

CHAPTER 3

KEY ISSUES

3.1 This chapter discusses the key issues raised in submissions and evidence in relation to the Bill, excluding those matters first raised and reported on in the committee's inquiry into the provisions of the Superannuation Bill. The issues covered in this chapter include:

- the model definition – 'de facto partner';
- parent-child relationships;
- consistency in Commonwealth laws;
- adverse implications of the Bill;
- commencement dates and an education campaign; and
- scope of the same-sex law reforms.

3.2 As with the Superannuation Bill, most submissions and evidence supported the stated objectives of the Bill: the removal of discrimination against same-sex couples and the children of same-sex relationships in 68 Commonwealth Acts.

3.3 The Bill aims to achieve its objectives by recognising same-sex relationships, thereby granting same-sex couples and their children the same rights and responsibilities afforded to opposite-sex couples and their families.

3.4 However, there are a number of views on the appropriate form of recognition for same-sex relationships. The inquiry highlighted these views as well as concerns regarding the appropriateness and effectiveness of certain provisions within the Bill.

3.5 The next section of this chapter discusses the primary form of recognition granted to same-sex relationships in the Bill: the status of a 'de facto partner'.

Model definition – 'de facto partner'

3.6 As detailed in chapter 2, the Bill proposes to insert a model definition of 'de facto partner' into the *Acts Interpretation Act 1901*, together with related definitions of 'de facto relationship' and 'registered relationship'.

3.7 Several submissions supported the proposed model definition, with the Gay & Lesbian Rights Lobby (NSW) (the GLR Lobby) identifying the benefits of that definition as follows:

This definition reflects many existing state/territory definitions, equally recognises same-sex and heterosexual couples, promotes federal

consistency, applies flexibly to individual relationship circumstances and clarifies the issue of temporary separation.¹

'De facto relationship'

3.8 The Australian Human Rights Commission (formerly the Australian Human Rights and Equal Opportunities Commission) (the Commission) observed that the related definition of 'de facto relationship' reflects the criteria recommended in the HREOC *Same-Sex: Same Entitlements* report.²

3.9 However, one particular aspect of the definition of 'de facto relationship' concerned a number of submitters. Proposed subsection 22C(5) reads,

...a de facto relationship can exist even if one of the persons is legally married to someone else or is in a registered relationship (within the meaning of section 22B) with someone else or is in another de facto relationship.³

3.10 The Explanatory Memorandum states that this provision 'reflects current laws which allow a person to be in a de facto relationship with a person even if they are married to another person.'⁴

3.11 In fact, the provision goes further in allowing a person to have more than one extant relationship. This greatly concerned both the Presbyterian Church of Australia, Church and Nation Committee and FamilyVoice Australia, who submitted that the proposed provision effectively legalises bigamy and polygamy:

If it is said you can be married and in a de facto relationship simultaneously, then you now have that status—you have a married spouse and a de facto spouse or de facto partner, depending on which act you look at, and they enjoy equal status and your two relationships enjoy equal status in Commonwealth law.⁵

1 Gay & Lesbian Rights Lobby (NSW), *Submission 18*, p. 4.

2 Australian Human Rights Commission, *Submission 12*, p. 5; and 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. 80. The committee also supported these criteria in its inquiry into the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008: see Senate Standing Committee on Legal and Constitutional Affairs, *Report into the Provisions of the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008*, September 2008.

3 Proposed subsection 22C(5) of the *Acts Interpretation Act 1901*

4 Explanatory Memorandum, p. 7. The committee notes that this is the current position under the *Family Law Act 1975*.

5 Mr Richard Egan, FamilyVoice Australia, *Committee Hansard*, Canberra, 22 September 2008, p. 14. Also, see Presbyterian Church of Australia, Church and Nation Committee, *Submission 16*, p. 1.

3.12 Gay and Lesbian Equality (WA) referred to a similar definition of 'de facto relationship' contained in section 13A of the *Interpretation Act 1984* (WA). Prior to enactment, identical objections had been raised, and these were countenanced within the statutory definition which does:

...not allow for the recognition of multiple people in a relationship at once (3 or more individuals) nor co-existent continuing relationships of substance (which would clearly be against the concept of a mutual commitment by a person to a shared relationship with another person).⁶

3.13 When the matter was put to the Department, the rationale provided in the Explanatory Memorandum was reiterated, and departmental officials observed that it is not unlawful for a person to be in a marital and a non-marital relationship at the same time. The officials emphasised the fundamental objective of ensuring that 'the family members of a de facto relationship are not excluded from benefits.'⁷

3.14 Another aspect of the definition of 'de facto relationship' which concerned some submitters was the criteria proposed to determine the existence of a 'de facto relationship'. The criteria are detailed in chapter 2 of this report.

3.15 The concerns expressed related primarily to the cohabitation requirement, which reads, 'the nature and extent of their common residence'.⁸

3.16 The National Welfare Rights Network (NWR Network), a network of community legal centres specialising in social security law and its administration by Centrelink, submitted that the criterion should have a temporal threshold. It was suggested that this would enhance consistency between Commonwealth Acts, and, in social security and family assistance law, more fairly apply the income and assets test to a same-sex couple commencing cohabitation.⁹

3.17 FamilyVoice Australia submitted that, in fact, no cohabitation would be required due to proposed subsection 22C(3) of the *Acts Interpretation Act 1901*. This subsection allows for no particular combination, finding or conclusion in relation to the criteria:

...the way the definition of de facto is drafted there is no qualifying period for length of time, you do not have to be sharing a joint residence and you may or may not have a sexual relationship.¹⁰

6 Gay and Lesbian Equality (WA) Inc, *Submission 34*, p. 2.

7 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 23 September 2008, p. 61.

8 Proposed paragraph 22C(2)(b) of the *Acts Interpretation Act 1901*

9 National Welfare Rights Network, *Submission 29*, p. 5. Also, see Ms Linda Forbes, National Welfare Rights Network, *Committee Hansard*, Canberra, 23 September 2008, p. 40; and Students Representative Council, University of Sydney, *Submission 24*, p. 2.

10 Mr Richard Egan, FamilyVoice Australia, *Committee Hansard*, Canberra, 22 September 2008, p. 11; and FamilyVoice Australia, *Submission 4*, p. 6.

3.18 In relation to the *Migration Act 1958*, the scenarios posed by FamilyVoice Australia might be beneficial according to the GLR Lobby. It submitted that, in at least 85 countries, homosexuality is criminalised, and it may not be possible for same-sex couples to live together. Notwithstanding the objectives of the Bill, it was suggested that proposed paragraph 22C(2)(b) of the *Acts Interpretation Act 1901* might have a discriminatory effect in relation to applications for protection or humanitarian visas.¹¹

3.19 As indicated in a preceding paragraph, some submitters and witnesses did not support the inclusion of same-sex couples within the model definition of 'de facto partner'. The primary reasons advanced in submissions for this lack of support were that same-sex marriage should be recognised in law;¹² a 'de facto relationship' is a 'lower' form of recognition;¹³ or 'registered relationship' should be an entirely separate category to that of a 'de facto partner'.

'Registered relationship'

3.20 For the Australian Coalition for Equality (ACE) and the Tasmanian Gay and Lesbian Rights Group (the GLR Group), a same-sex registered relationship is clearly not the same thing as a same-sex de facto relationship.

3.21 ACE especially argued that not all same-sex couples wish to be treated as de facto partners, and suggested that the Bill offer same-sex couples the alternative of a distinct registered relationship category (within the *Acts Interpretation Act 1901*) using the 'couple relationship' terminology proposed in the Superannuation Bill.¹⁴

3.22 The GLR Group expounded how the Bill might incorporate this suggestion, recommending that the Commonwealth should use:

...a different "umbrella" term in proposed s 22A. For example, the term "couple relationship" could be used to describe both registered and de facto relationships, while the term "partner in a couple relationship" could be used to describe both registered and de facto partners. This would...remedy the mischaracterisation that registered relationships are a subset of the broader category of de facto relationships.¹⁵

11 Gay & Lesbian Rights Lobby (NSW), *Submission 18*, pp 4-5 & 14. Also, see Mr Neil Appleby, *Submission m30*.

12 For example, NSW Young Lawyers, *Submission 22*, pp 4-6; Human Rights Law Resource Centre, *Submission 14*, p. 4; Coming Out Proud Program, *Submission 2*, p. 3; Student Representative Council, University of Sydney, *Submission 24*, p. 1; Lesbian and Gay Solidarity (LGS) Melbourne, *Submission 8*; Australian Coalition for Equality, *Submission 19*, p. 5; Liberty Victoria, *Submission 31*, p. 1.

13 Liberty Victoria, *Submission 31*, p. 3.

14 Australian Coalition for Equality, *Submission 19*, pp 10-11.

15 Tasmanian Gay and Lesbian Rights Group, *Submission 13*, p. 5. Also, see Mr Kevin Boreham, *Submission 36*, p. 2.

3.23 The committee sought the Department's response to the proposition that some same-sex couples do not wish to be categorised as 'de facto partners'. The Department's response was that the Bill recognises that there is a difference between a 'de facto relationship' and a 'registered relationship'.¹⁶

3.24 Recognition of registered relationships took on a further dimension when some submitters and witnesses suggested that Australia should also recognise registered relationships in international jurisdictions.¹⁷

Recognition of international same-sex marriages and unions

3.25 As in the inquiry into the provisions of the Superannuation Bill, the proposal was put to the committee that the Bill delete the phrase 'under a prescribed law of a State or Territory' from the definition of 'registered relationship'. ACE argued that this would enable Parliament to prescribe 'appropriate international civil unions as recognised registered relationships for the purposes of Federal law'.¹⁸

3.26 Both ACE and the GLR Group submitted that the registered relationship schemes operating in Australia are not fundamentally different from those that operate overseas, say, in New Zealand or the United Kingdom. Accordingly, the proposal to recognise international civil unions would not amount to anything more than what already exists in Australia.¹⁹

3.27 However, the Presbyterian Church of Australia, Church and Nation Committee queried whether the Bill's proposed paragraph 5F(2)(a) of the *Migration Act 1958* already goes even further, enabling the recognition of international same-sex marriages.²⁰

3.28 Proposed section 5F of the *Migration Act 1958* would read:

5F Spouse

(1) For the purposes of this Act, a person is the **spouse** of another person if, under subsection (2), the 2 persons are in a married relationship.

(2) For the purposes of subsection (1), persons are in a **married relationship** if:

16 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 23 September 2008, pp 48-49.

17 Mr Neil Appleby, *Submission m30*

18 Australian Coalition for Equality, *Submission 19*, p. 12. The committee notes that this argument was raised also in the inquiry into the Superannuation Bill.

19 Mr Wayne Morgan, Australian Coalition for Equality and Tasmanian Gay and Lesbian Rights Group, *Committee Hansard*, Canberra, 23 September 2008, pp 19-20.

20 Presbyterian Church of Australia, Church and Nation Committee, *Submission 16*, p. 2. Also, see Mr Richard Egan, FamilyVoice Australia, *Committee Hansard*, Canberra, 22 September 2008, p. 12.

- (a) they are married to each other under a marriage that is valid for the purposes of this Act; and
- (b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
- (c) the relationship between them is genuine and continuing; and
- (d) they:
 - (i) live together; or
 - (ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

Note: Section 12 also affects the determination of whether the condition in paragraph (2)(a) of this section exists.²¹

3.29 Section 12 of the *Migration Act 1958* currently provides:

For the purpose of deciding whether a marriage is to be recognised as valid for the purposes of this Act, Part VA of the Marriage Act 1961 applies as if section 88E of that Act were omitted.²²

3.30 The Department rejected the notion that the Bill would allow a same-sex marriage recognised in an overseas jurisdiction to be recognised for the purposes of either the Migration Act 1958 or any other Commonwealth Act. A representative observed that it is unlikely two men or two women would satisfy the 'husband and wife' criterion stated in paragraph 5F(2)(b). Furthermore, the note in section 12 of the Migration Act 1958 incorporates Part 5A of the Marriage Act 1961, including section 88EA (but excluding section 88E):

When you look at the Migration Act provision section 5F subsection 2 subsection (a) says that you are in a married relationship if you are married to each other under a marriage that is valid for the purposes of the Migration Act. Section 12 says, go and look at part 5A of the Marriage Act including 88EA, that makes it clear if you have a union between a man and a man and a woman and a woman, it is not to be considered to be marriage.²³

21 Proposed section 5F of the *Migration Act 1958*

22 Section 12 of the *Migration Act 1958*

23 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 23 September 2008, pp 43 & 53.

3.31 The Department, ACE and the GLR Group all agreed that, 'by force of section 12 of the Migration Act, section 88EA of the Marriage Act applies to decisions made under the Migration Act', and any regulation inconsistent with section 12 of the *Migration Act 1958* would be invalid under general principles of statutory interpretation.²⁴

Recognition of more than two parents under the Migration Act 1958

3.32 Also in relation to regulations made under the *Migration Act 1958*, the Commission objected to proposed subsections 5CA(2) and (3), which contemplate restricting the number of parents a child might have to no more than two people. The Commission argued that this restriction might adversely affect the immigration status of some same-sex families where a child has more than two people in the place of a parent:

It may be that in practice it is not such a significant problem because there might be other ways—say, if a child and one parent were able to achieve appropriate migration status then the other adult might be able to be recognised as a partner of the first adult and it may not be a significant problem in practice. But, in principle, we think that for something as important as migration status the reality of a child's family relationships should be recognised.²⁵

3.33 The committee raised this issue with the Department, who stated that the proposed subsections reflect the current approach of the *Migration Act 1958* and its regulations which limit the potential number of people who can sponsor a person for entry into Australia.²⁶

Application of the model definition

3.34 Throughout the inquiry, the committee was mindful of the fact that the model definition of 'de facto partner' will only 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...²⁷

3.35 The Explanatory Memorandum states:

24 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 23 September 2008, p. 43; Mr Wayne Morgan, Australian Coalition for Equality and Tasmanian Gay and Lesbian Rights Group, *Committee Hansard*, Canberra, 23 September 2008, p. 20; and Mr Jamie Gardiner, Liberty Victoria, *Committee Hansard*, Canberra, 22 September 2008, p. 27.

25 Ms Kate Temby, AHRC, *Committee Hansard*, Canberra, 22 September 2008, p. 7.

26 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 23 September 2008, p. 44.

27 Proposed section 22A of the *Acts Interpretation Act 1901*

This approach is a departure from the usual approach in the Acts Interpretation Act which is for words to be defined to have a meaning 'unless the contrary intention appears'. This means that the application of the definition of 'de facto partner' in the Acts Interpretation Act will have no effect unless it is 'triggered' by express provisions in the substantive Act. This approach avoids any possibility of unintended consequences in other legislation.²⁸

3.36 A few submitters and witnesses commented on the non-automatic application of the model definition. The ACE, for example, argued that the Bill should provide for the usual approach employed by the *Acts Interpretation Act 1901*.²⁹ In direct contrast, the Commission supported the approach used in the Bill, basing its argument on the specific needs of individual Commonwealth Acts:

There are instances where an alternative definition of a 'couple relationship' has been developed for specific policy reasons, such as in the *Social Security Act 1990* (Cth) or the *Migration Act 1958* (Cth). The Commission supports the retention of these established definitions, as long as they do not discriminate against same-sex couples.³⁰

3.37 The Department cited the *Family Law Act 1975* (the FL Act) as an example of where the model definition of 'de facto partner' would not be appropriate. However, its argument was based on constitutional issues.

The references of powers that support aspects of the Family Law Act are the main reason [for not adopting the model definition] because the references of power provide you with a basis to define things within the Family Law Act.³¹

3.38 In relation to Commonwealth Acts where no reference is involved, the Department noted that the Bill almost universally applies the model definition, the

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

29 Australian Coalition for Equality, *Submission 19*, p. 13. Also, see Superannuated Commonwealth Officers' Association, *Submission 7*, p. 1; and Comsuper Action Committee, *Submission 15*, p. 1.

30 Australian Human Rights Commission, *Submission 12*, p. 6. The committee notes that it canvassed this issue during its inquiry into the provisions of the Superannuation Bill, and agreed that, in some instances, the automatic application of a model definition would not be appropriate. See Senate Standing Committee on Legal and Constitutional Affairs, *Report into the Provisions of the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008*, October 2008

31 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 23 September 2008, p. 52. A representative from the GLR Group questioned the legitimacy of this rationale, arguing that the state and territory referring legislation uses a definition of de facto relationship, which includes opposite-sex and same-sex marriage-like relationships. See Mr Wayne Morgan, Australian Coalition for Equality and Tasmanian Gay and Lesbian Rights Group, *Committee Hansard*, Canberra, 23 September 2008, p. 20.

exceptions being those pieces of legislation which do not contain the term 'de facto partner'.³²

3.39 As indicated at the beginning of this chapter, the committee received submissions and evidence regarding the appropriateness and effectiveness of certain provisions within the Bill. The main concerns revolved around the parent-child relationship, which several organisations and persons argued is fundamentally redefined by the Bill.

Parent-child relationships

3.40 In general, there was some support for the Bill's proposed expansion of the definitions of 'child' and 'parent'.

3.41 The Let's Get Equal Campaign, for example, submitted that there are many instances within opposite-sex relationships where 'males and females need not be genetically related to a child in order to be called "mother" or "father"':

Not to extend such a definition to same-sex couples who also plan the conception of a child together, as well as care for and raise the child, is obviously to discriminate against the non-biological parent and is – worryingly – to treat the child prejudicially.³³

3.42 Liberty Victoria (formerly the Victorian Council for Civil Liberties) added:

...this is not a bill about creating recognition that is not already there or creating families that do not already exist; it is recognising what is and not discriminating...against children because of society's disapproval or anxiety or, for that matter, preference for a particular family structure.³⁴

3.43 However, there were some submissions critical of the proposed definition of 'child', and its 'product of the relationship' requirement. The concerns common to the Superannuation Bill and this Bill are not duplicated in this report.³⁵

3.44 Professor Patrick Parkinson, a legal academic at the University of Sydney, provided additional insights in relation to the Bill, using what he described as the 'disastrous' phrase 'product of the relationship' to illustrate his argument that the

32 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 23 September 2008, p. 52.

33 Let's Get Equal Campaign, *Submission 11*, p. 1. Cf. the Australian Christian Lobby, *Submission 10*, p. 4. Also, see Mr Wayne Morgan, Australian Coalition for Equality and Tasmanian Gay and Lesbian Rights Group, *Committee Hansard*, Canberra, 23 September 2008, p. 21.

34 Mr Jamie Gardiner, Liberty Victoria, *Committee Hansard*, Canberra, 22 September 2008, p. 28. Also, see Mr Graeme Innes AM, AHRC, *Committee Hansard*, Canberra, 22 September 2008, p. 8. Cf Mr Jim Wallace, Australian Christian Lobby, *Committee Hansard*, 23 September 2008, p. 8.

35 A succinct summary of most of those criticisms was provided by the Gay & Lesbian Rights Lobby (NSW): see *Submission 18*, pp 6 & 21-22.

proposals in Australia are 'not well thought through.' In particular, the Bill's failure to explicitly require consent to the conception of a child born through either surrogacy arrangements or ART, and documentation of that consent.

There are certain minimum requirements when we are redefining something as important as parenthood. The first requirement is to make sure that there is consent by all the people involved: birth mother, birth father, lesbian partner, male partner. The second thing is to ensure that there is proper documentation of that consent.³⁶

3.45 Professor Parkinson added that the Bill automatically grants parental recognition to a same-sex partner, whereas in Europe, where the issue has been thoroughly researched and debated, safeguards and processes are employed: a same-sex partner must apply for recognition as a parent with the consent of the birth mother. The position under the Bill is also in contrast to section 60H of the FLA Act.³⁷

3.46 The Department indicated that the issue of consent had been considered in the drafting of the Bill, but was rejected on account of state and territory inconsistencies in both parenting presumptions and surrogacy laws:

...we had to develop a way to recognise children in same-sex families effectively and this was one approach.³⁸

3.47 The fundamental concern of submitters and witnesses was not, however, the minutiae of the expanded definition of 'child', but its attempt to redefine the meaning of parenthood for the purposes of those Commonwealth Acts encompassed in the Bill.

Redefining the meaning of parenthood

3.48 Professor Parkinson, with whom several submitters agreed, acknowledged that the Bill might be grounded in good public policy, but he argued that the Bill is fundamentally flawed by its lack of consideration for the reasons for using 'child' and 'parent' definitions. Professor Parkinson suggested that 'a more fine-grained analysis' is required, and that the:

...[problematic provisions] can be removed without affecting the primary purpose for which this Bill has been introduced - to equalise the position of same-sex and heterosexual de facto couples. The issues concerning the

36 Professor Patrick Parkinson, *Committee Hansard*, Canberra, 23 September 2008, p. 14.

37 Professor Patrick Parkinson, *Committee Hansard*, Canberra, 23 September 2008, p. 15 and Professor Patrick Parkinson, *Submission 1*, p. 7. Also, see Explanatory Memorandum, p. 8 and Ms Kate Temby, AHRC, *Committee Hansard*, Canberra, 22 September 2008, p. 4.

38 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 23 September 2008, p. 54.

recognition of quasi-parental status for certain purposes need much more careful consideration.³⁹

3.49 In relation to the proposed definitions of 'step child' and 'step-parent', FamilyVoice Australia similarly questioned the expansion of parental legal status, arguing that the expanded definitions were a 'legal novelty by which a person could become a step-parent of a child merely by having a de facto relationship with a parent of the child'.

...my biggest concern is that this way of thinking will flow into the Family Law Act, where the definition of stepchild and step-parent is of more concern, because a step-parent is defined as a species of relation under the Family Law Act. And a relation, under the Family Law Act, always has the right to apply to the court for contact time with a child; so a grandparent or whoever can do that. It just seems to me that somebody's previous boyfriends, who were not ever the father of the child, really should not fit into that category. If they married and then that broke up there is more basis for a claim. But just because your mother slept with someone for a period of time, for them to get an ongoing claim on the child's life just seems to me untenable and unfair.⁴⁰

3.50 The GLR Lobby rejected FamilyVoice Australia's argument in relation to the collection of 'step-parents' under the Bill. The GLR Lobby drew a distinction between a co-parent and a step-parent: the former, it argued, are recognised from birth throughout a child's life, whereas the latter gains status by forming a relationship with an existing parent:

[If a birth parent and a co-parent] split up, the birth mother had a new partner and the co-mother had a new partner, the co-mother's partner would not be recognised as a step-parent because the co-mother is not recognised as a parent in the first place.⁴¹

3.51 The discussion regarding the appropriate way in which to define the parent-child relationship touched on another major concern: consistency in Commonwealth Acts.

Consistency in Commonwealth Acts

3.52 For many submitters and witnesses to the inquiry, the Bill's inconsistency with the FL Act was a major concern.

39 Professor Patrick Parkinson, *Submission 1*, p. 1. Also, see Social Issues Executive of the Anglican Church Diocese of Sydney, *Submission 23*, pp 1-2; Australian Christian Lobby, *Submission 10*, pp 4-5 & 8-9; and Presbyterian Church of Australia, Church and Nation Committee, *Submission 16*, p. 1.

40 Mr Richard Egan, FamilyVoice Australia, *Committee Hansard*, Canberra, 22 September 2008, p. 23 and FamilyVoice Australia, *Submission 4*, p. 9.

41 Mr Ghassan Kassisieh, Gay and Lesbian Rights Lobby (NSW), *Committee Hansard*, Canberra, 23 September 2008, p. 33.

3.53 Professor Parkinson submitted that the effect of the Bill will be to treat people as parents for the purposes of some Commonwealth laws, while in other Commonwealth laws (such as the FL Act) those same people are not defined as parents, have no parental responsibilities, and no parental obligations.

Under this Bill, children will have different parents for different purposes. In some situations offered up as examples in the Explanatory Memorandum, they will have two mothers as parents, and a father as well (although the Explanatory Memorandum fails to mention that the biological father will also be a parent). Yet under the Family Law Act and the Child Support legislation, these same children will usually have only one mother and a father.⁴²

3.54 In response to questions from the committee, Professor Parkinson added:

You ask me: how do we fix this? The logical way to fix it would be to do one of two things. One is to...give equal rights to same sex couples and their children without the need to redefine 'parenthood'. That is option No. 1. Option No. 2 is to change the meaning of 'parent' in the Family Law Act, which is the core meaning, and then to withdraw the term 'product of the relationship' from all these other bills.⁴³

3.55 The ACE was particularly uncomfortable with the failure of the Bill to amend the FL Act, arguing that this might lead to 'continued discrimination against children of same-sex couples, as [that] relationship will not be seen as equal to those of opposite sex couples'. Importantly, it was noted that unless same-sex parents are recognised in the FL Act, access to the Child Support Scheme is neither automatic nor guaranteed.⁴⁴

3.56 The Commission identified an alternative approach to the legal recognition of the parent-child relationship which would ensure greater consistency in Commonwealth laws, and between Commonwealth, state and territory laws. The alternative approach would involve:

- amendment of the parenting presumption in section 60H of the FL Act to include lesbian co-mothers;
- introduction of uniform state surrogacy laws that recognise gay co-fathers and provide a mechanism for the transfer of legal parentage from the birth mother;
- amendment of the FL Act to recognise parental status as conferred by state laws;

42 Professor Patrick Parkinson, *Submission 1*, p. 2. Example 3 in the Explanatory Memorandum was deconstructed as an example: see Explanatory Memorandum, p. 9. Also, see FamilyVoice Australia, *Submission 4*, p. 1.

43 Professor Patrick Parkinson, *Committee Hansard*, Canberra, 23 September 2008, p. 16.

44 Australian Coalition for Equality, *Submission 19*, p. 18.

- amendment of the definition of 'child' in the FL Act to include children born through intercourse, children lawfully adopted, children of parents recognised under section 60H and children of parents recognised by state laws; and
- extension of the FL Act definition of 'child' to apply to all Commonwealth laws that grant rights or obligations based on a parent-child relationship.⁴⁵

3.57 The committee notes that the same-sex law reforms are currently in a state of flux, and here there was a clear example of events over-taking the inquiry.

Section 60H of the Family Law Act 1975

3.58 On 18 September 2008, the Attorney-General announced that section 60H of the FL Act would be amended as recommended in the committee's report into the provisions of the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008.⁴⁶ Those amendments are contained in Schedule 3A of the amendments to that bill.

3.59 At the committee's public hearings, some witnesses had reviewed the proposed amendments to the FL Act, but were not convinced that their concerns in relation to the Bill would be sufficiently addressed:

- the Commission continued to support the Bill's definition of 'child' on account of its inclusive nature (particularly as regards gay co-fathers), and the lack of guaranteed state and territory surrogacy law reform;⁴⁷
- Professor Parkinson maintained his concerns regarding consent issues, but noted that amending section 60H of the FL Act would eliminate all need for the phrase 'product of the relationship'.⁴⁸

3.60 The GLR Lobby agreed with Professor Parkinson that 'product of the relationship' should be removed from the Bill and replaced with a consistent parent-child definition as reflected in section 60H of the FL Act:

Instead of introducing a whole new category of parental recognition, we think it would be a lot easier and more consistent for a range of legal and

45 Australian Human Rights Commission, *Submission 12*, pp 7-8.

46 The Hon. Robert McClelland MP, Attorney-General, 'Removal of same-sex discrimination continues', 18 September 2008.

47 Ms Kate Temby, AHRC, *Committee Hansard*, Canberra, 22 September 2008, p .6.

48 Professor Patrick Parkinson, *Committee Hansard*, Canberra, 23 September 2008, p. 14. Also, see Mr Wayne Morgan, Australian Coalition for Equality and Tasmanian Gay and Lesbian Rights Group, *Committee Hansard*, Canberra, 23 September 2008, pp 25-26.

social issues to simply reflect that parenting presumption in federal law, which is what is achieved by section 60H.⁴⁹

3.61 The committee accepts that it would be premature to predict the enactment of the amendments to section 60H of the FL Act, but the Department was asked how amending that provision might affect the definitional inconsistencies among other same-sex law reform bills currently before the Parliament.

3.62 A representative acknowledged that there are 'some slight differences and inconsistencies' within the legislation, and that subsequent to the amendment of section 60H of the FL Act, the remaining bills might also be further amended:

...in light of those amendments, we will be considering whether there are ways in which we can adopt them or bring them across to the bills that are currently in front of us in the same-sex area.⁵⁰

3.63 Specifically in relation to the Superannuation Bill and the Bill the subject of this inquiry, the committee was told that the Department is currently working on options to improve the draft legislation. It was suggested that the approach adopted for section 60H of the FL Act might be most preferable, but the fundamental concern will remain the capture of all children within Commonwealth Acts.⁵¹ The Department added that removing references to children who are the 'product of a relationship' and replacing those references with references to a child of a person within the meaning of the *Family Law Act 1975* would:

...incorporate all of the apparatus of the Family Law Act for determining parent-child relationships and would allow future refinements to take effect without requiring consequential amendments to numerous other Acts.⁵²

3.64 The Law Council of Australia has previously submitted that definitions need not be consistent in form so long as they have a consistent effect,⁵³ and Professor Parkinson concurred, telling the committee that more time and care needs to be invested in amending each individual Act:

You have to take the time to go back and work out what are the benefits being conferred on the child, and what are the benefits being conferred on a couple in the context of the Telstra Corporation Act, the Passenger

49 Ms Emily Gray, Gay and Lesbian Rights Lobby (NSW), *Committee Hansard*, Canberra, 23 September 2008, p. 29.

50 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 2 September 2008, pp 45 & 55-56.

51 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 23 September 2008, pp 50 & 56.

52 Attorney-General's Department, Additional Information, 8 October 2008, p. 3.

53 Same-Sex Entitlements (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008, Mr Alexander Charaneka, Law Council of Australia, *Committee Hansard*, Sydney, 6 August 2008, p. 33 and Law Council of Australia, *Submission 21*, p. 2.

Movement Charge Act or whatever it is, and then you can work out how to define the relationship that you want to define.⁵⁴

3.65 As indicated in chapter 2, the Bill is quite lengthy, and the time allocated to the inquiry has been short. For these reasons, the number and depth of submissions was disproportionate to the Bill. However, there was a considerable number of submissions and evidence provided to the committee in relation to a few specific Commonwealth Acts: the *Social Security Act 1991*, the *A New Tax System (Family Assistance) Act 1999* and the *A New Tax System (Family Assistance)(Administration) Act 1999* (the social security and family provision laws). The totality of this information is presented below.

Adverse implications of the Bill

3.66 Individuals and organisations representing individuals expressed particular concern with the Bill's impact on same-sex couples in the areas of social security and family provision laws. It was submitted that, in these areas, the Bill will impose financial hardship on same-sex couples, and discriminate between various groups within the same-sex community.

Same-sex couples receiving Centrelink payments

3.67 In general, submitters and witnesses supported the objectives of the Bill, but several argued that persons receiving Centrelink payments would be adversely affected by the change from 'single' to 'member of a couple' status. In the former category, the income and assets of a person's same-sex partner are irrelevant in determining eligibility for payment.⁵⁵

3.68 The NWR Network submitted that enactment of Schedule 6 Part 2 of the Bill (containing the social security and family provision amendments) will either disentitle many same-sex couples from receiving Centrelink payments or affect the amount of a Centrelink payment:

A person's payment is affected by their being a 'member of a couple' per se (single versus married rate), and their partner's income (including compensation income) and assets.⁵⁶

3.69 The Inner City Legal Centre, a community legal centre based in Kings Cross and specialising in LGBTI issues, gave the following example:

A lesbian couple are raising a child together. One mother is working full time and the other mother is working part time and receiving Family Tax

54 Professor Patrick Parkinson, *Committee Hansard*, Canberra, 23 September 2008, p. 17.

55 For example, see Mr Brian Dunn, *Submission m13* and Mr Giorgio Petti, *Submission m18*

56 National Welfare Rights Network, *Submission 29*, p. 4. Under the provisions of the *Social Security Act 1991*, a same-sex couple in a registered relationship will also be a 'member of a couple': see paragraph 4(2)(aa) of the *Social Security Act 1991*.

Benefit B, as Centrelink considers her to be a single parent. After the changes are implemented, Centrelink could reduce her payment if she earns more than \$17,000 per year. This means the household income will drop significantly.⁵⁷

3.70 The NWR Network observed also that the expanded definitions of ‘child’ and ‘parent’ will have a similar effect on a child's entitlement to Centrelink payments (such as Youth Allowance) by bringing the children of same-sex relationships under the ‘financial umbrella’ of both partners of that relationship. That will also affect the parent or parents’ access to financial support relating to the care of children of the relationship.⁵⁸

3.71 The GLR Lobby referred to the Bill's anticipated savings to the Department of Families, Housing, Community Services and Indigenous Affairs (approximately \$64.5 million over four years),⁵⁹ submitting that this represents the removal of resources and benefits from people’s everyday lives. The GLR Lobby suggested that there should be a departmental policy:

...where affected same-sex couples are given time and support to readjust their finances, without automatically attracting harsh penalties for an inability to comply with the new laws. This is particularly important as some same-sex partners will not know of the changes to the law and may find themselves with little time to readjust their finances. Some couples may find themselves even having to pay back overpayments.⁶⁰

3.72 The majority of submissions commenting upon the adverse implications of the Bill were, however, concerned not with same-sex couples in general but those same-sex couples who are either elderly or coping with a severe disability or chronic illness (such as HIV/AIDS). These concerns are both discussed separately below.

Same-sex couples dealing with disability or illness

3.73 A common theme in several submissions was that the Bill will significantly and adversely affect same-sex couples who are particularly reliant upon Centrelink payments due to medical circumstances.

3.74 The NWR Network submitted that many people living with HIV/AIDS are affected by fluctuating health where 'patterns of work and illness have become episodic': people alternate between paid work and social security entitlements. It was

57 Inner City Legal Centre, *Submission 5*, p. 2. The National Welfare Rights Network also provided a number of useful case studies illustrating how the Bill will impact upon same-sex couples and their families: see *Submission 29*, pp 4 & 8-9.

58 National Welfare Rights Network, *Submission 29*, pp 3 & 5-6.

59 Explanatory Memorandum, p. 5.

60 Gay & Lesbian Rights Lobby (NSW), *Submission 18*, p. 44. Also, see Mr Corey Irlam, Australian Coalition, *Committee Hansard*, Canberra, 23 September 2008, p. 24.

argued that the Bill will increase economic disadvantage and dependency for these people, not only on account of the payment rate and income and assets test, but also due to reliance upon the medical benefits provided through Centrelink:

...this group could be denied access to Pensioner Concession Cards or Health Care Cards due to a partner's income. Provision of concession cards ameliorates the sometimes prohibitive costs of ongoing treatments (including pharmaceuticals).⁶¹

3.75 Positive Life NSW, a non-profit organisation representing the interests of people with HIV, also expressed unease with the impact of the Bill on health care access and affordability:

Where both partners are living with HIV/AIDS and receiving a Disability Support pension, the payment will be adjusted from the rate paid to singles, to the rate paid for a couple, a reduction from \$999.40 per fortnight per couple to \$834.40 per fortnight, a loss of over \$160 per fortnight in couple income.

Where one partner is living with HIV/AIDS and receiving a Disability Support Pension and the other partner is working, eligibility for a number of pensions under the Social Security Act are subject to income and assets testing. The income and assets of the working partner may significantly impact on the eligibility and rate of pension and entitlements payable for the non-working partner.⁶²

3.76 The Inner City Legal Centre illustrated the argument as follows:

A gay man is working full time, and his partner receives the Disability Support Pension due to an HIV related illness. He needs a concession card in order to obtain his medication. Once the changes come into force, he may lose:

- 1) Any entitlement to his payment;
- 2) Access to his Health Care Concession card; and
- 3) Access to the Pharmaceutical Allowance.⁶³

3.77 Similarly, a theme throughout many submissions was that the Bill will significantly impact on elderly same-sex couples. However, while there will be an adverse affect in relation to social security and family assistance laws, it was submitted that the Bill will have a positive affect in relation to the *Aged Care Act 1997*.

61 National Welfare Rights Network, *Submission 29*, p. 10.

62 Positive Life NSW, *Submission 28*, p. 3. The possible impact upon current recipients of an Aged, Disability, or Carers Pension, or Health Care Concession Card was also noted.

63 Inner City Legal Centre, *Submission 5*, p. 2.

Elderly same-sex couples

3.78 The Bill's proposed changes to the *Aged Care Act 1997* were welcomed by Dr Josephine Harrison, a health sciences expert from the University of South Australia. Dr Harrison submitted that elderly same-sex couples have to date been discriminated against in the assessment of residential care placements. The Comsuper Action Committee agreed:

If an elderly couple own their home together and one of them has to go to a nursing home, while the other remains in the family home, the value of the home is not taken into account in assessing levels of nursing home fees if the couple are heterosexual, but the value of the family home is taken into account for a same sex couple, who are then liable for additional nursing home entry fees.⁶⁴

3.79 Dr Harrison told the committee this discrimination has caused 'devastating financial inequity, often involving the loss of the family home in which the partner not entering the facility would have remained living.'⁶⁵

3.80 Some submissions and witnesses argued that there are compelling reasons for the Bill to especially acknowledge the circumstances of elderly same-sex couples.

3.81 The NWR Network submitted that older gay and lesbian couples have experienced long-standing inequality, which has enabled them to benefit from social security policies designed to rectify this historical disadvantage. It was argued that the Bill will exclude elderly same-sex couples from the benefit of these savings provisions unless those couples retain a 'single' status or have the option to disclose a relationship to Centrelink:

Applying Social Security means tests to people who have long been disadvantaged before the law is effectively a doubling of their experience of discrimination.⁶⁶

3.82 The Northern Rivers Community Legal Centre provided the following example of how the Bill would personally affect elderly same-sex couples:

Jenny approached me at the close of the forum wanting me to hear her story. She had left her violent, alcoholic husband in the late 1970's to move in with her current partner, Mona. She had three children from her marriage and Mona helped Jenny (who went back to part-time nursing) to support the family. Jenny was so afraid of losing custody of the children (being a lesbian was then seen as being an unfit mother) that she did not press her ex-husband for child support or a property settlement. Mona was not able to

64 Comsuper Action Committee, *Submission 15*, p. 1. Also, see Dr Josephine Harrison, *Submission 6*; Ms Cathy Brown, *Submission m7*; and National Welfare Rights Network, *Submission 29*, pp 3-4.

65 Dr Josephine Harrison, *Committee Hansard*, Canberra, 23 September 2008, p. 2.

66 National Welfare Rights Network, *Submission 29*, p. 7.

claim Jenny or the children for tax, Medicare safety net or other benefits. Jenny felt that she was born at the wrong time, experiencing the social and economic negatives of being in a same sex couple for the last thirty years, and now that they were retired, they were looking at having their income reduced without any time to prepare.⁶⁷

3.83 Implicit in the preceding paragraphs is the notion that the Bill will not necessarily provide equal treatment to all same-sex couples. However, submitters did not agree on whether this outcome was acceptable within the same-sex community.

Inequity in the removal of discrimination

3.84 The GLR Lobby submitted that it was more important to the LGBT community for same-sex couples to have legal rather than financial equality:

It is beyond question that, even on the issue of social security, HREOC's consultation and our own consultation has shown that lesbian, gay, bisexual and transgender Australians do aspire for *equal* rights, not *special* rights. Same-sex couples are generally willing to forgo the advantages in social security for comprehensive equality across all areas of federal law.⁶⁸

3.85 The NWR Network disagreed, stating that Bill might appear fair in providing equal recognition and treatment of opposite-sex and same-sex couples, but the effect of the Bill will actually create financial inequity for some same-sex couples:

It is disingenuous to claim that the Bill removes discrimination against same-sex couples, when the proposed amendments relating to Social Security and Family Assistance will entrench poverty for individuals whose access to employment benefits, superannuation and insurance entitlements have already been significantly affected by the discriminatory laws that the rest of the Bill seeks to reform.

...

Many older people in same-sex relationships will be precluded from Social Security entitlements under pension and allowance income and assets tests due to their partner's income and assets, despite the fact that historically they have had no or limited rights to other entitlements (including employer, disability, superannuation and insurance entitlements) because their status as a partner was not recognised. Given that the raft of reforms the Government is now introducing have come too late to affect their accrual of such entitlements, it is unjust that they now bear the effects of the disadvantageous aspects of the reforms.⁶⁹

67 Northern Rivers Community Legal Centre, *Submission 3*, p. 3.

68 Gay & Lesbian Rights Lobby (NSW), *Submission 18*, p. 44.

69 National Welfare Rights Network, *Submission 29*, p. 6.

3.86 The Australian Federation of AIDS Organisations agreed, submitting that the 'negative consequences of this Bill will not be uniformly shared by those who will attain equality':

...for the most part, it is the disadvantaged – those on Centrelink Benefits such as the Disability Support Pension, low income earners and those who rely on the Health Care Card, who are going to bear a significant cost in the transition to equality.⁷⁰

3.87 Throughout the inquiry, the 'equitable and sensitive implementation' of the Bill was a recurring consideration. Many submissions, as well as witnesses, called for the Bill to grant same-sex couples, particularly elderly same-sex couples, sufficient time to prepare for a change in their financial circumstances, and for the development and implementation of an appropriate education campaign.

Commencement dates and an education campaign

3.88 The NWR Network told the committee that if the Bill is enacted without allowing sufficient preparatory time, 'large numbers of clients will be impacted with income support payments being cancelled and reduced and individuals having to rely on the support of the same-sex partner, who may, or may not, be willing to accept that responsibility.'⁷¹

3.89 The GLR Lobby added that elderly same-sex couples have already planned for their retirement, and that financial restructuring is not something that can occur overnight:

At say 65, it might be very difficult for someone to change their circumstances, certainly now in approximately six months to adjust their entire retirement plan and financial circumstances around retirement in a very limited time. There might be a need for sunset or grandfathering of certain pensions, maybe the aged pension, certainly the disability support pension, also for people who are very ill and expect to not survive an illness.⁷²

3.90 Similarly, the GLR Lobby indicated to the committee that sufficient lead time and the provision of information would be necessary to effectively implement the Bill:

...many people who will be initially disadvantaged by this bill certainly do not want the bill not to occur. However, they do want some education and

70 Australian Federation of AIDS Organisations, *Submission 26*, p. 2.

71 Ms Kate Beaumont, National Welfare Rights Network, *Committee Hansard*, 23 September 2008, p. 36

72 Mr Ghassan Kassisieh, Gay and Lesbian Rights Lobby (NSW), *Committee Hansard*, Canberra, 23 September 2008, p. 30.

perhaps some preparatory phase so that they can prepare their finances and their lives to get ready for this legislation.⁷³

The commencement date

3.91 The available lead time concerned several submitters, who strongly objected to the proposed commencement date for the social security and family provisions amendments (1 July 2009). It was argued that these provisions should commence much later than proposed in the Bill.

3.92 The Australian Federation of AIDS Organisations, for example, recommended that the Bill:

- delay the policy implementation of the “negative” consequences of the Bill to better allow people to prepare for their personal situation;
- fund appropriate education and support campaigns and services to help people negatively affected by the Bill; and
- provide an amnesty period of two years to allow people some discretion in which to report on their own situation and act in better faith with Government departments (such as Centrelink) without fear or risk of punitive actions and/or debt accrual.⁷⁴

3.93 Several submissions suggested variations on the above recommendations, the most common variation being with regard to the proposed commencement date:

- ACON (formerly the AIDS Council of NSW) suggested that there be a transitional period with a commencement date of 1 July 2010.⁷⁵
- The Northern Rivers Community Legal Centre suggested a five-year ‘grandfathering’ period.⁷⁶
- The GLR Lobby proposed some kind of a ‘phase in period’.⁷⁷
- The NWR Network suggested that there not necessarily be a commencement date for elderly same-sex couples and that these couples

73 Ms Emily Gray, Gay and Lesbian Rights Lobby (NSW), *Committee Hansard*, Canberra, 23 September 2008, p. 30.

74 Positive Life NSW, *Submission 28*, p. 4. Also, see Australian Federation of AIDS Organisations, *Submission 26*, p. 3.

75 ACON, *Submission 34*, p. 7. Also, see the Lesbian and Gay Solidarity (LGS) Melbourne, *Submission 8*, p. 2; and Dr Josephine Harrison, *Submission 6a*, p. 1.

76 Northern Rivers Community Legal Centre, *Submission 3*, p. 3. Also, see Inner City Legal Centre, *Submission 5*, p. 3.

77 Ms Emily Gray, Gay and Lesbian Rights Lobby (NSW), *Committee Hansard*, Canberra, 23 September 2008, pp 30-31. The committee notes that the phasing out of payments such as the Widow's Pension, Partner Allowance and Mature Age Allowance were provided with grandfathering clauses to minimise the impact on payment recipients.

be given the option of whether or not to disclose the existence of a same-sex relationship.⁷⁸

3.94 The committee asked representatives from the Department whether consideration had been given to a commencement date other than 1 July 2009.

3.95 A representative from the Department observed that extending the commencement date in Schedule 6 Part 2 of the Bill would continue the discrimination against same-sex relationships in the social security and family provisions laws. It would also affect other Commonwealth Acts which interact with those laws, possibly creating inconsistencies in legislative outcomes:

For example in the veterans affairs' provision where you are clearly going to be getting a benefit if you commence that on 01 July 2009 but then if we treat you as if you are not a member of a couple for social security purposes until 01 July 2010—is that really appropriate for everyone I suppose is one thing to bear in mind.⁷⁹

An education campaign

3.96 In addition to lead time, one of the main reasons for extending the commencement date was to provide for the development and implementation of a comprehensive and extensive education campaign to inform same-sex couples, the community and service providers of the changes proposed by the Bill:

An extensive public education campaign is needed to ensure the community is aware of, and prepared for, the changes. This includes providing education to the LGBTI community, so that they are aware of the way their rights may be changing and the impacts they may have on them. Such a campaign must also ensure that Commonwealth service providers, professionals and employees are fully aware of the reforms and will not discriminate in any way against same sex couples and their children.⁸⁰

3.97 Many submissions received by the committee typically expressed this view, with the Lesbian and Gay Solidarity (LGS) Melbourne suggesting that the essentiality of the campaign cannot be underrated:

It may seem that the public generally accepts same-sex people in their midst from the various surveys which have been publicised but violence towards us and youth suicide in our gay communities remains high. So it is not true to say that by amending all these laws makes the changes easily acceptable.⁸¹

78 National Welfare Rights Network, *Submission 29*, p. 6.

79 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 23 September 2008, p. 58.

80 Inner City Legal Centre, *Submission 5*, p. 3. Also, see Northern Rivers Community Legal Centre, *Submission 3*, p. 3; ACON, *Submission 33*, p. 8; *Submission f1*; and *Submission f1a*

81 Lesbian and Gay Solidarity (LGS) Melbourne, *Submission 8*, p. 2.

3.98 Dr Harrison submitted that, given the history of fear and anxiety associated with disclosure, gay and lesbian community organisations should provide education and advocacy support to elderly same-sex couples. Further, that resources and personnel should be allocated to the education of Commonwealth service providers to ensure an environment in which elderly same-sex couples feel comfortable to disclose a relationship in applying for admission to residential care:

Elderly couples who have never disclosed to a service provider are very unlikely to do so in situations where the professionals involved in administering the process of assessment for residential care are not sympathetic, informed and aware of the sensitivities involved in the process of disclosure. The couple will likely encounter ACAT staff, Centrelink staff, financial information services staff, Veterans Affairs' staff, DoHA staff, Carelink Centre staff, the Aged Care Info Line staff and possibly others.⁸²

3.99 Representatives from the NWR Network described the current Centrelink system as one which works 'badly in relation to the manner in which decisions are made about whether a person should receive a Centrelink payment at the single or partnered rate.' The NWR Network was concerned with the extension of this system to same-sex couples, querying whether Centrelink staff would be able to act impartially with regard to such sensitive cases:

Unfortunately, the decisions made can be coloured by the prejudices or own life experiences of the decision maker or by the drive to achieve compliance targets...and raising and recovering debts. Our experience, which has been borne out by reports completed by the Australian National Audit Office and the Commonwealth Ombudsman, has been that many of those who were investigating marriage-like relationships act as gatekeepers and actively discourage clients from challenging decisions. They come from an assumption that people are being fraudulent.

Centrelink have virtually unfettered powers in their capacity to investigate cases and often use a scattergun approach, sending out vast reams of correspondence to third parties in pursuit of a result that someone is a member of a couple. It is of concern that there is the potential where they are pursuing an investigation into a same-sex member of a couple, that the correspondence sent out could inadvertently indicate that the other party is of the same sex, with the repercussion that someone could be outed in the workplace or in the community.

Clients are regularly told, before they have been advised of a decision, about the overwhelming evidence against them and that they will be prosecuted even before a decision has been made or a debt raised. Not so often is there space permitted for clients to provide their own account or be informed of the evidence that they might be able to use to refute a finding that they are a member of a couple. Too often we see that there is also confusion about the purpose of the investigation which should be around

82 Dr Josephine Harrison, *Committee Hansard*, Canberra, 23 September 2008, p. 3.

making an administrative decision rather than gathering evidence for a prosecution case. It could be said that they put the cart before the horse.

The difficulty is that when we observe these types of practices occurring in relation to other-sex couples, we are concerned about how the extension of the definition in section 4 of the Social Security Act to include same-sex couples, will be handled by Centrelink.⁸³

3.100 Dr Harrison suggested that any education campaign should be undertaken upon enactment of the Bill, which would require early campaign development.

3.101 The Commission told the committee that the various agencies (mainly Centrelink) are 'planning campaigns to work with same-sex couples to ensure that people are made aware of their rights', and it was suggested that a 'central education platform' be adopted:

We understand that separate departments have been funded to educate as appropriate around the amendments. We would strongly support a central, probably web based, location for information about all the amendments so that people in same-sex couple relationships are not chasing around in circles trying to find out what the social security, tax and superannuation issues are and having to go to many different places.⁸⁴

3.102 The Department was asked whether it has considered implementation of the Bill, and in particular, a central portal or online education campaign. The Department confirmed the creation of an inter-departmental committee and various initiatives to monitor the progress and implementation of the Bill, including consideration of a common portal or website:

In one way, because Centrelink is the main service delivery agency for a lot of the programs, they are likely to be an area where this might be an area where we could focus further attention on that area. Definitely the government is keenly aware of that issue and it is something that in changing the reforms, to ensure that there is equal treatment, that it does not have any unintended consequences and that people are aware of what their obligations are as well as what their rights are.⁸⁵

Outing same-sex couples

3.103 As indicated in the above comments of the NWR Network, some submitters and witnesses were highly concerned that the Bill will force same-sex couples to 'out' themselves. It was argued that this will have an adverse impact on same-sex couples

83 Ms Kate Beaumont, National Welfare Rights Network, *Committee Hansard*, Canberra, 23 September 2008, p. 36.

84 Ms Kate Temby & Mr Graeme Innes AM, AHRC, *Committee Hansard*, Canberra, 22 September 2008, p. 10.

85 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 23 September 2008, p. 45.

living in remote or rural (traditionally conservative) communities, and elderly same-sex couples who have endured decades of discrimination.

3.104 Dr Harrison described the context within which elderly same-sex couples have lived their lives as a history of 'fear of persecution, criminal conviction, religious condemnation, family rejection, labelling as mentally ill, loss of employment, the brutality of shock treatment or lobotomy'. She argued that:

...to expect elderly same-sex couples to come rushing out of the closet after lifetimes of fear and terror will take more than amending pieces of legislation and just sitting back and waiting. It is vitally important that the process of implementing this legislative change does not compound this fear and anxiety or consequent depression for same-sex elderly couples but provides an opportunity to finally convey messages of concern and, above all, safety so that they are encouraged to make considered decisions and choices about disclosure and the consequences of doing so.⁸⁶

3.105 In these circumstances, and in view of its comments regarding the Centrelink system, the NWR Network observed that some same-sex couples might choose not to declare their relationship:

For many people, declaring their same-sex de facto relationships to an employer, an insurer or a superannuation fund in order to acquire the benefits long extended to opposite sex couples is a matter of principle and financial need. However, declaring their gay or lesbian relationship to Centrelink is another matter – especially for those whose previous experiences of dealing with government agencies may have been difficult due to either actual or perceived discriminatory policies and practices.⁸⁷

3.106 Dr Harrison expressed similar concerns, arguing that elderly same-sex couples should not feel forced to reveal their relationship or be penalised. The penalty would be either discrimination in the application for residential care or subsequent allegations of overpayment of entitlements:

This is a serious situation which requires training and education of all those involved and necessitates appropriate and sensitive advocacy related assistance for the elderly same-sex couples...The process by which disclosure occurs is particularly sensitive in the area of aged care.⁸⁸

3.107 The GLR Lobby agreed that some same-sex couples will be afraid of 'outing' themselves, but the majority of same-sex couples are most interested in equality 'across the board'. For that reason, 'aspects like the invasion of privacy or like some

86 Dr Josephine Harrison, *Committee Hansard*, Canberra, 23 September 2008, p. 2.

87 National Welfare Rights Network, *Submission 29*, p. 7.

88 Dr Josephine Harrison, *Submission 6*, p. 1 and *Submission 6a*, p. 1.

couples having to out themselves at Centrelink can be dealt with by an education campaign.⁸⁹

Scope of the same-sex law reforms

3.108 One final matter in submissions and evidence concerned the scope of the same-sex law reforms, including the omission of certain Commonwealth laws.

3.109 The ACE noted discrepancies between the 58 Commonwealth laws identified in the HREOC *Same-Sex: Same Entitlement* report as discriminatory, and the approximately 84 Commonwealth laws targeted for amendment in the:

- Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008;
- Evidence Amendment Bill 2008;
- Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008;
- Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill; and
- National Employment Standards Bill (yet to be introduced).⁹⁰

3.110 The GLR Lobby similarly identified a number of discrepancies, and recommended that the committee review:

...whether all the recommendations of Same-Sex: Same Entitlements have been incorporated (to the extent possible) by this Bill or proposed reforms and whether any further action is required to ensure equality for same-sex couples and their children in federal law.⁹¹

3.111 The committee confirmed with the Department that it had conducted an audit of Commonwealth legislation, and that the Bill and the Superannuation Bill amend most of the discriminatory Acts identified in the audit. The Department told the committee that the exceptions, including those mentioned by the ACE and GLR Lobby, primarily relate to legislation which has been repealed and/or replaced; legislation that is being separately amended (such as the FL Act); and legislation that does not require amendment. There is also a range of legislative instruments, trust deeds and determinations of regulations, which will be progressively amended after amendment of the principal Acts.⁹²

89 Ms Emily Gray, Gay and Lesbian Rights Lobby (NSW), *Committee Hansard*, Canberra, 23 September 2008, p. 34.

90 Australian Coalition for Equality, *Submission 19*, pp 6-10.

91 Gay & Lesbian Rights Lobby (NSW), *Submission 18*, p. 29.

92 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 23 September 2008, pp 41-42. Also, see Attorney-General's Department, Additional Information, 8 October 2008, p. 2.

3.112 The GLR Lobby had expressed particular concern with the omission from the Bill of the *Diplomatic Privileges and Immunities Act 1967*, the *Foreign States Immunities Act 1985*, and the *International Organisations (Privileges and Immunities) Act 1963*, in which important terms are not defined.⁹³

3.113 The Department explained that the Australian Government has decided not to amend these three Acts for reasons of 'comity of international relations':

...they implement Australia's obligations under international law and international treaties, and various countries around the world have different views about who is a spouse and who is not a spouse.⁹⁴

3.114 Overwhelmingly, the Commonwealth Act whose omission from the Bill was most queried was the *Marriage Act 1991*. Some submissions argued that, in accordance with Australia's international obligations, same-sex marriages should be recognised in Australia.⁹⁵

3.115 However, the purpose of the Bill is to 'provide for equality of treatment under a wide range of Commonwealth laws between same-sex and opposite-sex de facto couples.'⁹⁶ The issue of same-sex marriage is therefore a matter beyond the scope of this inquiry.

Committee view

3.116 This Bill gives effect to the Australian Government's commitment to remove discrimination against same-sex couples and their families in 68 Commonwealth laws. This commitment arose from the recommendations of the HREOC *Same-Sex: Same Entitlements* report, reflects Australia's international treaty obligations, and received in principle support from most stakeholders submitting to this inquiry. For these reasons, the committee endorses the inclusion of same-sex couples in the model definition of 'de facto partner', and the inclusion of the children of same-sex relationships in the expanded definitions of 'child' and 'step child'.

3.117 The committee considers it important to recognise that same-sex couples and their families currently exist within Australia, and that there is no sound basis on

93 Gay & Lesbian Rights Lobby (NSW), *Submission 18*, pp 29-30.

94 Mr Peter Arnaudo, Attorney-General's Department, *Committee Hansard*, Canberra, 23 September 2008, pp 41-42.

95 NSW Young Lawyers, *Submission 22*, pp 4-6; Human Rights Law Resource Centre, *Submission 14*, p. 4; Coming Out Proud Program, *Submission 2*, p. 3; Student Representative Council, University of Sydney, *Submission 24*, p. 1; Lesbian and Gay Solidarity (LGS) Melbourne, *Submission 8*; Australian Coalition for Equality, *Submission 19*, p. 5; Liberty Victoria, *Submission 31*, p. 1.

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

which to discriminate between them and opposite-sex couples and families in the provision of practical entitlements.

3.118 The committee therefore supports the Bill, and believes it should be passed at the earliest opportunity.

3.119 At the same time, the committee acknowledges the concerns expressed in relation to the Bill. The main concerns related to general provisions within the Bill, and the affect of those provisions on same-sex couples, particularly elderly same-sex couples and those affected by chronic illness or severe disability.

3.120 As regards the model definition of 'de facto partner', the committee believes that this provision is unambiguous and appropriate. The definition of 'de facto relationship' and its criteria are sufficient to prevent a person from having multiple relationships for the purposes of the Commonwealth Acts amended by the Bill. The committee is not convinced that it is necessary for a 'de facto relationship' to have a temporal threshold, trusting that the flexibility of the criteria will allow each case to be considered on its own merits. In principle, the committee supports Commonwealth recognition of internationally recognised civil unions or registered relationships, provided that this recognition in no way breaches section 88EA of the *Marriage Act 1991*. On the evidence before it, the committee does not consider that the Bill breaches that Act.

3.121 In relation to the expanded definition of 'child', the committee is troubled by the phrase 'product of the relationship', noting that it has been criticised by the majority of stakeholders. The committee queries whether the phrase has been properly considered at all levels, and whether it is appropriate and necessary for the purposes of the Bill. The committee acknowledges that the Department has invested considerable time and effort in this matter, but agrees with the independent legal experts that it would be best to find another means of achieving the Bill's objectives.

3.122 The inquiry highlighted that the parent-child relationship is a complex issue in which there are many different perspectives. The committee does not consider the Bill the appropriate forum in which to redefine that relationship. The committee welcomes the proposed amendments to section 60H of the *Family Law Act 1975* and the Department's advice that the Australian Government will be considering options to incorporate similar amendments within not only this Bill but also the Superannuation Bill. The committee understands that consistent definitions will be used within the Commonwealth Acts but accepts that, in some instances, this will not be appropriate. The committee encourages the Department to include consistent definitions wherever possible.

3.123 It was encouraging for the committee to receive the many submissions that it did within the short time frame allocated for this inquiry. Of particular note were the many submissions from or on behalf of individuals who will be directly affected by the Bill. The committee acknowledges that there will be a practical impact on same-sex couples and not necessarily a positive one for certain same-sex couples. The

committee understands that implementation of the social security and family provisions laws on 1 July 2009 will cause some financial hardship. While the committee sympathises with persons in that circumstance, the committee considers the same-sex law reforms introduced by the Bill to be long overdue and does not wish to prolong the discrimination against same-sex couples and their families in Commonwealth laws.

3.124 The committee believes that a comprehensive education campaign will provide same-sex couples with the information they require to restructure their financial affairs. In this regard, the committee recommends that the various government departments and agencies develop and implement appropriate user-friendly initiatives and strategies as a matter of priority (such as a central portal). These should focus upon same-sex couples; seek to inform all service providers and the general community; and be operational no later than 31 March 2009.

3.125 Notwithstanding the education campaign, the committee is mindful of the fact that these things take time, and it will be difficult for many same-sex couples to meet the 1 July 2009 deadline.

3.126 In this regard, the committee notes with concern the evidence regarding individuals' experiences with Centrelink. For the purposes of this Bill, it is essential that Centrelink's same-sex clients are treated in a courteous and professional manner. The committee suggests that it would be appropriate for front line and other service staff to receive additional training designed to ensure that same-sex clients are not treated prejudicially or in a judgemental manner as they interact with the agency. This comment extends also to other government departments and agencies which are tasked with implementing the provisions of the Bill.

3.127 Finally, the position of elderly same-sex couples and same-sex partners affected by severe disability or chronic illness concerns the committee. The committee accepts that these two subgroups of the same-sex community will be most immediately affected by the Bill. The committee agrees that elderly same-sex couples will require extra support to comply with their new legal obligations.

Recommendation 1

3.128 The committee recommends that the definition of 'child' within 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 2

3.129 The committee recommends that all government departments and agencies responsible for providing Commonwealth benefits be required to:

- **develop and implement user-friendly initiatives and strategies to inform clients and staff of the proposed changes no later than 31 March 2009; and**
- **provide training to front line and other service staff to ensure that same-sex clients are not treated prejudicially or in a judgemental manner as they interact with the department or agency.**

Recommendation 3

3.130 The committee recommends that the Government give further consideration to what administrative or regulatory mechanisms may be available to appropriately manage the impact of the reforms on same-sex couples who may have benefits reduced under the changes.

Recommendation 4

3.131 Subject to the above recommendations, the committee recommends that the Senate pass the Bill.

Senator Trish Crossin

Chair