem to me a logical argument if I were coming from the same-sex lobby to say, 'Now you've given us all the benefits of married couples, why would you not allow us to have marriage itself?'²²

5.30 As discussed in chapter 3, the Bill does not precisely follow HREOC's recommendations for eliminating discrimination against same-sex couples, one of which was the creation of gender neutral definitions of 'de facto relationship' and 'de facto partner' to be introduced into Commonwealth laws conferring financial and work related entitlements.²³

5.31 The committee observes that the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 proposed a definition of 'de facto relationship' in accordance with the model definition stated in the HREOC *Same-Sex: Same Entitlements* report, as does the General Law Reform Bill.

The General Law Reform Bill

The 'de facto' terminology

5.32 As indicated in chapter 2, one of the Acts to be amended by the General Law Reform Bill will be the Acts Interpretation Act 1901. Schedule 2 Part 1 Item 1 of the General Law Reform Bill proposes to create a key definition of 'de facto partner' which refers to associated definitions of 'registered relationship' and 'de facto relationship'.

21 Ms Angela Conway, Australian Family Association, *Committee Hansard*, Melbourne, 6 August 2008, p. 15.

22 Mr Richard Egan, FamilyVoice Australia, *Committee Hansard*, Melbourne, 6 August 2008, p. 32. Also, see Mr Paul Russell, Catholic Archdiocese of Adelaide, *Committee Hansard*, Melbourne, 6 August 2008, p. 13.

23 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, pp 80-81.

5.33 The key definition of 'de facto partner' is gender neutral, and will apply, for the purposes of a provision of an Act that is a provision in which de facto partner has the meaning given by this Act...²⁴

5.34 The Explanatory Memorandum for the General Law Reform Bill acknowledges,

This approach is a departure from the usual approach in the Acts Interpretation Act which is for words to be defined to have a meaning 'unless the contrary intention appears'. This means that the application of the definition of 'de facto partner' in the Acts Interpretation Act will have no effect unless it is 'triggered' by express provisions in the substantive Act. This approach avoids any possibility of unintended consequences in other legislation.²⁵

5.35 The committee notes that this approach was consistent with some of the evidence provided during the inquiry. However, while the General Law Reform Bill provides the key definition of 'de facto partner', the Bill does not incorporate this definition and continues to rely upon the definition of 'couple relationship'.

5.36 The new definition of 'registered relationship' proposed by the General Law Reform Bill is consistent with that of the Bill. However, the new definition recognises neither interdependency relationships nor relationships registered internationally. Inconsistency between state and territory laws is not addressed.

5.37 As stated in preceding paragraphs, the new definition of 'de facto relationship' is consistent with the model definition proposed in the HREOC *Same-Sex: Same Entitlements* report. The proposed definition reads:

...a person is in a de facto relationship with another person if the persons:

- (a) are not legally married to each other; and
- (b) are not related by family (see subsection (6)); and
- (c) have a relationship as a couple living together on a genuine domestic basis.²⁶

5.38 The NSW Law Society submitted that the definition of 'de facto relationship' in the *Property (Relationships) Act 1984* (NSW) was worthy of adoption.²⁷ The committee notes that this definition is essentially the same as that proposed by the HREOC *Same-Sex: Same Entitlements* report, the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, and the General Law Reform Bill.

24 Proposed clause 22A of the Acts Interpretation Act 1901

25 Same-Sex Relationships (Equal Treatment in Commonwealth Laws - General Law Reform) Bill 2008, Explanatory Memorandum, p. 6.

26 Proposed clause 22C(1) of the Acts Interpretation Act 1901

27 NSW Law Society, *Submission 44*, p. 2.

The definition of 'child'

5.39 The General Law Reform Bill proposes to also create a key definition of 'child'.

It provides that a child will be considered to be a person's child where the child is the product of a relationship the person has or had as a couple with another person.²⁸

5.40 The committee notes that this definition harkens back to the controversial couple terminology of the Bill, rather than the de facto terminology of the General Law Reform Bill, an observation reinforced by the Explanatory Memorandum which states:

The key definition of 'child' will also extend recognition to children of opposite-sex relationships who are not already covered by the existing definitions in the Acts or provisions of Acts to be amended. For example, a child who is biologically related to either member of an opposite-sex couple who is conceived through a private surrogacy arrangement, either by the use of Artificial Insemination or through sexual intercourse, would be recognised.²⁹

5.41 Similar arguments were made by the Attorney-General's Department in relation to the definition of 'child' within the Bill. And the problems identified in chapter 3 of this report, namely, issues concerning the phrase 'product of the relationship' have been duplicated in the General Law Reform Bill.³⁰ The committee is yet to be convinced that these problems are irrelevant to the purposes of the General Law Reform Bill let alone Commonwealth laws in general.

5.42 One notable difference is the expansion of the definition of 'step child' (and its associated definition of 'step parent') to include a child of an opposite-sex or same-sex de facto partner from a previous relationship.

This is achieved by providing that a 'stepchild' includes a child who would be the stepchild of a person who is the de facto partner of a parent of the child, except that the person and the parent are not legally married. It is not necessary to establish that the person and the parent are capable of being legally married.³¹

28 Same-Sex Relationships (Equal Treatment in Commonwealth Laws - General Law Reform) Bill 2008, Explanatory Memorandum, p. 8.

29 Same-Sex Relationships (Equal Treatment in Commonwealth Laws - General Law Reform) Bill 2008, Explanatory Memorandum, p. 8.

30 Same-Sex Relationships (Equal Treatment in Commonwealth Laws - General Law Reform) Bill 2008, Explanatory Memorandum, p. 8.

31 Same-Sex Relationships (Equal Treatment in Commonwealth Laws - General Law Reform) Bill 2008, Explanatory Memorandum, p. 11.

5.43 *Prima facie* this amendment will enable a child who does not satisfy the definition of 'child of the couple relationship' to be considered a 'step child' in a couple relationship (whether opposite-sex or same-sex), thereby allowing for equal treatment of the children in opposite-sex or same-sex de facto families.

5.44 The committee observes that the key definitions will only apply if they are incorporated within a particular Act. In relation to the Bill, none of its affected Acts cross reference to the Acts Interpretation Act and only one its Acts is concurrently proposed to be amended by the General Law Reform Bill.

5.45 Schedule 7 Part 2 of the General Law Reform Bill proposes to make amendments to the Superannuation Act 1976. But the provisions relate to the circumstances in which a member is required or permitted to make contributions, and has no direct relevance to the objectives of the Bill.

Consistency in legislation

5.46 Professor Parkinson told the committee that the Bill has serious drafting problems due to the minimalist approach adopted by the parliamentary drafters, resulting in a 'legal quagmire'.

They have sought to make amendments to the existing legislation using as few different words as possible to the Acts they are amending...The drafters may have saved a few words for the Statute Book, but these minimalist amendments will cause a legal quagmire, and have also raised serious concerns of a moral and social nature which could easily be resolved with less minimalist drafting to reflect the different context of the relationships now sought to be covered by the Bill.³²

5.47 Throughout the inquiry, the committee noted inconsistencies between Commonwealth, state and territory laws, and also within various Commonwealth laws. The latter inconsistencies related primarily to definitions within statutes (such as the definitions of 'de facto partner' in the Evidence Amendment Bill 2008 and the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008), and also to the terminology used in Commonwealth statutes.

5.48 In answers to questions on notice, the Attorney-General's Department advised, for example, 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')

32 Professor Patrick Parkinson, *Submission 14*, p. 1.

- 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).³³

5.49 Concerns were expressed about such inconsistencies, not only in relation to the bills currently being examined by the committee but also throughout Commonwealth legislation.

5.50 Some witnesses suggested that a more consistent approach should be taken by either locating key definitions within the Acts Interpretation Act 1901 or another cross referenced Act (such as the SIS Act).

5.51 However, Associate Professor Stewart supported the idea of individually amending Commonwealth legislation.

Different federal laws have different definitions of 'couple' for different purposes and it is appropriate, then, to amend those specific definitions to remove the discrimination rather than necessarily change the whole structure of the federal law with one uniform definition.³⁴

5.52 In response to questioning on this issue, a representative of the Attorney's General Department concurred that, 'there are very clear policy reasons why in the Evidence Act and the Family Law Act there is a need to take different factors into account.'³⁵

5.53 The committee accepts that this might be the case in some but not all instances, a view supported by the General Law Reform Bill which allows for the location of specific definitions in the *Acts Interpretation Act 1901*. The committee suggests that a consistent, easy to use, approach toward defining terms used in Commonwealth legislation, as far as possible, would be beneficial.

Committee view

5.54 This Bill gives effect to the recommendations of the HREOC *Same-Sex: Same Entitlements* Report, and honours Australia's obligations under several international treaties, including the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child. The objectives of the Bill were supported by a considerable number of persons contributing to this inquiry. For these reasons, the committee supports the removal of discrimination against same-sex couples and the children of same-sex relationships in Commonwealth superannuation laws.

33 Attorney-General's Department, Answers to Questions on Notice (20 August 2008), p. 3.

34 Associate Professor Miranda Stewart, *Committee Hansard*, 6 August 2008, Melbourne, p. 2.

35 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, 7 August 2008, Canberra, p. 17.

5.55 The committee recognises that the operative provisions of the Bill were scheduled to commence shortly after the introduction of the Bill into Parliament, and this inquiry has now delayed commencement by some months. In these circumstances, the committee considers it appropriate that Schedule 4 of the Bill be backdated to commence as of 1 July 2008.

5.56 In view of the above comments, the committee supports the Bill and believes it should be passed as a matter of priority.

5.57 Notwithstanding its support, the committee is mindful of the concerns and suggestions for improvements in relation to the Bill. The main concerns related to the proposed new definitions of 'partner', 'couple relationship', and 'child'.

5.58 The committee recognises that the new definitions of 'partner' and 'couple relationship' enable same-sex couples to be included in the definition of a relationship for the purposes of the receipt of death and related tax benefits. The committee is not persuaded that this in any way undermines or devalues the status of marriage in law or society. Marriage is afforded a unique and privileged position which is neither affected by the objectives of the Bill, nor a proper subject of debate for this inquiry.

5.59 However, the committee notes that there is a group within the community who see the elimination of the term 'marital relationship' in this Bill as eroding the institution of marriage.

5.60 There was also significant evidence presented to convince the committee that same-sex couples are most appropriately classified as being in a de facto relationship.

5.61 For these reasons, the committee considers that it would have been more appropriate to employ the term 'marital or de facto relationship' rather than the new definition 'couple relationship'. The committee is not persuaded that use of the former term would defeat the Bill's objectives. Any risk associated with such an approach could have been managed, as has been the case with the General Law Reform Bill, and other Commonwealth, state and territory legislation.

5.62 In addition, the committee is concerned by the approach taken in the Bill to the definition of 'child'. The committee acknowledges the intent of the Bill to expand the definition to include as eligible beneficiaries the children of same-sex relationships. That this is easier said than done was evident throughout the inquiry. Ultimately, the committee is not persuaded that the objective has been achieved in relation to children born through surrogacy arrangements or ART. Hence, it is not clear that the discrimination will be eliminated by the enactment of the Bill. The committee is concerned also that discrimination between children intended to be covered by the Bill and children from previous relationships has not been adequately addressed. More significantly, the committee questions the need for the new definition of 'child' which imports contradictory Commonwealth, state and territory parenting presumptions.

5.63 Until all these issues are resolved, including a review of the parental-child relationship, the committee prefers that the proposed definition be removed from the Bill altogether, and a child's entitlement to death benefits be clearly linked to the surviving same-sex partner of the relationship.

5.64 Specifically in relation to reform of state and territory surrogacy law reform, the committee encourages the development and implementation of a consistent approach to the legal recognition of children born through surrogacy arrangements or ART and which emphasises the child's best interests as a paramount consideration. The committee agrees that Commonwealth law should reflect the transfer of parental status, and in the meantime, facilitate the recognition of families through court orders granted under the *Family Law Act 1975* or amendment of section 60H of the *Family Law Act 1975* to express gender neutral language. This was also the committee's recommendation in its report on the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008.

5.65 In relation to the issues of interdependency, categorisation of same-sex couples as dependants under the interdependency provisions of the SIS Act is not appropriate and discriminates between opposite-sex and same-sex de facto couples. In principle, the committee agrees that discrimination against other kinds of interdependants cannot be justified. However, the committee is not persuaded that same-sex de facto relationships can or should be categorised as interdependency relationships. Accordingly, whether there is discrimination against those relationships and how any such discrimination should be addressed are issues which warrant their own inquiry. This finding by the committee militates against the inclusion of interdependants within the couple relationship category proposed by the Bill.

5.66 Finally, the committee recognises the importance of consistency and uniformity across federal legislation to the extent that it is achievable. The committee notes, for example, suggestions that consistent definitions be inserted into the *Acts Interpretation Act 1901* or other cross-referable legislation. The committee further notes that the General Law Reform Bill proposes to create a common definition of 'de facto partner', and related definitions, and suggests that a common definition for 'child' would be appropriate.

Recommendation 1

5.67 The committee recommends that the definition of 'couple relationship' in the Bill be amended to read 'marital or de facto relationship', including all related definitions.

Recommendation 2

5.68 The committee recommends that the definition of 'child' in the Bill be amended to align it with the amended definition of 'child of a de facto relationship' proposed for the *Family Law Act 1975* in the amendments circulated by the Government to the Family Law Amendment (De Facto Financial Matters

and Other Measures) Bill 2008 in response to a bipartisan recommendation of this committee on that bill.

Recommendation 3

5.69 Subject to the preceding recommendations, the committee recommends that the Senate pass the Bill.

Senator Patricia Crossin

Chair