

ADDITIONAL COMMENTS BY LIBERAL SENATORS

1.1 Liberal senators wish to make the following additional comments in relation to the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008 (the Bill).

Amendments to the Bill

1.2 The Bill was referred to the committee on 18 June 2008 for inquiry and report no later than 30 September 2008. On 4 September 2008, a related bill, the *Same Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008* (General Law Reform Bill) was referred to the committee with a concurrent reporting date.

1.3 The committee held two public hearings into the provisions of the General Law Reform Bill. At the second of these hearings held on 23 September 2008, the last witness, the Attorney-General's Department, advised that the government would shortly be introducing amendments to the Bill. The committee was told that the Attorney-General's Department would endeavour to provide further details to the committee 'in a timely manner so that it can assist you in your consideration.'¹ The Chair of the committee subsequently confirmed that the amendments would be provided by the government on 8 October 2008. On this basis the Liberal senators agreed to delay reporting to 14 October 2008 to allow the committee sufficient time to consider these amendments.

1.4 To date, no further details have been provided by the government, and the committee has not had the opportunity to consider proposed amendments to the Bill prior to the adoption and tabling of this report.

1.5 Liberal senators question the process by which a Senate committee is asked to inquire into a bill, only to be advised that the government intends to amend the Bill without providing the amendments to the committee. The Senate should have every opportunity to scrutinise legislation put forward by the government, including proposed government amendments. Liberal senators consider this process to be most unsatisfactory.

1.6 Liberal senators urge the Senate to give the amendments to the Bill their full attention upon introduction, bearing in mind that the committee has not been given the opportunity to do so.

1 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 23 September 2008, p. 56.

'Couple relationship'

1.7 The term 'couple relationship' is used in the Bill to cover both marriages and de facto relationships, including same-sex de facto relationships. In fact, marriage is treated simply as one of the possible indications that two persons are in a couple relationship, and it is not even conclusive for this purpose.

1.8 This novel approach undermines the unique status of marriage in Commonwealth law.

1.9 It was abandoned by the government in drafting the General Law Reform Bill, which, in general, refers to marriages and de facto relationships as two distinct types of relationship, while nonetheless treating them equally.

Recommendation 1

1.10 The use of the term 'couple relationship' in the *Same Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008* should be abandoned, and the Bill should be redrafted using the terminological approach used in the *Same Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008*.

'Child as a product of a relationship'

1.11 The government has displayed extraordinary ineptitude in presenting the Senate with a series of ad hoc and incompatible approaches to the definitions of 'child' and 'parent' in Commonwealth law.

1.12 The Bill would introduce a provision that, any child, in relation to a person, includes '...if, at any time, the person was in a relationship as a couple with another person (whether the persons are the same sex or different sexes)—a child who is the product of the person's relationship with that other person.'²

1.13 The Explanatory Memorandum to the Bill gives two scenarios in which this definition would apply. These scenarios each involve artificial conception. Each scenario raises complex questions about the consent required by various parties in connection with a procedure involving assisted reproductive technology undergone by one party, and the implications for a possible parent-child relationship between these parties and any child conceived as a result of that procedure. The Bill does not adequately address these issues.

1.14 The scenarios canvassed by the Explanatory Memorandum to this Bill do not refer to surrogacy arrangements. However, the definition may cover some surrogacy arrangements.

2 Proposed subsection 19AA(5) of the *Parliamentary Contributory Superannuation Act 1948*

1.15 This lack of clarity is deeply regrettable in a matter as significant as the legal relationship of parenthood. The government deserves considerable criticism for having proceeded in this manner.

1.16 A more extensive set of scenarios is given in the Explanatory Memorandum to the General Law Reform Bill. These scenarios explicitly include some involving surrogacy arrangements. However, while the House of Representatives was debating and ultimately passing without amendment the General Law Reform Bill, the government circulated proposed amendments to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008* (Family Law Bill) some of which also address the definition of 'child' and 'parent' in Commonwealth law.

1.17 Item 5 of proposed new Schedule 3A of the Family Law Bill would effectively give parental status to the lesbian partner of a woman who undergoes an 'artificial conception procedure'. This includes artificial insemination and IVF.

1.18 Item 7 of proposed new Schedule 3A of the Family Law Bill would introduce a new Section 60HB to the *Family Law Act 1975* which would give parental status under that Act to any person for whom an order has been made under a prescribed surrogacy law of a state or territory.

1.19 The Parliament of Victoria is currently debating a government bill – the *Assisted Reproductive Treatment Bill 2008* (VIC) – which would allow male homosexual couples, as well as single men or single women, to commission a child through a surrogacy arrangement. There is a conscience vote on this bill, but it was opposed by all Liberal and National MLAs, as well as by four Labor MLAs.

1.20 These changes to the *Family Law Act 1975* would give full parental status in the circumstances set out. This parental status would survive any break-up of the same-sex relationship, and give the non-biological 'parent' of the child the right to shared parental responsibility and all the other rights given to biological or adoptive parents.

1.21 These changes are radical. They appear to give approval and recognition to procedures that facilitate bringing a child into the world which may deprive the child of either a father or a mother.

1.22 In relation to surrogacy, current jurisprudence from the Family Court of Australia decides cases which involve a surrogacy arrangement on the basis that it is not bound by any such agreement whether legal or not in the relevant jurisdiction. The cases are resolved – sometimes in favour of the birth mother – on the sole basis of the best interests of the child.³

³ In *Re Mark*, [Re Mark: an application relating to parental responsibilities [2003] FamCA 822 (28 August 2003)] Brown J considered the relevance of a surrogacy contract entered into under the law of California but observed (at 94) “It is the Family Law Act which governs this case, not the provisions of the surrogate agreement.”

1.23 There has been no inquiry by a Senate committee into surrogacy. It would be inappropriate for the Senate to adopt this amendment in the absence of any such inquiry. The Standing Committee of Attorneys-General is currently considering uniform national laws on surrogacy but the initial consultation paper for this process has not yet been issued.

1.24 The Coalition policy on the same sex reform package is in-principle support while being committed to 'resolutely oppose any measure which might open the door or otherwise give legitimacy to gay adoption, gay IVF or gay surrogacy.'⁴

1.25 Each of the approaches to the definition of 'child' and 'parent' so far proposed by the government involve measures which might open the door or otherwise give legitimacy to gay IVF or gay surrogacy.

1.26 A better approach to ensuring equal treatment for children who have a parent who is a party to a same-sex relationship would be to use the phrase 'child of the de facto partner of the person' to refer to a child in these circumstances while avoiding unnecessarily creating a new definition of 'child' or 'parent.'

Recommendation 2

1.27 The Bill should be amended to remove all references to a child as 'the product of the person's relationship with that other person' and to replace such references with the phrase 'child of the de facto partner of the person.'

Senator Guy Barnett Senator Mary Jo Fisher Senator Russell Trood

Deputy Chair

In *Re Evelyn*, [[*Re Evelyn* [1998] FamCA 55 (15 May 1998)] the Full Court upheld a decision by Jordan J making a parenting order in favour of a birth mother and her husband despite the existence of a surrogacy arrangement. The Full Court adopted the view that the existence or otherwise of the surrogacy arrangement had no effect on the outcome of the case.

"Before his Honour, an argument was mounted on behalf of the Ss that the various State and Commonwealth provisions relating to surrogacy led to the inevitable conclusion that for various reasons, the law required a decision in favour of the Ss. His Honour, correctly in our view, rejected this proposition as artificial and based his decision squarely upon the principle that 'the paramount consideration remains the best interests of the child'".

4 The Hon. Dr Brendan Nelson MP, Leader of the Opposition, *House Hansard*, 4 June 2008, p. 4480.