SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCE: EVIDENCE AMENDMENT BILL 2008

Questions on Notice

Attorney-General's Department

Hansard ((L&CA 26, 27) 7 August 2008)

Senator Hanson-Young asked the following question at the hearing on 7 August 2008:

> **Senator HANSON-YOUNG**—Have you seen the definition put forward by the New South Wales gay and lesbian rights group? They highlighted some concerns with it?
> **Mr Arnaudo**—That was earlier this week, I think, wasn't it?
> **Senator HANSON-YOUNG**—Yes.
> **Mr Arnaudo**—Perhaps I have it in front of me but with some other submissions here as well. Off the top of my head, I am not really clear, but it might be that that approach is very much based on relying on surrogacy laws or parenting presumptions in the states and territories. Is that so? I am not sure if I am correctly summarising it.
> **Senator HANSON-YOUNG**—They had four main criteria which you would assume would be able to capture most children. And then the last two were there to make sure we were able to cover those who perhaps did not fit somewhere else. But having the four categories in the beginning meant that there was not this onus to have to prove all the time, for everybody, why you are a product.
> **Mr Arnaudo**—From my recollection that approach does capture most children, which is fine, but there will always be some children who will not be caught because they will not satisfy those definitions—
> **Senator HANSON-YOUNG**—Which is why they had this—without having the submission in front of me I do not have the—
> **Mr Arnaudo**—Perhaps operating without seeing it in front of us may make it difficult.
> **Senator HANSON-YOUNG**—Yes. Would you be able to take that on notice and respond in terms of
> whether you think that would be an appropriate approach?
> **Mr Arnaudo**—I would be happy to take that on notice and look at it. Just so that I can have the exact
> submission, it was the New South Wales—
> **Senator HANSON-YOUNG**—It was the New South Wales Gay and Lesbian Rights Lobby.
> **Mr Arnaudo**—I will have a look at that and see.

The answer to the honourable senator's question is as follows:

The submission by the New South Wales Gay and Lesbian Rights Lobby is very thoughtful. However, the approach recommended would lead to several inappropriate results.

In relation to their first two recommendations, biological children of both parents and adopted children are already recognised for superannuation purposes.

As recognised in the New South Wales Gay and Lesbian Rights Lobby's submission, State and Territory parenting presumptions relating to same-sex couples are inconsistent. The effect of relying on these presumptions at the national level is that it would lead to different treatment of children in similar circumstances depending on

which State or Territory they were born. In terms of superannuation entitlements under Commonwealth defined benefit schemes this would be undesirable and inappropriate.

The proposal by New South Wales Gay and Lesbian Rights Lobby to recognise children under the care of a person who is acting in the position of a parent or by recognising children normally resident in the household may cause issues. This proposal may go further than the policy underpinning this Bill. 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.

The limitations of relying on parenting orders was discussed in HREOC's *Same-Sex: Same Entitlements* report at pp102 and ff. The Commission received evidence that the process can be costly and onerous.

Hansard (L&CA 22 7 August 2008,)

Senator Brandis asked the following question at the hearing on 7 August 2008:

> **Senator BRANDIS**—I think the question you took on notice before, just to avoid any doubt, was a question in which I asked for all of the drafting instructions to be produced to the committee, so that will include drafting instructions in relation to this issue as well, of course.
> **Mr Arnaudo**—In relation to this bill?
> **Senator BRANDIS**—Yes, that is right, which includes the question of the definition of 'child'. May we take it that the drafting instructions did include instructions concerning the appropriate definition of 'child' or was this issue of a generic category of dependency versus the adumbrated categories we see in the bill a decision taken within the Office of Parliamentary Counsel?
> **Mr Arnaudo**—Sorry, I do not have the instructions in front of me to refresh my memory as to exactly how they dealt with these. I just do not have a memory on those issues—
> **Senator BRANDIS**—You are not in a position to tell me?
> **Mr Arnaudo**—Not at this stage, no.
> **Senator BRANDIS**—That is fine.
> **Mr Arnaudo**—I will take it on notice and ask the Attorney-General whether he would be happy to disclose

The answer to the honourable senator's question is as follows:

I have asked the Attorney-General about the release of the drafting instructions issued to the Office of Parliamentary Counsel. The Attorney-General has declined to agree to their release.