SUBMISSION TO

THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE SAME-SEX RELATIONSHIPS (EQUAL TREATMENT IN COMMONWEALTH LAWS –GENERAL LAW REFORM) BILL 2008

from

Patrick Parkinson

Professor of Law

University of Sydney

My background

I am a Professor of Law and was Chair of the Family Law Council, a statutory body which advises the federal Attorney-General, from 2004-2007. Prior to that (from 2001-04) I was a member of the Council. I also chaired the Ministerial Taskforce on Child Support (2004-05) that led to the new Child Support Scheme that was introduced recently. I have written widely on family law issues and am a member of the Executive Council of the International Society of Family Law.

I am writing this submission in my personal capacity.

Summary of position on the Bill

The Bill's intent, so far as it concerns the ending of discrimination for couples in same-sex relationships, is entirely proper and I support it. I also support the move towards a more uniform definition of de facto relationships in Commonwealth law.

However, the Bill goes beyond the ending of discrimination for couples in same-sex relationships and seeks to redefine the meaning of parenthood in parts, but not all, of federal law, and in such a problematic manner that I do not believe this Bill should be passed with these provisions still in it. They 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 recognition of quasi-parental status for certain purposes need much more careful consideration.

There are three major problems with this Bill, insofar as it concerns parent-child relationships. First, it continues to use the same definition as in the Superannuation Bill, defining certain children as "products of a relationship". This terminology was criticised on all sides when it first appeared. I am very surprised, given the extent of the problems with this terminology, that in this Bill it is proposed to extend it across most of federal law.

The second problem is that if this Bill passes, people will be treated as parents for the purposes of certain specific pieces of legislation, when they are not parents for the purposes of Australian federal law generally. The Bill does not amend the Family Law Act, which is where parental responsibility is defined, or the Child Support legislation to insert its "product of a relationship" terminology into those Acts.

That is wise, given how controversial such a conferral of parental status would be, and the problems in dealing with issues about the position of the biological father. However, the consequence of introducing that terminology in a piecemeal way in this Bill is that people will be defined as parents for certain purposes in some legislation when they are not defined as parents for general purposes, 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.

The Government has at least tried to clarify the meaning of 'product of a relationship' in the Explanatory Memorandum to this Bill; but that creates as many problems as it solves.

Thirdly, the Bill explicitly endorses surrogacy arrangements, without dealing with any of the issues and problems inherent in them. So the Parliament is being asked to recognise and endorse surrogacy arrangements for some purposes, but without any regulatory framework for surrogacy being in place. There are numerous questions that are unresolved about surrogacy, all of which are ignored in the Explanatory Memorandum. What is the position of the birth mother if the commissioning couple are defined as parents for certain laws and yet not under the Family Law Act? What is, or should be the status of surrogacy agreements? Is an agreement that a surrogate mother will give up the baby enforceable? What safeguards are there against the exploitation of poor women, perhaps in third world countries, through commercial surrogacy arrangements? The Government is rushing headlong into the recognition of children born through surrogacy for a great range of legal purposes, but with none of these issues and problems resolved.

The Government is, with respect, entering a legal, social and political minefield in rushing to legislate to confer parental status on people in same sex relationships to the extent that this Bill will achieve. It does not need to do so at this time to end discrimination against same-sex couples. Children are third parties to such relationships, and whether they are born or just contemplated, children's interests require independent consideration.

For these reasons, I consider that the Government would be well advised to accept the recommendation made by the Senate Committee in its report on the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 for a review of all federal legislation containing definitions of ''child' and 'parent', with a view to

ensuring consistent concepts and terminology are used wherever appropriate, with a moral compass that is informed by the values of the whole Australian community and not just those groups –sometimes highly organised and articulate - that tend to give evidence at Senate inquiries.

Recommendation

1. That the Committee only endorse this Bill if all amendments seeking to redefine 'parent' and 'child' or variations thereof, be deleted from the Bill pending the review proposed in recommendation 2.
2. That the Government reconsider, in relation to each piece of legislation to be amended by the Bill, whether there is any need to redefine 'child' or 'parent' at all, and if so how the Act could be amended to include a broader range of children without redefining parental status.

Is there any evidence of discrimination against children?

The long title to this Bill is: "A Bill for an Act to address discrimination against same-sex couples and their children in Commonwealth laws, and for other purposes".

It builds on the HREOC report concerning discrimination in financial matters against same sex couples. However, it goes far beyond the HREOC recommendations. This Bill seems to be the product of having some junior official do a word-search of the statute book for every occasion where the word 'child' and 'parent' is used, except for the family law legislation, with a view to amendment. There is no evidence that it is the product of any careful policy evaluation or thorough inquiry.

The long title suggests that there is a need to prevent discrimination against children. The EM (para 3) states that the "amendments will ensure that children of same-sex couples are not disadvantaged solely because of their family structure." Discrimination is the ultimate trump card argument in public policy. Any discrimination is regarded as improper; but what evidence has the Government got that children are being discriminated against? By what laws? Children across Australia are generally treated the same way in legislation whether they are in intact families, single-parent families, blended families or same sex families. The adult carers in their lives may not all have the same place in law, but that is a different matter. Usually, the primary carer in their lives is a parent, but some primary carers are stepparents who have no parental responsibility or other forms of recognition under most Australian laws. Some are grandparents. There might be a gay or lesbian partner.

It may be that some of those adults who fulfil quasi-parental roles in children's lives but are not defined in law as 'parents' might claim 'discrimination' - I don't know. The word seems to be bandied about endlessly for all kinds of causes. However, if there is discrimination (as opposed to differentiation), it is not discrimination *against children*. And if there is 'discrimination', then perhaps the Government should conduct a thorough review of the legal position of stepparent and grandparent carers, who are far more numerous than those who are intended to be covered by this Bill.

All that this Bill will do is to define someone as a parent who is not in fact a parent. That has nothing to do with preventing discrimination against children. It is all about the adult's claims. As so often happens, children are being used to promote adult agendas.

If in fact there are children who are being disadvantaged by non-recognition of a "co-parent" under any of these laws, (or a step-parent for that matter) that can be fixed without conferring parental status for limited purposes – as I demonstrated in relation to the Superannuation Bill. References to dependent children, partners of parents with children and other such formulations will appropriately deal with the issues.

Children as 'product' of the relationship

Children are human beings, not products

As I wrote in my submission on the superannuation Bill, 'product' is an ugly word. It suggests that children are things that are made, like household appliances or widgets.

In family law, one of the goals of law reform has been to get away from the idea that parents own or possess their children. This is one of the reasons why the last Labor government passed the Family Law Reform Act 1995, abandoning the language of 'custody' of children. It is a seriously retrograde step to now define children as products.

The definition that no-one wants

It is very surprising indeed that after the strong criticisms made on all sides in submissions to the Senate Committee on the Superannuation Bill, this Bill continues with the same flawed language.

In my submission on the Superannuation Bill, I expressed many criticisms of the problems inherent in the drafters' approach. It is based on a falsehood. There is no good reason in public policy to pretend that clay can be turned into gold, that pigs can fly or that two women or two men can produce a child. None of these things are possible, and they are not made possible because Parliament deems them to be possible.

There may, however, be very good reasons of public policy to recognise, for certain purposes, that a person who helps *nurture* a child within a same sex relationship may be important to the child and the child important to them. That requires a more fine-grained analysis of the reason the terms 'child' or 'parent' are included in certain laws, and whether the definition needs to be broadened in some way.

In the submissions on the superannuation Bill, the term 'product of the relationship' was criticised by people from widely divergent perspectives. For example, Prof. Jenni Millbank, a leading advocate for lesbian and gay people, expressed very strong and cogent criticisms:
http://www.aph.gov.au/Senate/committee/legcon_ctte/same_sex_entitlements/submiss

ions/sub08.pdf
These criticisms were not just about the terminology. They went to the very heart of the definition, who it applies to and how it will be interpreted.

The drafters respond to all these warnings of looming icebergs, not by changing the course of the ship, but by providing a detailed Explanatory Memorandum, offering an elaborate explanation of which children are covered by the definition. However, those explanations create as many problems as they solve.

The Examples in the Explanatory Memorandum

No need for the definition at all in many of the examples

The Bill may give the appearance of sorting out who is a parent in all sorts of situations. However, in some of the examples, the position is already quite clear in legislation, either because the issue was never in doubt, or because it was resolved a great many years ago as a consequence of s.60H of the Family Law Act 1975 (Cth) and status of children laws in the states and territories (see eg example 1).

Consider Example 6.

J, a man, is married to S, a woman. Together they have a child H who is the biological child of both J and S.

The EM helpfully explains:

The child H clearly satisfies the common law definition of 'child'. H is also the product of J and S's relationship because both J and S are biologically related to H and S is the birth mother of H.

Did we really need an explanatory memorandum to tell us that a child born to a married couple in the normal way in which children have been born since the beginnings of humanity, is their child?

Different parental combinations for the same children

Under the proposed amendments, children will now have different combinations of parents for different purposes. Consider example 3 in the EM:

> Example 3
>
> J forms a relationship as a couple with S. During the relationship J and S enter into an arrangement with T, a person of the opposite-sex, whereby S will have sexual intercourse with T so that S may become pregnant. All parties agree that T will have no role in the life of the child following the child's conception. The arrangement takes place and S gives birth to H.
>
> The EM explains:
>
> Whilst H is the biological child of S, H is not the biological child of J. H will be considered J's child for the purposes of the definition of 'child'. That is, H is the product of the relationship between J and S because H is S's biological child and there

was an element of joint endeavour between J and S in the procreation of H . H would continue to be considered J and S's child even if the relationship between J and S were to break down at a later time.

The EM states categorically that H would be considered J and S's child, and that would be so even if the relationship between J and S were to break down at a later time.

Well, no actually. H might be considered J's child for the purposes of the *Export Market Development Grants Act* 1997, the *Seafarers Rehabilitation and Compensation Act* 1992, the *Passenger Movement Charge Collection Act* 1978 and the *Telstra Corporation Act* 1991 amongst other legislation; but H is still not the child of J in general federal law. He or she is the child of S because S is the biological mother. However, J has no parental responsibility under the Family Law Act; nor would she be recognised as a parent if the relationship were to break down at a later time in terms of an obligation to pay child support. The explanation given in the EM is only true for the specific pieces of legislation which are amended in this Bill, none of which actually confer parental status on a person generally in federal law. Nor will they both be parents under any State or Territory laws, because this child has not been born through an artificial conception procedure.

So who are the real parents of H in general federal law? Who actually has parental responsibility and parental obligations? There is absolutely no doubt about this. That has been decided for example, in *ND and BM* [2003] FamCA 469. Whatever the intent of the three of them may have been, because the child was conceived through sexual intercourse, T and J, the biological mother and father, are the parents. They cannot contract out of that. Even if there were a written agreement between T and J that T would not be a parent, would have no parental responsibilities and would pay no child support, he would still be the parent in Australian law. The agreement would be null and void and of no legal effect: *ND and BM* (above).

And the Explanatory Memorandum to this Bill would not change any of that, unless of course, the meaning of 'child' had to be determined for the purposes of the *Export Market Development Grants Act* 1997, the *Seafarers Rehabilitation and Compensation Act* 1992, the *Passenger Movement Charge Collection Act* 1978 or some other Act to be amended by this Bill.

This is chaotic and unsatisfactory. There is simply no evidence that these issues have been thought about.

Two inconsistent definitions in federal law for the same children

What this Bill does is to provide for two very different definitions of the parent-child relationship to be operative in federal law depending on which legislation arises for interpretation. They are not consistent. For example, the 'product of the relationship' definition does not require the other partner's consent. Section 60H of the *Family Law Act* and all the status of children legislation does. To quote from Prof. Millbank's submission on the Superannuation Bill (p.2):

"[T]he definition does not specify, as all state parentage presumptions (eg *Status of Children Act 1996* (NSW)) do, the requirement of *consent* to the conception of the child, *nor the point*

at which consent must be given in order to trigger recognition. By way of example, if a woman become pregnant through ART while not in a de facto relationship, and then during the course of the pregnancy entered into a de facto relationship with another person, it is not clear whether a child would or would not be the "product of the relationship" under the Bill. Equally, if an embryo were created during the relationship but then was used without consent it is not clear whether the child would or would not be "product of the relationship". Under the *Family Law Act 1975* (Cth) and state parentage presumptions as they currently stand a de facto partner or husband would *not* be a parent in such circumstances as there was not consent to the conception attempt by the partner (see eg *In the marriage of P and P* [1997] FLC 92−790; *Ganter v Whalland* [2001] NSWSC 1101)."

The EM responds to this concern very weakly, by saying at para 22:

"Consent to the procreation of a child is not an express requirement in the key definition of 'child'. This is because the term 'product of the relationship' implies an element of joint endeavour. The use of the term 'product of the relationship' allows all the circumstances of a particular case to be considered, which means that a unilateral action by one party would not be likely to fall within the definition of the 'product of the relationship'.

There are also examples in the EM about lack of consent that purport to respond to some of Prof. Millbank's points, and my own; but to say something would not be "likely" to fall within a definition is to acknowledge that the drafters of this Bill have left the issue unresolved and uncertain.

In general, it is wise not to have two different definitions concerning the same subject-matter which are inconsistent with one another. There is no explanation, in the EM, as to why the Government has abandoned the consent requirement which has governed the conferral of parental status in relation to artificial conception procedures for many years, both in state and federal law.

Little guidance for administrators

The EM at para 22 talks about "all the circumstances" of the case being "considered". Considered by whom? The *Passenger Movement Charge Collection Act* 1978 for example, concerns the departure charge at airports, from which some people are exempt. Are travel agents or clerical staff at airports meant to conduct quasi-judicial inquiries into "all the circumstances" to determine whether or not someone is exempt from the departure charge? Law has to be practical. This is why we really need people who have informal relationships to at least register their relationships and the status of any children so that there is a sensible process by which decision-makers, on matters great and small, can know in what relationship people stand with others.

Perhaps the writers of the EM mean that a court will decide. Courts are not free. Litigation costs thousands and thousands of dollars, and it may well take the best part of a year to get from commencement to judgment. People need to make decisions on all sorts of matters quickly without the luxury of being able to go to court, and without the uncertainty of having to rely on equivocal legal advice of the "on the one hand, on the other hand" kind. For many of the purposes covered by this legislation, the issues are too trivial to warrant litigation. Administrators will have to make the decision with little guidance from Parliament.

The first responsibility of Parliament is to be clear enough that administrators can know simply and easily which people have certain rights, entitlements and privileges, and so that litigation on such issues can as far as possible be avoided. This definition fails that test.

Endorsement of surrogacy arrangements

One of my criticisms of the definition in my submission on the Superannuation Bill was that the Parliament would be implicitly endorsing and normalising commercial surrogacy arrangements in spite of the huge concerns there have long been about such arrangements. Surrogacy arrangements are generally not recognised in Australian law. The surrogacy contract is not enforceable and courts are not bound by that agreement in determining parenting arrangements after birth.

The exception, to some extent, is in the ACT, which has passed laws on surrogacy which take a cautious approach under the Parentage Act 2004. It allows for the transfer of parental status after birth through court order if there is informed consent and it is in the best interests of the child.

Now this Bill throws all caution to the wind, endorsing all kinds of surrogacy arrangements without any safeguards and without resolving the issue of the place of the birth mother - who may well refuse to hand over the child after giving birth (as has happened in numerous cases around the world). Consider example 4 in the EM.

J forms a relationship as a couple with S. During the relationship J and S enter into a surrogacy arrangement with T, whereby T will become pregnant using gametes from S and gametes from an anonymous donor. All parties agree that T will have no role in the life of the child following the child's birth. The arrangement takes place and T gives birth to H.

The EM goes on to explain:

Whilst H is the biological child of S, H is not the biological child of J. H will be considered J's child for the purposes of the definition of 'child'. That is, H is the product of the relationship between J and S because H is S's biological child there is also an element of joint endeavour between J and S in the procreation of H. H would continue to be considered J and S's child even if the relationship between J and S were to break down at a later time.

So there we have it. The Federal Parliament is being asked to endorse surrogacy in spite of all the issues with it, and without any of the problems being resolved. In example 4, we are told that "all parties agree that T will have no role in the life of the child following the child's birth". Well that may be so, but that agreement is not enforceable. Under every state and territory law throughout the country, including the ACT, the birth mother is still the mother. Under the ACT legislation or the Family Law Act (Cth), she will have parental responsibility for the child unless and until that is displaced by court order. J will not be a parent, and the position of S will depend on the terms of the status of children legislation in his or her state or territory.

So we have the federal Parliament being asked here to endorse surrogacy arrangements without any safeguards or resolution of the status of the birth mother for

the purposes of, for example, the *Seafarers Rehabilitation and Compensation Act* 1992, and the *Telstra Corporation Act* 1991, but without changing who is the parent for the major purposes of Australian law – the *Family Law Act* and the Child Support legislation.

If the Government is effectively endorsing surrogacy by saying that children who are the 'product of' a male same-sex relationship can be recognised for many purposes, (but not for the purpose of conferring parental responsibility) where does that leave it in formulating a coherent policy on surrogacy? There are huge debates about surrogacy. What are the human rights implications if the surrogate mother was living in a third world country and entered into the surrogacy arrangement under physical or economic duress? There is no indication that the Government has considered the moral and social issues involved in surrogacy before preparing this legislation.

The Explanatory Memorandum is misleading and should be withdrawn

As these examples have illustrated, the EM is seriously misleading, inasmuch as it gives the impression that for all intents and purposes, a gay or lesbian couple will be the parents of a child and that no others will be. It may be unusual for an Explanatory Memorandum to have to be withdrawn from Parliament but this needs to be withdrawn. It could well mislead MPs and many other users who rely on the EM to explain the meaning and effect of a Bill. The EM, while being technically correct in terms of the effect of the Bills to be amended, makes statements that are plainly wrong in law generally. When people use the word 'parent' they expect that word to mean that the person has rights, responsibilities and obligations towards a child. The word 'parent' is used in this legislation in a special way to apply to people who are not parents in any ordinary meaning of the word.

Should the Government extend the term 'product of a relationship' to the Family Law Act?

It may be thought that the resolution of these problems is just to treat the same sex couple as the parents, cutting out the biological father or birth mother, for the purposes of the *Family Law Act* 1975 (Cth) and the child support legislation. No doubt that course will be urged on the Committee by some activists.

However, it does not solve the problems. Consider the case of *Re Patrick* [2002] FLC 93-096. In that case, (which had a tragic ending when the mother killed both herself and her child), a gay man helped a woman in a lesbian partnership to conceive. There was no written agreement (and in any event it would have been unenforceable). According to the lesbian couple's version of events, the agreement was that he just be a semen donor. In his version of events, he acknowledged the primacy of their parental and quasi-parental relationship but he wanted to be a kind of uncle figure. He applied to the court for contact with the child.

Should the man just be cut out by operation of law? In *Re Patrick*, the child was conceived in the privacy of the home by means other than sexual intercourse. In example 3 of the EM, the issues are even more difficult. Here, we are told, the man had sex with one of the women with a view to conception. We are told further that "all parties agree that T will have no role in the life of the child following the child's

conception". Yet the definition, 'product of a relationship' does not rely on the consent of the biological father to give up his parental rights as father to the child. It just adds another parental figure, and as I have noted, currently that agreement would be wholly unenforceable.

So if the government were to amend the *Family Law Act* or the Child Support legislation so that there was a consistent definition across federal law, making the lesbian couple the 'parents' to the exclusion of the father, what kind of agreement from the father ought to suffice? An oral agreement could not possibly be sufficient. That was one of the problems in R*e Patrick* – there were two very different versions of the oral agreement. Would a man require independent legal advice? What about the child's right to know and be cared for by his or her parents and to know his or her identity - rights guaranteed by Articles 7 and 8 of the United Nations Convention on the Rights of the Child?

Perhaps the answer instead is that everyone should be a parent in all of these examples – the biological mother, the biological father, the surrogate birth mother, the gay partner or the lesbian partner. Yet I doubt anyone would support this - not I am sure, many gay and lesbian activists who would want exclusive recognition of their parental status to the exclusion of biological parents who are external to the relationship; not, I am sure, the general Australian community.

The need for proper consultation

There has been no public consultation except this very rushed Senate Inquiry. Yet what would people in Brisbane, Blacktown or Burnie think of this Bill's attempt to redefine parenthood and to endorse commercial surrogacy? The major political parties have determined that the Australian public would not support same-sex marriage. Does the Australian public really support the normalisation of same-sex parenthood? We have yet another important Bill about family life in Australia being rushed into Parliament without any proper public consultation or surveys of public opinion.

The way forward

It is, in my view, unreasonable to expect the Senate Committee to sort out the mess being created by this Bill. The time being given to the inquiry is too short, and the problems too major. The only way forward is to delete the amendments concerned with being 'products' of a same sex relationship entirely, pending a proper and careful review by the Government, and with appropriate public consultation.

There are ways of amending all these laws without redefining parenthood. A dependency test, a partner of a parent test, and other such formulations could all be used. Partners in same sex relationships could be given the same status as step-parents. That would be inherently logical and uncontroversial.

It all just needs rather more thought than is evident in this Bill. The elimination of discrimination against same-sex couples ought to be widely accepted in the Australian community, if only the Parliament is not asked to take on board all these highly controversial and complex issues concerning parent-child status as well.

P. Parkinson **September 8th 2008**