

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 – General Law Reform) Bill 2008 (the Bill).

Amendments to the Bill

1.1 The Bill was referred to the committee on 4 September 2008. The committee held two public hearings into the provisions of the 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 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.

1.2 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.

1.3 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.

1.4 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.

'Spouse' and 'de facto partner'

1.2 The Bill is inconsistent in its use of the term 'spouse'. In some places 'spouse' retains its standard English meaning of the other party to a marriage, that is, a person's husband or wife. In other places 'spouse' is defined to include a 'de facto partner'. It is true that this usage is already present in a number of Commonwealth Acts. However,

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

with the inclusion of same-sex relationships in Commonwealth law it is inappropriate to use the term 'spouse' to refer to a person's de facto partner, including a same-sex partner.

Recommendation 1

1.3 The Bill should be amended so that the term 'spouse' is consistently used in the Bill to mean the other party to a marriage, that is, a person's husband or wife. It should never be defined to include a 'de facto partner'.

Multiple relationships

1.4 Item 1 of Schedule 2 of the Bill would amend the *Acts Interpretation Act 1901* by adding a new section 22C dealing with de facto relationships. Subsection (5) would provide that '...a de facto relationship can exist even if one of the persons is legally married to someone else or is in a registered relationship with someone else or is in another de facto relationship.'

1.5 This provision is unsatisfactory insofar as it:

- may undermine and devalue marriage as a union between a man and a woman to the exclusion of all others; and
- may be viewed by some to approve a form of polygamy.

1.6 The proposed subsection 22C(5) contained in Item 1 of Schedule 2 of the Bill should be deleted, and any assessment of these matters should be left at the discretion of the courts.

Recommendation 2

1.7 Subsection 22C(5) contained in Item 1 of Schedule 2 of the Bill should be deleted.

'Child as a product of a relationship'

1.8 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.

1.9 The Bill would introduce a provision that, 'someone is the *child* of a person if he or she is the product of a relationship the person has or had as a couple with another person (whether of the same sex or a different sex).'

1.10 The Explanatory Memorandum to the Bill lists a range of scenarios in which this definition would apply. These scenarios raise 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.

1.11 The scenarios canvassed by the Explanatory Memorandum include surrogacy arrangements. However, there is no detail as to which surrogacy arrangements would give rise to a parent-child relationship. For example, it is not clear that surrogacy arrangements involving payments to a woman to carry a child would be excluded.

1.12 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.

1.13 While the House of Representatives was debating and ultimately passing without amendment the Bill, the government circulated proposed amendments to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008* (the FL Bill) some of which also addresses the definition of 'child' and 'parent' in Commonwealth law.

1.14 Item 5 of proposed new Schedule 3A of the FL 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.

1.15 Item 7 of proposed new Schedule 3A of the FL 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.

1.16 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.

1.17 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.

1.18 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.

1.19 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.²

1.20 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.

1.21 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.'³

1.22 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.

1.23 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 3

1.24 The Bill should be amended to remove all references to the child as 'the product of a relationship the person has or had as a couple with another person (whether of the same sex or a different sex)' and to replace such references with the phrase 'child of the de facto partner of the person'.

² 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."

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'."

³ The Hon. Dr Brendan Nelson MP, Leader of the Opposition, *House Hansard*, 4 June 2008, p. 4480.

'Step child' and 'step-parent'

1.25 The Bill introduces a novel definition of step child as 'someone who is a child of a partner of the person is the step child of the person, if he or she would be the person's step child except that the person is not legally married to the partner.'

1.26 Commonwealth law currently provides (section 3 of the *Family Law Act 1975*) that 'step-parent', in relation to a child, means a person who (a) is not a parent of the child; and (b) is or has been married to a parent of the child.

1.27 As the stated goal of the government is to provide equal treatment between same-sex and opposite sex de facto couples there is no justification for this change to the definition of 'step child' which will affect all children who have a parent who enters into a de facto relationship with another person who is not a parent of the child.

1.28 Where necessary to ensure equality of treatment, the phrase 'child of the de facto partner of the person' could be utilised to ensure the same outcome that would be achieved by the bills without introducing a novel definition of 'step child'.

Recommendation 4

1.29 The Bill should be amended to remove all new definitions of 'step child' and to use instead where necessary the phrase 'child of the de facto partner of the person'.

Conflicting definitions

1.30 Liberal Senators note that in the Bill, the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008 (the Superannuation Bill), the Evidence Amendment Bill 2008 and the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 there are at least three different definitions of 'de facto relationship'. The majority report accepts that in some instances specific definitions will be unavoidable but expresses a preference for consistency and uniformity across federal legislation.

1.31 Liberal Senators believe that the majority report fails to acknowledge the seriousness of this issue.

1.32 The government's ineptitude in introducing three different definitions of the same term in four related bills, introduced within weeks of each other, is staggering. The government has introduced in the same Parliament four bills on closely related matters, each of which contains a significantly different definition of an important and contentious term.⁴

4 Proposed section 22C of the *Acts Interpretation Act 1901*; proposed section 4AA of the *Family Law Act 1975*; proposed subsection 11(3) of the *Evidence Act 1995*; and various proposed definitions of 'couple relationship': for example, see proposed addition to subsection 4B(2) of the *Parliamentary Contributory Superannuation Act 1948*

1.33 Liberal senators hold the strong view that there is no obvious purpose to be served by this confused approach to legislative reform. Despite government rhetoric about simplicity and certainty, it reflects a reckless indifference by the government to the importance of legal consistency.

1.34 Consistent with the committee's approach in relation to the Superannuation Bill, the Evidence Amendment Bill 2008, and the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, Liberal Senators are of the view that the government should review the definition of 'de facto relationship', and any related definitions, across all relevant federal legislation, with a view to ensuring a consistent approach.

Recommendation 5

1.35 Liberal senators recommend that the government undertake a review of all relevant federal legislation containing definitions of 'de facto relationship', and any related definitions, with a view to ensuring consistent concepts and terminology are used wherever appropriate.

Time for the inquiry

1.36 The Bill was referred to the committee on 4 September 2008 for inquiry and report no later than 30 September 2008. The committee was due to report on that same date on the provisions of the Superannuation Bill.

1.37 Liberal senators note that the Bill comprises 179-pages, and suggest that 26 days is not sufficient a period of time in which to properly inquire into and report on such a lengthy and important piece of legislation. The lack of time did not escape the attention of several submitters who commented upon the brevity of their submissions given the time constraints.

Senator Guy Barnett Senator Mary Jo Fisher Senator Russell Trood

Deputy Chair