

The Senate

Standing Committee on
Legal and Constitutional Affairs

Same-Sex Relationships (Equal Treatment
in Commonwealth Laws—Superannuation)
Bill 2008

October 2008

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TABLE OF CONTENTS

MEMBERS OF THE COMMITTEE	iii
ABBREVIATIONS	vii
RECOMMENDATIONS.....	ix
CHAPTER 1	1
INTRODUCTION	1
Purpose of the Bill	1
Conduct of the inquiry	2
Acknowledgement	3
Scope of the report.....	3
Note on references	3
CHAPTER 2	5
OVERVIEW OF THE BILL.....	5
Background to the Bill.....	5
Purpose and key provisions	7
CHAPTER 3	13
SAME-SEX DISCRIMINATION	13
Same-sex discrimination in Commonwealth superannuation laws.....	13
Australia's international obligations regarding same-sex discrimination.....	14
Key provisions intended to eliminate same-sex discrimination in Commonwealth superannuation laws	15
CHAPTER 4	29
INTERDEPENDENT RELATIONSHIPS.....	29
Legal recognition of interdependent relationships in Commonwealth superannuation laws	29
Coverage of interdependent relationships	31

Terms of reference for the inquiry.....	31
CHAPTER 5	43
CHILDREN AND LEGISLATIVE CONSISTENCY	43
Status of children within the Bill.....	43
Legal and fiscal implications of the definitions of 'child' and 'child of a couple relationship'.....	44
Same-sex de facto relationships	47
The General Law Reform Bill.....	49
Consistency in legislation.....	52
Committee view.....	53
ADDITIONAL COMMENTS BY LIBERAL SENATORS	57
Amendments to the Bill.....	57
'Couple relationship'	58
'Child as a product of a relationship'	58
ADDITIONAL COMMENTS BY SENATOR HANSON-YOUNG.....	61
Introduction	61
Background.....	61
Private Superannuation Funds.....	61
Definition of a 'couple relationship'	62
Definition of a 'child'	64
Conclusion.....	65
APPENDIX 1	67
SUBMISSIONS RECEIVED.....	67
APPENDIX 2	79
WITNESSES WHO APPEARED BEFORE THE COMMITTEE	79

ABBREVIATIONS

ART	Artificial Reproduction Technology
Attorney-General	The Hon. Robert McClelland MP
Bill	Same-Sex Relationships (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008
committee	Senate Standing Committee on Legal and Constitutional Affairs
CRC	Convention on the Rights of the Child
Department	Attorney-General's Department
HREOC	Human Rights and Equal Opportunity Commission
HREOC <i>Same-Sex: Same Entitlements</i> report	HREOC, <i>Same-Sex: Same Entitlements: National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits</i> , May 2007
ICCPR	International Covenant on Civil and Political Rights
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>

RECOMMENDATIONS

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.

CHAPTER 1

INTRODUCTION

Purpose of the Bill

1.1 On 18 June 2008, the Senate referred the Same-Sex Relationships (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008 (Bill) to the Senate Standing Committee on Legal and Constitutional Affairs (committee) for inquiry and report by 30 September 2008, or after consideration of any related bill(s) that may be introduced to give effect to the recommendations of the Human Rights and Equal Opportunity Commission's report *Same Sex: Same Entitlements*, whichever is the sooner.

1.2 On 4 September 2008, a related bill, the Same-Sex Relationships (Equal Treatment in Commonwealth Laws-General Law Reform) Bill 2008 (the General Law Reform Bill), was referred to the committee for inquiry and report by 30 September 2008.

1.3 On 25 September 2008, the Senate extended the reporting date for both bills to 14 October 2008.

1.4 The terms of reference for the inquiry into the provisions of this Bill include:

- (i) the definition of 'couple relationship',
- (ii) empirical evidence from the states concerning the existence, recognition and relative numbers of interdependent relationships, other than de facto (whether heterosexual or same-sex) and marital relationships,
- (iii) whether the definition of 'couple relationship' should be amended to incorporate other interdependent relationships and, if so, whether the definitions should be broadened to include those relationships or whether a separate definition is required,
- (iv) the fiscal implications of the statutory recognition of other interdependent relationships for superannuation and taxation purposes,
- (v) the definitions of 'child' and 'child of a couple relationship',
- (vi) the legal and fiscal implications of the definitions referred to in (v), 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), and

(vii) all other matters considered necessary by the committee.¹

1.5 The Bill amends 14 Acts in relation to Commonwealth civilian and military (defined benefit) superannuation schemes; parliamentary, judicial and statutory legal officer pension schemes; and the Governor-General's pension scheme to ensure that same-sex partners and the children of same-sex couples are able to access reversionary superannuation benefits upon the death of the scheme member. The Bill will also amend related taxation and superannuation regulatory Acts.

Conduct of the inquiry

1.6 The committee advertised the inquiry in *The Australian* newspaper on 2, 16 and 30 July 2008. Details of the inquiry, the Bill and associated documents were placed on the committee's website. The committee also wrote to 120 organisations and individuals inviting submissions by 25 July 2008.

1.7 The committee received 306 submissions. The committee also received variations on seven different standard letters, totalling 318 individuals, and 63 joint submissions relating to the inquiry and other inquiries concurrently being conducted by the committee in relation to the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 and the Evidence Amendment Bill 2008. The submissions for this inquiry are all listed at Appendix 1.

1.8 A list of submissions was placed on the committee's website. However, not all submissions were published on the committee's website. This was due to the large number of submissions received for the three inquiries, and the resources required to publish those submissions. The majority of submissions received merely expressed a short statement in favour of, or opposing, the Bill. While some submitters requested confidentiality, all public submissions are available to the general public and can be provided upon request made to the committee secretariat.

1.9 The committee held public hearings in Sydney on 5 August 2008, Melbourne on 6 August 2008, and Canberra on 7 August 2008. Hearings were also conducted on those dates for the inquiries in relation to the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 and the Evidence Amendment Bill 2008. Due to overlap between certain issues, this report may refer to evidence relating to those inquiries, as well as to the Bill which is the subject of this inquiry.

1.10 A list of witnesses who appeared at the hearings for this Bill is at Appendix 2, and copies of the Hansard transcript are available through the internet at <http://www.aph.gov.au/hansard>.

1 Parliament of the Commonwealth of Australia, Journals of the Senate, No. 16, 18 June 2008, pp 509-510.

Acknowledgement

1.11 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

Scope of the report

1.12 Chapter 2 provides the background and an overview of the Bill. Chapter 3 discusses the issue of same-sex discrimination in relation to key provisions of the Bill. Chapter 4 explores the issues concerning 'interdependency relationships'. Chapter 5 discusses the issues specifically related to children and legislative consistency.

Note on references

1.13 References in this report are to individual submissions as received by the committee, not to a bound volume. References to Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard.

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter provides a brief background to the Bill, and then outlines its purpose and key provisions.

Background to the Bill

2.2 In May 2007, the Human Rights and Equal Opportunity Commission (HREOC) released its report titled *Same-Sex: Same Entitlements: National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefit*¹ (the HREOC *Same-Sex: Same Entitlements* report).

2.3 The primary finding of the HREOC *Same-Sex: Same Entitlements* report was that same-sex couples and their families cannot access the same financial and work-related entitlements as opposite-sex couples and their families. HREOC identified 58 Commonwealth statutes which it found to be discriminatory and consequently in breach of the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC).¹

2.4 Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²

2.5 HREOC stated that every time a same-sex couple or their family are denied entitlements and benefits available to opposite-sex couples and their families, there is a breach of the right to non-discrimination under Article 26 of the ICCPR. In some

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, Appendix 1.

2 United Nations, International Covenant on Civil and Political Rights, Article 26 (Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966)

circumstances, that breach will also lead to breaches under the CRC and other international treaties.³

2.6 Article 2 of the CRC states:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

2.7 Article 3 of the CRC states:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.⁴

2.8 HREOC made two recommendations aimed at promoting non-discrimination, equality under the law, and the best interests of the child:

- Recommendation 1: The federal government should amend the discriminatory laws identified by the HREOC inquiry to ensure that same-sex and opposite-sex couples enjoy the same financial and work-related entitlements.
- Recommendation 2: The federal government should amend the discriminatory laws identified by the HREOC inquiry to ensure that the

3 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. 376. The other international treaties which might be affected by discriminatory legislation are the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Discrimination (Employment and Occupation) Convention (ILO 111).

4 United Nations, Convention on the Rights of the Child, Article 3(1)-(2) (Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989)

best interests of children in same-sex and opposite-sex families are equally protected in the area of financial and work-related entitlements.⁵

2.9 On 30 April 2008, the Hon. Robert McClelland MP, Attorney-General (the Attorney-General), announced that legislation to remove same-sex discrimination from a wide range of Commonwealth laws would be introduced in the Winter Sittings of Parliament.

The changes will provide for equality of treatment under a wide range of Commonwealth laws between same-sex and opposite-sex de facto couples. Importantly the reforms will also ensure children are not disadvantaged because of the structure of their family...The changes do not alter marriage laws. They will make a practical difference to the everyday lives of a group of our fellow Australians who have suffered discrimination under Commonwealth laws for far too long.⁶

Purpose and key provisions

Purpose of the Bill

2.10 The Bill was introduced in the Senate on 16 June 2008. In the second reading speech, Senator the Hon. John Faulkner, Special Minister for State, described the overall objectives of the Bill as follows:

This bill marks the first step in removing discrimination against same-sex couples and their children in Acts governing Commonwealth (defined benefit) superannuation schemes and related Acts that have not moved with the times.

...

This bill will remedy these injustices by allowing same-sex couples and their children to access the benefits and entitlements they have been denied for so long...The bill also allows for the equal recognition of children who are the product of same-sex and opposite-sex relationships.⁷

2.11 The Bill represents the first tranche of reform for same-sex couples and their families, with the second tranche of reform contained in the General Law Reform Bill.

5 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. 382.

6 The Hon. Robert McClelland MP, Attorney-General, 'Rudd Government moves on same-sex discrimination', 30 April 2008.

7 Senator the Hon. John Faulkner, Special Minister for State, *Senate Hansard*, 16 June 2008, pp 2225 & 2224.

Structure of the Bill

2.12 The 36-page Bill comprises primarily Schedules 1 – 5, each of which amends the following specific legislation:

- Schedule 1 – Finance and Deregulation amends the *Parliamentary Contributory Superannuation Act 1948*; the *Superannuation Act 1922*; and the *Superannuation Act 1976*;
- Schedule 2 – Attorney-General's amends the *Federal Magistrates Act 1999*; the *Judges' Pensions Act 1968*; and the *Law Officers Act 1964*;
- Schedule 3 – Defence amends the *Defence Force Retirement and Death Benefits Act 1973*; and the *Defence Forces Retirement Benefits Act 1948*;
- Schedule 4 – Treasury amends the *Retirement Savings Accounts Act 1997*; the *Small Superannuation Accounts Act 1995*; the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*; the *Superannuation Industry (Supervision) Act 1993*; and the *Income Tax (Transitional Provisions) Act 1997*; and
- Schedule 5 – Prime Minister and Cabinet amends the *Governor-General Act 1974*,

(collectively called the affected Acts).

2.13 The Bill therefore covers several Commonwealth superannuation schemes:

- the Commonwealth Superannuation Scheme;
- the scheme under the *Superannuation Act 1922*;
- the Defence Force Retirement and Death Benefits Scheme;
- the Judges' Pensions Scheme;
- the Federal Magistrates Disability and Death Benefits Scheme;
- the Governor-General Pension Scheme; and
- the Parliamentary Contributory Superannuation Scheme.

2.14 The Public Sector Superannuation Scheme, which is established by the *Superannuation Act 1990*, is not amended by the Bill: the Explanatory Memorandum indicates that there are no discriminatory provisions within that principal Act.⁸ The Attorney-General's Department (the Department) added that any discriminatory legislative instruments, trust deeds and determinations of regulations will be progressively amended once principal Acts have been amended.⁹

8 Explanatory Memorandum, p. 5.

9 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 23 September 2008, p. 42.

Key provisions

2.15 In the HREOC *Same-Sex: Same Entitlements* report, the primary cause of discrimination against same-sex couples and their families was identified as the definitions used in legislation to describe a couple or family.¹⁰ Accordingly, the Bill focuses upon redefining a number of those definitions in the affected Acts.

2.16 Some of the new definitions proposed by the Bill are described below.

'Partner'

2.17 The Bill proposes to insert a new definition of 'partner' into most of the affected Acts. A typical example is:

A person is the partner of another person if the two persons have a relationship as a couple (whether the persons are the same sex or different sexes).¹¹

2.18 In other affected Acts, the Bill proposes instead to redefine 'spouse' by omitting 'as the husband or wife of the person' and substituting 'in a relationship as a couple (whether the persons are the same sex or different sexes)',¹² or by importing an alternate statutory definition.¹³

2.19 The new definition of 'partner' extends the range of persons who can be considered to be eligible for death benefits by including the same-sex partner of a scheme member or former scheme member. This amendment is related to other amendments in the Bill, which replace references to 'husband or wife' with references to 'partner'.¹⁴

'Couple relationship'

2.20 The Bill also proposes to replace the term 'marital relationship' with the new term 'couple relationship'. The new provisions will typically read,

10 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. 374.

11 This example is a proposed addition to subsection 4(1) of the *Parliamentary Contributory Act 1948*.

12 Proposed subsection 20(2) of the *Retirement Savings Accounts Act 1997*; proposed addition to section 4 of the *Small Superannuation Accounts Act 1995*; proposed subsection 54(3) of the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*; proposed addition to subsection 10(1) of the *Superannuation Industry (Supervision) Act 1993*

13 Proposed paragraphs 295-485A(2)(a) and 302-195A(2)(a) of the *Income Tax (Transitional Provisions) Act 1997*

14 Explanatory Memorandum, p. 6.

(1) For the purposes of this Act, a person had a couple relationship with another person at a particular time if the person ordinarily lived with that other person as that other person's partner on a permanent and bona fide domestic basis at that time.¹⁵

2.21 This amendment ensures that the definition of a relationship, for the purpose of the payment of death benefits, includes both opposite-sex and same-sex relationships.¹⁶ 'Permanent and bona fide domestic basis' is already defined in the affected Acts and is not changed by the Bill.¹⁷

'Child'

2.22 The Bill proposes to repeal and redefine the definition of 'child'. An example of the new term would be:

child, in relation to a person, means a child of the person, including:

- (a) an adopted child or an ex-nuptial child of the person; and
- (b) if, at any time, the person had a partner (whether the persons are the same sex or different sexes)-a child who is the product of the person's relationship with that partner.¹⁸

2.23 This new definition of 'child' will apply to the majority of the affected Acts. However, there are minor variations. One such example incorporates the new definition of 'couple relationship'.

child of a couple relationship, in relation to a couple relationship, means:

- (a) a child born of the couple relationship; or
- (b) a child adopted by the people in the couple relationship during the period of the relationship; or
- (c) a child who is the product of the couple relationship.¹⁹

15 Proposed addition to subsection 4B(1) of the *Parliamentary Contributory Superannuation Act 1948*. Also, see proposed addition to subsection 3(1) of the *Superannuation Act 1976*; and proposed addition to subsection 4(1) of the *Judges' Pensions Act 1968*

16 Explanatory Memorandum, p. 6.

17 For example, addition to subsection 4B(2) of the *Parliamentary Contributory Superannuation Act 1948*

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

19 Proposed addition to subsection 4(1) of the *Judges' Pensions Act 1968*. Another variation is the importation of alternate statutory definitions: see proposed paragraphs 295-485A(2)(b) and 302-195A(2)(b) of the *Income Tax (Transitional Provisions) Act 1997*; and proposed section 4 of the *Small Superannuation Accounts Act 1995*

2.24 These new definitions of 'child' expand the class of children that may be deemed to include a child of the scheme member or former scheme member for the purposes of determining eligibility for benefits.²⁰ However, step-children do not appear to be included within the classes of children envisaged by the new definition of 'child'.

'Product of the relationship'

2.25 The Bill proposes to expand the indicia of a 'couple relationship' to include a child who was:

the product of the relationship between the persons.²¹

2.26 Most of the affected Acts will incorporate this amendment which is intended to assist in determining whether two persons had a 'couple relationship' where a relationship is of less than three years duration.²² This helps to establish whether a couple has been living together on a 'permanent and bona fide domestic basis'.

2.27 The new indicium 'product of relationship' would also be used in some of the affected Acts as an additional criterion for the definition of an eligible child.²³ Typically, this definition would read:

(7) A child cannot be the product of the 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.²⁴

2.28 The Explanatory Memorandum states only that this provision is relevant to the new definition of 'child'.²⁵ There is no further explanation of the provision within the Bill. However, the terminology suggests that a couple must consent to the 'production' of the child.

20 Explanatory Memorandum, p. 6.

21 This example is proposed addition to subparagraph 4B(4)(c)(iii) of the *Parliamentary Contributory Superannuation Act 1948*.

22 Explanatory Memorandum, p. 7.

23 Proposed subparagraph 9E(7)(c)(iii) of the *Federal Magistrates Act 1999*; proposed addition to subsection 4AA(2) of the *Judges' Pensions Act 1968*

24 Proposed addition to subsection 4(7) of the *Parliamentary Contributory Superannuation Scheme 1948*. The only Acts which do not include this provision are the *Small Superannuation Accounts Act 1995*; the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*; and the *Income Tax (Transitional Provisions) Act 1997*.

25 Explanatory Memorandum, p. 6.

Other provisions

2.29 In addition to the new definitions proposed by the Bill, there were two other provisions relevant to the committee's inquiry: registration of same-sex relationships; and the date of commencement for the Bill.

Registration of same-sex relationships

2.30 The Bill proposes to expand the indicia of a 'couple relationship' by inserting as an indicium the registration of a same-sex relationship on a state or territory relationship register. The typical provision would read:

(ba) the persons' relationship was registered under a law of a State or Territory prescribed for the purposes of paragraph 4AB(4)(ba) of the *Judges' Pension Act 1968*, as a kind of relationship prescribed for the purposes of that paragraph.²⁶

2.31 Senator Faulkner stated the objective of this amendment:

[This] will enable a relationship registered under prescribed State laws to be evidence of the existence of a same-sex relationship when considering who may be entitled to a death or pension benefits.²⁷

2.32 The amendment will be incorporated into several of the affected Acts, with the Attorney-General making the necessary regulations for application to other Commonwealth superannuation schemes. The amendment assumes that the states and territories have functional relationship registers.

Date of commencement

2.33 Schedules 1-3 and 5 of the Bill will commence on a day to be fixed by Proclamation. However, if any of the provisions do not commence within 6 months after receiving the Royal Assent, then they commence on the first day after expiration of that period. Schedule 4 of the Bill was intended to commence on 1 July 2008.

26 Proposed paragraph 4B(4)(ba) of the *Parliamentary Contributory Superannuation Act 1948*

27 Senator the Hon. John Faulkner, Special Minister for State, *Senate Hansard*, 16 June 2008, p. 2224. Also, see Attorney-General's Department, *Submission 38*, p. 4.

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.

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

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

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'

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:

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.

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

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

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

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.

(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.

(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:

- at the time of the death of the deceased Judge, the child was wholly or substantially dependent on the deceased Judge; or
- 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

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

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’

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

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

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.

CHAPTER 4

INTERDEPENDENT RELATIONSHIPS

4.1 This chapter explores the issues concerning interdependent relationships, including:

- legal recognition of interdependent relationships in Commonwealth superannuation laws;
- coverage of interdependent relationships; and
- terms of reference for the inquiry.

Legal recognition of interdependent relationships in Commonwealth superannuation laws

4.2 Prior to 1 July 2004, the *Superannuation Industry (Supervision) Act 1993* (SIS Act) defined 'dependant', in relation to a person, as the 'spouse and any child of the person'. 'Spouse' included 'another person who, although not legally married to the person, lives with the person on a genuine domestic basis as the husband or wife of the person'. 'Child' included 'an adopted child, a step-child or an ex-nuptial child of the person'.¹

4.3 Accordingly, same-sex partners could not receive death benefits or related tax benefits direct from superannuation funds. Instead, a surviving same-sex partner had to establish a claim as a financial dependant, and entitlements paid to financial dependants were received not from the fund but the estate of the former scheme members.

4.4 The disadvantages of receiving payments from a deceased estate rather than a superannuation fund were highlighted by Mr Andrew Charaneka from the Law Council of Australia:

That then raises issues in terms of timing, contest and whether the entire benefit would be made available to the survivor if, for example, the deceased person had certain debts owing at the time of death that would be accounted for from that superannuation death benefit distribution.²

4.5 The enactment of the *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* extended the definition of 'dependant' to include, in

1 Section 10 of the *Superannuation Industry (Supervision) Act 1993*

2 Mr Andrew Charaneka, Law Council of Australia, *Committee Hansard*, Sydney, 5 August 2008, pp 33-34. Also, see Ms Kate Temby, HREOC, *Committee Hansard*, Melbourne, 6 August 2008, pp 28-29.

relation to a person, 'any person with whom the person has an interdependency relationship'.³ The circumstances in which two persons will be deemed to have an 'interdependency relationship' were also described in the legislation, that is, if:

- they have a close personal relationship;
- they live together;
- one or each of them provides the other with financial support; and
- one or each of them provides the other with domestic support and personal care.⁴

4.6 The introduction of the interdependency provisions enabled surviving same-sex partners to access death benefit distributions (and related tax benefits) direct from superannuation funds.

4.7 However, as pointed out by Associate Professor Miranda Stewart and others, the SIS Act provisions are not mandatory for private sector superannuation funds:

...the SIS Act regulates private superannuation funds that are administered under superannuation trust deeds, as well as providing definitions to which the various Commonwealth superannuation funds refer. The SIS regulatory regime is generally permissive (except for its prudential requirements on funds). Thus, this amendment, while enabling recognition of the partner of a private superannuation fund member, does not mandate such recognition.⁵

4.8 While many private superannuation fund trust deeds incorporate the definitions contained in the SIS Act, an uncertain number of private superannuation fund trust deeds do not. Mr Ross Clare from the Association of Superannuation Funds of Australia told the committee:

Certainly the bulk of funds would not pick up the definitions automatically. A significant minority would require amendment of trust deeds to pick it up. We have certainly seen indications of a willingness to do that.⁶

4.9 The committee notes therefore that same-sex partners are currently categorised as dependants under the interdependency provisions, a position different to that of opposite-sex de facto partners, and that classification as an 'interdependent'

3 Schedule 2 Item 3 of the *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004*

4 Section 10A of the Superannuation Industry (Supervision) Act 1993

5 Associate Professor Miranda Stewart, *Submission 37*, pp 3-4. Also, see Association of Superannuation Funds of Australia, *Submission 28*, p. 1.

6 Mr Ross Clare, Association of Superannuation Funds of Australia, *Committee Hansard*, Sydney, 5 August 2008, p. 25. The Government hopes that the passage of the Bill will encourage private superannuation funds to incorporate the definitions contained in the SIS Act: see Senator the Hon. John Faulkner, Special Minister for State, *Senate Hansard*, 16 June 2008, p. 2225.

requires a person to first fulfil certain criteria. However, as discussed later in this chapter, fulfilling these criteria imposes a more difficult requirement on same-sex couples than for opposite-sex couples, and is thus discriminatory.

Coverage of interdependent relationships

4.10 The issue of discrimination was also raised in the House of Representatives during the second reading debates by the Hon. Dr Brendan Nelson MP, the then Leader of the Opposition. However, Dr Nelson was concerned with discrimination between same-sex couples and other 'permanent domestic non-married relationships'.

In pursuing law reform in this area we must be very careful to avoid the trap of creating new inequalities by according economic recognition to the status of some types of relationships but leaving others unrecognised. This bill opens the door on the whole question of the proper treatment of all kinds of interdependent relationships outside marriage.

...

There is, in the opposition's view, a strong argument for giving those relationships as much recognition and respect as we give to same-sex relationships. In our view, just as same-sex couples should not be discriminated against, so too they should not be accorded a recognition and status denied to other permanent, domestic, non-marital relationships.⁷

4.11 The committee notes that intent of the Bill is to remove discrimination against same-sex couples and their children in Acts governing Commonwealth (defined benefit) superannuation schemes (and related Acts). The Bill does not provide for other dependants classified as 'interdependents'.

Terms of reference for the inquiry

4.12 When the Senate referred the Bill, it set a number of terms of reference that it asked the committee to address, including matters related to 'interdependents'. The terms of reference are detailed in chapter 1, and are separately discussed below.

Existence, recognition and relative numbers of certain interdependents

4.13 Term of reference (ii) requested the committee to inquire into empirical evidence from the states concerning the existence, recognition, and relative numbers of interdependent relationships, other than de facto (whether opposite-sex or same-sex) and marital relationships.⁸

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

8 Parliament of the Commonwealth of Australia, *Journals of the Senate*, No. 16, 18 June 2008, pp 509-510.

4.14 Neither submissions nor evidence provided the committee with any empirical evidence concerning the existence, recognition and relative numbers of such interdependency relationships.

4.15 State and territory relationship registers appear to be one of the few, if not the only, means by which empirical evidence could be gleaned. However, as indicated, no submissions were received from state and territory governments, and the existing registers are not useful indicators of the numbers of interdependency relationships.

The Victorian register of relationships became operational very recently, the ACT register does not permit the registration of non-conjugal relationships (amongst other things specifically prohibiting registration of relationships between relatives), and the Tasmanian figures that have been published [100 only in the past five years] do not split between same sex couples and other registrable relationships.⁹

4.16 The Tasmanian Gay & Lesbian Rights Group pointed out that, to date, existing registration schemes might have been under utilised.

It is true that only a handful of caring relationships have been registered in Tasmania. In this regard we note that the Tasmanian Government has done nothing whatsoever to explain or promote the benefits of registration to caring partners.¹⁰

4.17 The committee notes that state and territory relationship registers provide an option for formal, legal recognition of relationships, but that there is not necessarily any consistency in terms of either availability or the types of relationships which can be registered.

Interdependents' incorporation within 'couple relationship'

4.18 Term of reference (iii) requested the committee to inquire into whether the definition of 'couple relationship' should be amended to incorporate other interdependent relationships and, if so, whether the definitions should be broadened to include those relationships or whether a separate definition is required.¹¹

4.19 The Association of Superannuation Funds of Australia argued that the characteristics of interdependent relationships do not 'fit at all well' within the definition of 'couple relationship'.

A parent would find it unhelpful and perhaps even disturbing to have to establish that they are in a 'couple relationship' with an adult child still

9 Association of Superannuation Funds of Australia Limited, *Submission 28*, p. 3.

10 Tasmanian Gay & Lesbian Rights Group, *Submission 32*, p. 4.

11 Parliament of the Commonwealth of Australia, Journals of the Senate, No. 16, 18 June 2008, pp 509-510.

living at home even if the definition of couple relationship were expanded to cover such circumstances.¹²

4.20 HREOC similarly argued that the definition of 'couple relationship' is clear and intended to apply to couples only (opposite-sex or same-sex).

This definition should not be confused by broadening to include those who are in 'interdependent relationships'.¹³

4.21 The committee notes that these submissions address the term of reference, but that there were a considerable number of submitters and witnesses who rephrased the term of reference as 'should same-sex couples be included within the interdependency category' to which the overwhelming response was in the negative.

4.22 Foremost among these was HREOC which argued that, in three different areas of Commonwealth law, same-sex couples treated as interdependents have not been afforded treatment equal to that of either married or opposite-sex de facto couples.

4.23 HREOC stated that the three ways in which that categorisation continues to perpetuate discrimination are:

- the criteria for establishing an 'interdependency relationship' may be more difficult to establish than those for an opposite-sex married or de facto couple;
- the characterisation of same-sex relationships as 'interdependent relationships' suggests that there is something different about the quality of a same-sex relationship to that of an opposite-sex relationship; and
- the interdependency category may confer financial entitlements on people who are not in a couple.¹⁴

4.24 The first and second points were raised at the hearings and are discussed below.

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

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

14 HREOC, *Submission 34*, pp 10-11. HREOC suggested that its third point could be remedied by allowing only couples' registered relationships to evidence a 'couple relationship'. Also, see HREOC, 'Same-Sex: Same Entitlements: National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits', May 2007, pp 295-297; Kevin Boreham, *Submission 33*, p. 1; Gay and Lesbian Rights Lobby, *Submission 19*, pp 7-8; Victorian Gay & Lesbian Rights Lobby, *Submission 42*, p. 3; Dr John Challis, Superannuated Commonwealth Officers' Association, *Committee Hansard*, Canberra, 7 August 2008, p. 2; Mr Ross Clare, Association of Superannuation Funds of Australia, *Committee Hansard*, Sydney, 5 August 2008, p. 23;

The criteria

4.25 In relation to establishing an 'interdependent relationship', witnesses told the committee that the criteria of 'financial support' and 'domestic and personal care' are difficult for same-sex couples to satisfy.

4.26 Mr Robert Hodge from the Association of Superannuation Funds of Australia submitted that same-sex couples have more of an emotional relationship than a financial relationship.

You can have two people who are financially independent—that is, they both have jobs and they are both able to look after themselves. So they are not actually directly providing financial support...which does not apply in other de facto relationships or marital relationships.¹⁵

4.27 Furthermore, 'most people do not record instances of providing domestic support and personal care',¹⁶ and that criterion has been difficult for same-sex couples, and others, to evidence.

4.28 Associate Professor Stewart was also critical of the 'complex' set of interdependency requirements that currently apply to same-sex de facto couples. She stated that these requirements are onerous compared to the standard list of factors, which courts use to define opposite-sex de facto couples, and they are not appropriate.

In particular, the concept of domestic support and personal care is not a factor that exists in the general list of factors that courts use to consider couple relationships...The only legal interpretation of a phrase like that which has been done to date is actually in New South Wales law...The interpretation essentially required that it be care in the way that you would think of as a carer relationship—that is, someone who is seriously ill, requires physical assistance in dressing or whatever, or requires ongoing assistance with mental or physical health.¹⁷

4.29 Associate Professor Stewart added:

As a matter of policy and of legal clarity and certainty of administration, it is inappropriate to include same-sex couple relationships in the category of interdependency relationships...The two kinds of relationships are different; the latter concept is clearly targeted to a carer relationship and is well suited to that category only. Same-sex couple relationships are much more similar to opposite-sex couple relationships than they are to any form

15 Mr Robert Hodge, Association of Superannuation Funds of Australia, *Committee Hansard*, Sydney, 5 August 2008, p. 23.

16 Mr Robert Hodge, Association of Superannuation Funds of Australia, *Committee Hansard*, Sydney, 5 August 2008, p. 23

17 Associate Professor Miranda Stewart, *Committee Hansard*, Melbourne, 6 August 2008, p. 4. Also, see Mr Rodney Croome, Australian Coalition for Equality, *Committee Hansard*, Melbourne, 6 August 2008, p. 37.

of carer/companion, sibling or parent/child relationship, the categories intended to be covered by the interdependency category.¹⁸

4.30 The discriminatory nature of the interdependency relationship criteria was alluded to by the Australian Federation of AIDS Organisations when it described the criteria as intrusive and overly complicated.

Unlike heterosexual de-facto couples who must meet the criteria of a 'spouse', a same-sex partner can only be conferred a death benefit after superannuation trustees have considered numerous highly intrusive factors relating to their relationship.¹⁹

Characterisation

4.31 HREOC's second criticism that categorisation of same-sex couples as 'interdependents' suggests there is a qualitative difference between opposite-sex and same-sex relationships was supported in several submissions and evidence.

4.32 The Australian Federation of AIDS Organisations submitted:

The relegation of same-sex couples to a separate category that includes other interdependent people who are not members of a 'couple' (eg. two elderly friends or siblings living with, and caring for, each other) is of itself highly problematic. Not only does it fail to represent the reality of same-sex couples, it is marginalising and stigmatising. It fails to acknowledge the depth and sincerity of same-sex relationships, and suggests there is something intrinsically different (or lesser) between opposite-sex and same-sex couple relationships.²⁰

4.33 Dr John Challis from the Superannuated Commonwealth Officers' Association suggested that there is an ulterior motive for including same-sex relationships within the interdependency category.

It transforms them into some kind of sanitised asexual relationship. They are sort of whitewashed in a sense and made more respectable by calling them interdependent relationships instead of same-sex relationships.²¹

4.34 Witnesses strongly rejected the notion that their support for the inclusion of same-sex couples in the category of de facto relationships, rather than that of

18 Associate Professor Miranda Stewart, *Submission 37*, p. 3. Also, see Superannuated Commonwealth Officers' Association, *Submission 27*, pp 5-6; and Mr Graeme Innes AM, HREOC, *Committee Hansard*, Melbourne, 6 August 2008, p. 26.

19 Australian Federation of AIDS Organisations, *Submission 7*, p. 3.

20 Australian Federation of AIDS Organisations, *Submission 7*, pp 3-4. Also, see Hawkesbury Nepean Legal Centre, *Submission 2*, p. 3. Also, see Victorian Gay & Lesbian Rights Lobby, *Submission 42*, p. 2.

21 Dr John Challis, Superannuated Commonwealth Officers' Association, *Committee Hansard*, Canberra, 7 August 2008, p. 2. Also, see Tasmanian Gay & Lesbian Rights Group, *Submission 32*, p. 5; and Mr Kevin Boreham, *Submission 33*, p. 2.

interdependency, demeans, or considers inferior, other permanent, loving, domestic relationships.

4.35 HREOC asserted that same-sex relationships are not superior to other kinds of 'interdependency relationships': they are simply different and more akin to de facto relationships.

A marital couple relationship that is well recognised in the law, where de facto couples are recognised according to a set of well-established criteria, both in legislation and in the common law, is fundamentally different to the interdependent relationships that you are talking about, which would not meet all of those criteria that are well established to determine a de facto or marital couple relationship. Our view is that same-sex couples who would meet those criteria except for the fact that they are of the same sex should be recognised in the same way as other couple relationships.²²

4.36 The NSW Gay and Lesbian Rights Lobby agreed, having no objection to recognising other 'interdependents', but disputing that same-sex couples were properly classified in a carer category.

What we do have an objection to is saying de facto heterosexual couples are different to same-sex de facto couples and putting the latter in a carer category as opposed to where they properly belong, which is akin to heterosexual de facto couples.²³

4.37 Similarly, the Australian Coalition for Equality noted:

It has not been suggested that opposite sex de facto relationships be placed on the same legal footing with "two aunts living together".²⁴

4.38 Mr Kevin Boreham, a legal academic based at the ANU College of Law, submitted that including same-sex relationships in a non-de facto category lacked the element of fairness.

It would be unfair for the Parliament, having denied same sex couples the status of married couples in the 2004 amendments to the Marriage Act, now to deny us even the recognition that a committed same sex relationship has a definable difference from other relationships of people living together.²⁵

4.39 Reverend Elenie Poulos from Uniting Justice Australia discounted the issue of 'interdependency relationships', arguing that it is not at all relevant to the intent of the Bill.

The amendments are about couples who live in a specific kind of relationship. What we are concerned about is that people who live in

22 Ms Kate Temby, HREOC, *Committee Hansard*, Melbourne, 6 August 2008, p. 27.

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

24 Australian Coalition for Equality, *Submission 30*, p. 6.

25 Mr Kevin Boreham, *Submission 33*, p. 1.

exactly the same kind of relationship have, up to this point, been excluded from the same privileges by virtue of their gender alone.²⁶

Intependency relationship - a separate issue

4.40 As indicated in preceding paragraphs, there was some discussion during the inquiry about interdependent relationships and whether discrimination against people in such relationships also needs to be addressed along with discrimination against same-sex couples. At the hearings for this inquiry, some witnesses remarked upon the need for a thorough examination of the position of interdependents.

4.41 Ms Emily Gray from the NSW Gay and Lesbian Rights Lobby told the committee:

There are many instances in this country where the living situation of sister or carer relationships do need to be recognised and protected, but we think that is a whole other area of law that would need a whole separate inquiry.²⁷

4.42 Several submissions agreed with the Australian Christian Lobby and the Lutheran Church of Australia-Commission on Social and Bioethical Questions, respectively, that the issue was one of principle:

If the goal is to remove unfair discrimination, that should also be removed against those in other types of interdependent relationships.²⁸

We believe strongly that any changes in our laws in this area should focus on the long-term domestic co-dependent relationship...All of the media attention appears to be focused on same-sex couples, and we are concerned that other domestic co-dependents should benefit equally from your legal reform. Surely it would be inappropriate for our government to be seen to discriminate against people because of a perceived lack of sexual activity.²⁹

Commonwealth recognition of registered relationships

4.43 While there are outstanding issues regarding the legal recognition of interdependents, the Bill enhances the recognition of same-sex couples in Commonwealth superannuation laws with the addition of the registered relationships as an indicia of a 'couple relationship'.

26 Reverend Elenie Poulos, Uniting Justice Australia, *Committee Hansard*, Sydney, 5 August 2008, p. 18. Also, see Mr Kevin Boreham, *Submission 33*, p. 1.

27 Ms Emily Gray, NSW Gay and Lesbian Rights Lobby, *Committee Hansard*, Sydney, 5 August 2008, p. 3. Also, see Mr Corey Irlam, Australian Coalition for Equality, *Committee Hansard*, Melbourne, 6 August 2008, pp 36 & 39.

28 Mr Lyle Shelton, Australian Christian Lobby, *Committee Hansard*, Canberra, 7 August 2008, pp 7 & 10. Also, see Mr Corey Irlam, Australian Coalition for Equality, *Committee Hansard*, Melbourne, 6 August 2008, p. 39; Australian Federation of AIDS Organisations, *Submission 7*, p. 4; and Presbyterian Church of Australia Church and Nation Committee, *Submission 10*, p. 1.

29 Lutheran Church of Australia-Commission on Social and Bioethical Questions, *Submission 5*, p. 1.

4.44 In general, this amendment was welcomed with some submitters and witnesses suggesting ways in which the provisions could be further improved.

4.45 Associate Professor Stewart, for example, considered it appropriate for the Bill to amend paragraph 4AB(4)(ba) of the *Judges' Pension Act 1968* as relevant evidence of a 'couple relationship' in the affected Acts. But,

it would be more appropriate to have this general provision in the Acts Interpretation Act.³⁰

4.46 Furthermore, Associate Professor Stewart recommended that the provision be extended, 'to enable the government to prescribe the law of another country under which registration is allowed, so as to assist in this evidentiary exercise.'³¹

4.47 However, the committee also received submissions critical of the amendment. The main reason for this criticism was that the provision would not advance the objectives of the Bill due to the inadequacies of the state and territory registration schemes.³²

4.48 Mr Boreham considered the proposed provision unequal and inefficient, identifying the inconsistent availability of registration schemes as a problem.

Partners in a same sex relationship will be able to access the entitlements recognised in the Bill only if one partner lives in the ACT, Tasmania or Victoria, the only jurisdictions which have registration schemes for same sex partners. Other people in same sex relationships will have to wait until the Parliaments in their jurisdiction get around to establishing registration schemes.³³

4.49 Mr Boreham suggested that the establishment of a national relationships registration scheme would be one way in which the Commonwealth could overcome part of the problem, but acknowledged that this would require a referral of power by the states and territories under section 51(xxxvii) of the Constitution.

It seems much more likely that the States would make such a referral promptly if requested, than that they will each assign the same high priority

30 Associate Professor Miranda Stewart, *Submission 37*, p. 4. Also, see Australian Coalition for Equality, *Submission 30*, p. 7.

31 Associate Professor Miranda Stewart, *Submission 37*, p. 4. Also, see Australian Coalition for Equality, *Submission 30*, p. 7. Also, see Mr Corey Irlam, Australian Coalition for Equality, *Committee Hansard*, Melbourne, 6 August 2008, p. 36.

32 There was also the criticism that de facto relationships are not registered relationships and should not be presumptively recognised as such: see Mr Rodney Croome, Australian Coalition for Equality, *Committee Hansard*, Melbourne, 6 August 2008, p. 37. Also, see Tasmanian Gay & Lesbian Rights Group, *Submission 32*, p. 7.

33 Mr Kevin Boreham, *Submission 33*, p. 2.

to drafting, consulting on and enacting consistent partnership registration schemes.³⁴

4.50 The committee acknowledges that the recognition of registered relationships provided for in the Bill will have limited application, and notes that the General Law Reform Bill contains identical provisions.

4.51 There was some suggestion that registered relationships should be treated as a completely separate category to de facto relationships. Mr Rodney Croome from the Australian Coalition for Equality, for example, argued:

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 a couple, for instance, in Tasmania or the ACT, register their civil partnership or their significant relationship, what they are doing is choosing specifically to no longer to be considered a de facto couple.³⁵

4.52 The committee refers to its report on the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, where this issue is discussed in more detail.

Fiscal implications of statutory recognition of other interdependent relationships

4.53 Term of reference (iv) requested the committee to inquire into the fiscal implications of the statutory recognition of other interdependent relationships for superannuation and taxation purposes.³⁶

4.54 Neither submissions nor evidence provided the committee with any precise information in this regard. Instead, submitters and witnesses limited themselves to general commentary on the likely fiscal implications in relation to 'permanent domestic non-married relationships', and the likely fiscal implications in relation to same-sex partners. Both types of commentary are discussed below.

4.55 The Association of Superannuation Funds of Australia informed the committee that the main groups to benefit from interdependency provisions have been same-sex partners, and the parents of children who were living at home prior to their death.

Other possible beneficiaries...are likely to be very rare in actual practice.³⁷

34 Mr Kevin Boreham, *Submission 33*, p. 2.

35 Mr Rodney Croome, Australian Coalition for Equality, *Committee Hansard*, Melbourne, 6 August 2008, p. 37. Also, see Tasmanian Gay & Lesbian Rights Group, *Submission 32*, p. 7.

36 Parliament of the Commonwealth of Australia, Journals of the Senate, No. 16, 18 June 2008, pp 509-510.

37 Association of Superannuation Funds of Australia, *Submission 28*, pp 2-3. For example, two siblings living together, or persons with a disability or illness.

4.56 It was also pointed out that compulsory superannuation is a relatively recent invention, and accordingly, the majority of people do not have superannuation entitlements at the time of their death. The Association of Superannuation Funds of Australia stated that, 'in 2006-07 there were around 140,000 deaths in Australia but only 36,000 death benefits paid by superannuation funds.'³⁸

4.57 The combination of these two factors, determinable beneficiaries and non-existent entitlements, led the Community and Public Sector Union and the Superannuated Commonwealth Officers' Association to respectively conclude that the cost of statutorily recognising interdependency relationships, other than same-sex relationships, is likely to be 'negligible,³⁹ or at least relatively insignificant.⁴⁰

4.58 The committee observes that almost 90 per cent of Australians are in private superannuation funds, which are not necessarily affected by the Bill, and that most superannuation funds are accumulation funds, which would have no cost implications under the proposed Bill.⁴¹ For those Australians in Commonwealth superannuation (defined benefit) schemes, and private superannuation (defined benefit) funds which incorporate the provisions of the Bill, there will be cost implications.

4.59 The committee notes that the Bill does not intend to encompass 'interdependency relationships' however numerically or fiscally insignificant.

4.60 In the public sector, the Explanatory Memorandum provided the following information on the cost implications of the Bill.

38 Association of Superannuation Funds of Australia, *Submission 28*, p. 2.

39 Community and Public Sector Union, *Submission 1a*, p. 7.

40 Superannuated Commonwealth Officers' Association, *Submission 27*, Attachment B, p. 6.

41 Association of Superannuation Funds of Australia, *Submission 28*, p. 2. Also, see Mr Ross Clare, Association of Superannuation Funds of Australia, *Committee Hansard*, Sydney, 5 August 2008, p. 26. Also, see Ms Kate Temby, HREOC, *Committee Hansard*, Melbourne, 6 August 2008, p. 29.

Table 1: Approximate increase in unfunded liability

	(\$ million)
Schemes administered by the Department of Finance and Deregulation	81.5
Schemes administered by the Department of Defence	30.0
Schemes administered by the Attorney-General's Department	1.0

Source: *Explanatory Memorandum, p. 3.*

4.61 The Explanatory Memorandum also provided information regarding the four year financial impact across various departments and agencies, noting that these will be ongoing.⁴²

4.62 The committee received no further information regarding the fiscal implications of the statutory recognition of same-sex relationships in Commonwealth superannuation laws.

42 Explanatory Memorandum, p. 2.

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

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

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.

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.

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:

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.

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*

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.

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

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

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.

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

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.

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:

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.

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.

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.

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

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.

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

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'.

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

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.

24 Proposed clause 22A of the Acts Interpretation Act 1901

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.

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

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.

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

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

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.

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.

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')
- 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.

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

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

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.

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

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.

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

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.

ADDITIONAL COMMENTS BY SENATOR HANSON-YOUNG

Introduction

1.1 The Australian Greens commend the Chair and committee secretariat on the comprehensive nature of the committee's report.

1.2 We believe that the inquiry into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008 (the Bill) has provided the committee with the opportunity to recommend to the Government ways to strengthen and tighten the legislation to ensure same-sex couples are not discriminated against in any way.

1.3 However, the Australian Greens have a number of additional concerns which we consider should be addressed to ensure equality for all couples – regardless of their sexuality – is actually met.

Background

1.4 There has been discussion and public debate about the removal of same-sex discrimination for decades.

1.5 The first stage of the Rudd Government's election promise to remove discrimination against same-sex couples in more than 100 pieces of Commonwealth legislation following a 2007 Human Rights and Equal Opportunity Commission (HREOC) report highlighted that at least 20 000 same-sex couples experience systemic discrimination daily.

1.6 The Australian Greens believe that freedom of sexual orientation and gender identity are fundamental human rights.¹ The need for acceptance and celebration of diversity, including sexual orientation and gender diversity, is essential for genuine social justice and equality.

Private Superannuation Funds

1.7 The Australian Greens do not think people should be discriminated against on the basis of their sexuality.

1.8 In particular, we, along with other key witnesses, are concerned that while the government's proposed piece of legislation will provide for superannuation

¹ United Nations Universal Declaration of Human Rights: <http://www.unhchr.ch/udhr/lang/eng.htm>

entitlements for same-sex couples who have Commonwealth super schemes, for those who have commercial super schemes, the discrimination could continue.

1.9 Where a superannuation fund provides for recognition of an opposite-sex relationship as a “de facto relationship” we believe this should be non-discriminatory.

1.10 While this Bill specifically legislates for judges, veterans and Commonwealth public servants, it allows private superannuation firms to, if they choose to, remove the discrimination, and yet does not actually mandate them to do so.

1.11 While the Australian Greens were indeed pleased to see the government commit to its election promise of removing same-sex discrimination in all areas of law, we are disappointed to see that this legislation does not specifically mandate private superannuation firms to stop discriminating against same-sex couples, considering that around 90 per cent of Australians have their super tied up in private funds.²

1.12 The *Superannuation Industry (Supervision) Act 1993* (Cth) (the SIS Act) regulates private superannuation schemes. Where private superannuation trust deeds refer directly to the definitions contained in the SIS Act, they will have the immediate effect of including same-sex couples. Yet, the legislation, in its current form, does not require all trust deeds to incorporate these definitions.

Recommendation 1

1.13 The Australian Greens recommend the government amend the SIS Act, to mandate that, where an individual superannuation fund recognises opposite-sex de facto couples, they must also recognise same-sex de facto couples.

Recommendation 2

1.14 The Australian Greens further recommend that any amendment that is made will not cause any resettlement of the trust funds or otherwise pose a risk to security of those funds including tax liability.

Definition of a ‘couple relationship’

1.15 The government explicitly outlines the reasoning for the adoption of the definition 'couple relationship' in its Explanatory Memorandum stating:

The effect of [these amendments] is to ensure that the definition of a relationship, for the purpose of the payment of death benefits, includes a same-sex relationship as well as an opposite-sex relationship. The inclusion of same-sex relationships within this definition is not intended to change the treatment of married or opposite-sex de facto couples. It removes same-

² APRA Statistics Annual Superannuation Bulletin June 2007

sex discrimination but does not change or re-define any other indicia of a relationship.³

1.16 It is for this reason that the Australian Greens welcome the new definition of a ‘couple relationship’ contained within the Bill.

1.17 We particularly support the explicit reference to same-sex couples in the definition of partner and the addition of registration of a relationship as evidence of the existence of a couple relationship.

1.18 The Australian Greens particularly support point number 17 in HREOC’s submission that states:

The combined effect of replacing the term ‘marital relationship’ with ‘couple relationship’ and replacing the phrase ‘husband and wife’ with ‘partner’ ensures the equal treatment of same-sex and opposite-sex relationships.⁴

1.19 It is for this reason that the Australian Greens do not support the committee’s recommendation to amend the definition of ‘couple relationship’ in the Bill to read ‘marital or de facto relationship’.

1.20 Further to this, the Australian Greens also support the recommendation put forward by the Australian Coalition for Equality that the recognition of registered relationships needs to be completely separate from the distinct recognition of de facto relationships.⁵

Recommendation 3

1.21 The Australian Greens recommend that the current definition of a ‘couple relationship’ contained within the legislation remains, to ensure the equal treatment of same-sex and opposite-sex relationships for the purpose of a payment of a death benefit.

Recommendation 4

1.22 The Australian Greens further recommend an ‘umbrella term’ of ‘couple relationship’ be adopted, to ensure the courts do not treat married, registered or de facto couples differently, in that each will have unique criteria but be provided with equal ‘couple relationships’ entitlements.

³ Explanatory Memorandum, paras 33, 78, 110, 113, 149, 159, 161, 193, 194, 225, 242, 248, and 266.

⁴ HREOC, *Submission 34*

⁵ Australian Coalition for Equality, *Submission 30a*

Definition of a ‘child’

1.23 The Australian Greens support the intention in the Bill to ensure that children born into same-sex families have the same rights and entitlements to superannuation benefits as children born into opposite-sex families.

1.24 The Bill expands the changes the definition of 'child of a relationship' by adding the concept of a child who is the 'product of the relationship', which caused significant confusion during the inquiry. Many witnesses claimed it was ‘ugly’ language without any legal precedent.

1.25 During the inquiry in Sydney, Professor Jenni Millbank suggested to the committee that the ‘product of a relationship’ concept was attempting:

...to do too many things while pretending it is not doing very much and that the ensuing confusion and uncertainty will deprive the people of their rights rather than grant them rights.⁶

1.26 It is for this reason that the Greens, along with other key witnesses, have concerns about the terminology ‘product of a relationship’ used to define a child.

1.27 While we support the need for a more concise and legally tested definition of a 'child', the Greens do not support the committee’s recommendation that a review be conducted to determine the necessity for the definition to be included within this Bill.

1.28 While many witnesses highlighted the need to amend section 60H of the *Family Law Act 1975* to express gender neutral language, it should be noted that the Government has tabled amendments to the *Family Law Act 1975*, which would address this concern in the current Bill.

Recommendation 5

1.29 The Australian Greens recommend that the definition of a child and a parent should simply be called ‘child’ and ‘parent’ (with the exception of adoptive, step or grand interrelations). This essentially means that the term 'relationship parent' and 'relationship child', as defined within the *Social Security Act 1991*, would be amended to simply state 'child' or 'parent'. The definition should be amended to ensure children across Australia will be equitably included, and the distinction between parents/co-parents and step-parents should not be inappropriately blurred.

⁶ Professor Jenni Millbank, *Committee Hansard*, Sydney, 5 August 2008, p. 15.

Conclusion

1.30 The Australian Greens support the removal of discrimination in all areas of federal law, and we do not want to see the Bill delayed any further. The public have expressed their desire to have same-sex discrimination removed from law, and we need to see this discrimination removed expediently.

Senator Sarah Hanson- Young

Greens' Spokesperson for LGBTI

APPENDIX 1

SUBMISSIONS RECEIVED

Submissions received from organisations

Submission Number	Submitter
1	Community and Public Sector Union
1a	Community and Public Sector Union-supplementary submission
2	Hawkesbury Nepean Community Legal Centre
3	FamilyVoice Australia
4	Lesbian and Gay Solidarity Melbourne
5	Lutheran Church of Australia-Commission on Social and Bioethical Questions
6	Uniting Justice Australia
7	Australian Federation of AIDS Organisation
8	Professor Jenni Millbank, Faculty of Law, University of Technology Sydney
9	Let's Get Equal Campaign (South Australia)
10	Presbyterian Church of Australia Church and Nation Committee
11	Australian Christian Lobby
12	Australian Family Association (South Australia)
13	Rainbow Labor New South Wales
14	Professor Patrick Parkinson-University of Sydney
14a	Professor Patrick Parkinson-supplementary submission
15	Lyndoch Lutheran Parish
16	Member for Sydney-Clover Moore
17	Australian Institute for Family Counselling
18	Anti-Discrimination Board of New South Wales
19	New South Wales Gay and Lesbian Rights Lobby
19a	New South Wales Gay and Lesbian Rights Lobby-supplementary submission
20	New South Wales Council for Civil Liberties
21	Human Rights Council of Australia
22	Australian Family Association
23	Penny Sharp MLC
24	Family Life International
25	Comsuper Action Committee
25a	Comsuper Action Committee-supplementary submission

26	Catholic Archdiocese of Adelaide
27	Superannuated Commonwealth Officers' Association Inc.
28	Association of Superannuation Funds of Australia
29	Gay and Lesbian Equality (Western Australia) Inc
30	Australian Coalition for Equality
30a	Australian Coalition for Equality-supplementary submission
31	Law Council of Australia
32	Tasmanian Gay and Lesbian Rights Group
33	Kevin Boreham-Australian National University College of Law
34	Human Rights and Equal Opportunity Commission
35	UniSuper
36	Western Australian Equal Opportunity Commission
37	Associate Professor Miranda Stewart
38	Attorney-General's Department
39	Fatherhood Foundation
40	Victorian Attorney-General, Rob Hulls MP
41	Victorian Gay and Lesbian Rights Lobby
42	Industry Funds Forum

Submissions received from individuals

Submission Number	Submitter
m1	Mr Ross Beale
m2	Mr Jeff Townsend
m3	Name withheld
m4	Neil Freestone
m5	M. Dayana
m6	Shirley Coombs
m7	Nathan Holmes
m8	Malcolm and Rosemary Pryor
m9	Merrilyn Billing
m10	Ted Skuse
m11	Frank Cowell
m12	Di Chapman
m13	Darren Laudenbach
m14	Ross Naddei
m15	Gabrielle Priest
m16	Rowan du Boulay

m17	Dave Bugler
m18	Mrs Helen Louden
m19	Mr and Mrs Bruce and Jenny McWilliam
m20	Stephan Grobler
m21	Hinson Chan
m22	Mr and Mrs John and Renee Dillon
m23	Stephen Barnard
m24	Phillip W. Gunton
m25	Geoffrey Roy Earl
m26	Matthew Loader
m27	Dan Kalpakoff
m28	Name withheld
m29	John Goldbaum
m30	Chris Broomhead
m31	Luidi Rosolin
m32	Daniel Fabiyanic
m33	Name withheld
m34	Les Aldridge and Family
m35	James Howes
m36	Jennifer Agnew
m37	Collin Giddings
m38	Philip Robinson
m39	Annette Wotherspoon
m40	Claire Leslie
m41	Kate Small
m42	Terry and Diane Harding
m43	Jannah Burgess
m44	Paul Thompson
m45	Name withheld
m46	Michael Smith and Waren Fuge
m47	Ryan Black
m48	David Seeto
m49	Dr Ruth Nicholls
m50	David Skidmore
m51	Mrs Jacqui Ratajczak
m52	Dianne Seeto
m53	Louise Barker
m54	Name withheld
m55	Frances Bedford

m56	George Hansford
m57	Martin Sobey
m58	Warick Poole
m59	Jemma Tribe
m60	Emma Ellis
m61	Ian R. Wilby
m62	Pastor David Blair
m63	Michelle Parker, Gemma Miscrachi, Pia Struwe, Roz Smart
m64	Cathy Brown
m65	Colin Ellis
m66	Peter Crouch
m67	Helen Murray
m68	Kathryn Cooper
m69	Roger J. Williamson
m70	Sonny Tuapola
m71	Guy Fitzpatrick
m72	Gillian Appleton
m73	James Poland
m74	Brian Paul
m75	Mary Perrett
m76	Pauline and Rod Coady
m77	Barry and Sue Cuthbertson
m78	Mr Jason Waszaj
m79	Robert Worner
m80	C. D. Parkin
m81	Margaret and Dunstan Hartley
m82	Jan Wilson
m83	F. C. Brohier
m84	Confidential
m85	Gwenda Allan
m86	Confidential
m87	Bev Pattenden
m88	Martin Bleby
m89	Stuart Revill
m90	Nita and Bert Hyam
m91	Susan Cleary
m92	Dr Peter Arnold
m93	Mrs Rhonda Avasalu
m94	John de Jongh

m95 John F. Schwerdt
m96 Dougal Pottie
m97 Mervyn R. Vose
m98 Darryl Allen
m99 Mrs Jennifer Hunt
m100 Peter Rive
m101 Mrs Norma Cayzer
m102 Greg Wyld
m103 Michael Nakhla
m104 Rev Gordon Boughton
m105 Confidential
m106 Robert James Martin
m107 Wes Milton
m108 David Doery
m109 Margaret Baguley
m110 David Mander Brook
m111 William Schaefer
m112 Jim Woulfe and Andreas Ohm
m113 Bernard Hennessy
m114 Patricia Bosel
m115 Rina Huber
m116 Rev J. E. and Mrs Studd
m117 Shirley Arnold
m118 Mary Rawlings
m119 Eric Labonne
m120 Mrs Patricia Cherry
m121 Mrs D. Purcell
m122 Rev. David O. Paech
m123 Mrs Marion Smith
m124 Tony and Karen Fisher
m125 David Madill
m126 Ray and Del Moran
m127 Cheryl Mahinay
m128 Ben Carter
m129 Linda Sala
m130 Lise Rawlings
m131 Gerard Calilhanna
m132 Mrs Catherine Crittenden
m133 Greg Chenhall

m134 John Gresser
m135 Mrs Nancy Paul
m136 Mr and Mrs N. Watt
m137 Jillian Spring
m138 Adrian and Rhonda Shakespear
m139 Ian Jyner
m140 John J. Morrissey
m141 Dr D. Gaffney
m142 William Anthony Burnell
m143 David Dutton
m144 John Kingsmill
m145 Jude Lowe
m146 Mrs Jillian M. Wehr
m147 Murray and Barbara Morton
m148 Melinda Berry
m149 Confidential
m150 Hon Ian Hunter MLC
m151 Mrs Anna E Vaatstra
m152 David Rogerson Major
m153 Robyn Lingard
m154 Paulina May
m155 Confidential
m156 Bruce Heselwood
m157 Bevan Grady and Reinaldo Fernandes
m158 Dr Annette Shewan
m159 Christine Loundes
m160 Mr Neville and Mrs Jacqueline Halgren
m161 Confidential
m162 Mrs Merle Ross
m163 Andrea Fagnoli
m164 Vienie Birchley
m165 Julie-Anne Ford
m166 Wendy and Adrian Brown
m167 Roger Dalton
m168 The Rev H. Gordon Williams, OSJ. JP
m169 Robert and Hannah Craig
m170 Rod Spark
m171 Mrs Allison Bennett
m172 David Trchala

m173	Barbara Holland
m174	Chris Lukins
m175	Susan Laris
m176	Raymond G. Coughlan
m177	Mrs Belinda Birch
m178	Andrew and Carolyn Ewers
m179	Mrs Betty Oldfield
m180	Confidential
m181	Dr Donald Hardgrave
m182	David and Ruth Clark
m183	Alexandra Gaffy
m184	C. J. and B. M. Scholar
m185	Glenice Vladich
m186	S. R. (Ron) Moulton
m187	Mr Matthew C. Scrimgeour
m188	Margaret J. Dickson
m189	Marie and Howard Hogan
m190	John and Valerie Flanagan
m191	Dr Matt Redding
m192	Owen and Bronya Mulder
m193	David Glen
m194	Margaret and Louis Ackerman
m195	Garry and Ursula Bennett
m196	Mark and Kaye McCrum
m197	Robert and Jill Lawrie
m198	Dr Jamie Mattner
m199	Steven Flanagan
m200	Logan and Kylie Timms
m201	Rick Martin
m202	Mrs Sharan Hall
m203	Andrew Murray
m204	David and Pat Williamson
m205	Ian Miller
m206	Gary Weston
m207	Rev Christopher C. Twinn
m208	Lizzie Simpson
m209	Andrew Soper
m210	Pieter Dikstal
m211	Preben Larsen and Gunnel Larsen

m212 Mr Robert and Mrs Dahlis Willocks
m213 Keith and Jean Hobson
m214 Phillip Gummerson
m215 Confidential
m216 John Ridley
m217 Mrs Gweneth McCallum
m218 Doreen and Ralph Draheim
m219 Dr B. Christina Naylor
m220 Jenny Thorburn
m221 Felicity and Chris Cocks
m222 Adam Overweel
m223 Patricia Clarke
m224 Noel Nicholls
m225 Rev J. E. and Mrs Studd
m226 Confidential
m227 Brendan Lloyd
m228 Bill Stranger
m229 Andrew and Anne Campbell
m230 Jason Alan
m231 Mrs W. Scrimgeour
m232 Alison Heuchan
m233 Richard John Moore
m234 Geoff Laphorne
m235 Confidential
m236 Ann Sinquesfield
m237 L. and G. Prentice
m238 Mr and Mrs Ralph Chesson
m239 Mrs B. J. Revill
m240 Anthony Willis
m241 John D. C. Studdert
m242 Mrs Sue Bond
m243 Robert Thompson
m244 John Santamaria
m245 Mrs Anna Shepherd
m246 Renalda Fuentes
m247 Arthur Gilmour
m248 Warren Woodley OAM
m249 Confidential
m250 Alice Beauchamp

m251	Patricia Orton
m252	Confidential
m253	Mrs T. Enders
m254	Sue Downing
m256	Confidential
m257	Dr Gretchen Poiner
m258	Confidential
m259	R. J. McPherson
m260	Mr Ben Blackburn
m261	Confidential
m262	Confidential
m263	Ms Pat McCahey

Standard letters and form letters

Submission

Number	Submitter
f1	Standard form letter received from 101 individuals
f1a	Variations on standard form letter f1 received from 11 individuals
f2	Variations on a standard letter received from 7 individuals
f3	Variation on a standard letter received from 13 individuals
f4	Variation on a standard letter received from 80 individuals
f5	Standard letter received from 44 individuals
f6	Variations on a standard letter received from 62 individuals

Submissions addressing the committee's inquiries into Same-Sex Relationship (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008, Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 and Evidence Amendment Bill 2008

Submission

Number	Submitter
j1	Variations on a standard form letter received from 41 individuals
j2	Andrew Elder
j3	Patrick Seedsman
j4	Name withheld
j5	Brian Greig
j6	Queensland Association for Healthy Communities
j7	Tom Wise
j8	Mr D. I. Nicholson
j9	Keith and Sheila Thompson
j10	Melanie Vella
j11	Name withheld
j12	E. R. Peel
j13	Adrian Gunton
j14	Rev J. E. and Mrs Studd
j15	Mark Ford
j16	Arun
j17	Johannes Pors
j18	Martin and Fiona Cran
j19	Moreen and Max Clanfield
j20	Spencer Gear MA
j21	Peter Hibbert
j22	Alan Bailey
j23	Dallas Clarnette
j24	Law Society of Western Australia
j25	Peter Jenkins
j26	Matthew Bowles
j27	Ken and Jean West
j28	Denis Colbourn
j29	Maxwell J. Hilbig
j30	John Caldwell
j31	Andrew James Brumpton
j32	Lyn and Michael Lawson
j33	Nick Goumas

j34 Jonathan Fry
j35 Metro Church Melbourne — Pete Buckley
j36 Mr D. I. Nicholson
j37 Tom and Amanda McInnerney
j38 Robert Barden
j39 Confidential
j40 Beryl Turnbull
j41 Michael Thorpe
j42 Raymond G. Coughlan
j43 Simon Lambourne
j44 Mrs Jill M. Wehr
j45 Elizabeth Ryan
j46 Dan and Adeline Keenan
j47 John Kingsmill
j48 Tom and Jenine Foster
j49 Mrs Karen Nelson
j50 Mrs J. A. Miller
j51 Gae Harris
j52 Lindsay and Liubov Wright
j53 Margaret Laundry
j54 Frederik and Geraldena Bekker
j55 Walter Lee
j56 Salt Shakers
j57 Christine Loundes
j58 Steve Landers
j59 Wayne Morgan, Senior Lecturer in Law, ANU College of Law
j60 Variations on a standard letter received from 16 individuals
j61 Name withheld
j62 Name withheld
j63 Greg Chenhall
j64 Reg and Patricia Brody

ADDITIONAL INFORMATION RECEIVED

- 1 Kate Whitehouse - Honours Thesis: 'A Political Trophy or an Essential Human Right? The Federal Recognition of Same-Sex Relationships'
- 2 Comments received from John Challis (Comsuper Action Committee) regarding his appearance at a public hearing in Canberra on 7 August, 2008
- 3 Attorney-General's Department: answers to Questions on Notice received on 29 August 2008

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Sydney, Tuesday 5 August 2008

BUDAVARI, Ms Rosemary, Acting Director
Criminal Law and Human Rights Unit, Law Council of Australia

CHARANEKA, Mr Alexander Scott, Member
Superannuation Lawyers Committee, Law Council of Australia

CLARE, Mr Ross William, Director, Research, and Acting Director
Policy and Industry Practice, Association of Superannuation Funds of Australia

FELTHAM, Mr Peter, Industrial Officer
Community and Public Sector Union

GRAY, Ms Emily, Co-convenor
New South Wales Gay and Lesbian Rights Lobby

HODGE, Mr Robert, Principal Policy Adviser
Association of Superannuation Funds of Australia

KASSISIEH, Mr Ghassan, Policy and Development Coordinator
New South Wales Gay and Lesbian Rights Lobby

MILLBANK, Professor Jenni
Private capacity

NEWMAN, Ms Lisa, Deputy National President
Community and Public Sector Union

PARKINSON, Professor Patrick
Private capacity

POULOS, Reverend Elenie, National Director
Uniting Justice Australia, Uniting Church National Assembly

RAHILL, Ms Alison, Parliamentary Liaison Officer
Community and Public Sector Union

Melbourne, Wednesday 6 August 2008

CANNON, Mr Tim, Research Officer
Australian Family Association

CONWAY, Ms Angela, National Research Officer and Spokesperson
Australian Family Association

CROOME, Mr Rodney, Committee Member
Australian Coalition for Equality

EGAN, Mr Richard John, National Policy Officer
FamilyVoice Australia

INNES, Mr Graeme, AM, Human Rights Commissioner
Human Rights and Equal Opportunity Commission

IRLAM, Mr Corey, Committee Member
Australian Coalition for Equality

MORGAN, Mr Wayne Kenneth, Consultant
Australian Coalition for Equality

RUSSELL, Mr Paul, Senior Officer
Family and Life, Catholic Archdiocese of Adelaide

STEWART, Associate Professor Miranda
Private capacity

TEMBY, Ms Kate, Director
Human Rights Policy Unit, Human Rights and Equal Opportunity Commission

Canberra, Thursday 7 August 2008

ARNAUDO, Mr Peter, Assistant Secretary
Human Rights Branch, Attorney-General's Department

CHALLIS, Dr John Robert, Gay Rights Adviser
Superannuated Commonwealth Officers Association

LINKSON, Ms Marita Joy, Federal Secretary
Superannuated Commonwealth Officers Association

SHELTON, Mr Lyle Gavin, Chief of Staff
Australian Christian Lobby

THOMSON, Mr Peter, Principal Legal Officer
Age and Sex Discrimination Section, Human Rights Branch, Attorney-General's
Department

WALLACE, Mr Jim, Managing Director
Australian Christian Lobby