COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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

WEDNESDAY, 6 AUGUST 2008

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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Wednesday, 6 August 2008

Members: Senator Crossin (*Chair*), Senator Barnett (*Deputy Chair*), Senators Farrell, Feeney, Fisher, Hanson-Young, Marshall and Trood

Participating members: Senators Abetz, Adams, Arbib, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Collins, Coonan, Cormann, Eggleston, Ellison, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Heffernan, Hogg, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett, Brandis, Crossin, Feeney, Hanson-Young, Pratt and Trood

Terms of reference for the inquiry:

To inquire into and report on: Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008

WITNESSES

Committee met at 9.17 am

CHAIR (Senator Crossin)—Good morning. I declare open this meeting of the Senate Standing Committee on Legal and Constitutional Affairs. This morning the committee is inquiring into the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008. Submissions that are to be considered at today's hearing have been authorised for publication and are available on the website.

I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. We prefer all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera, and such a request may of course also be made at any other time.

[9.18 am]

STEWART, Associate Professor Miranda, Private capacity

CHAIR—Welcome, Professor. You have a lodged a submission with us and for our purposes that has been numbered 37. Before I invite you to make a short opening statement, do you have any changes or alterations you need to make to that submission?

Prof. Stewart—I want to thank the committee for its indulgence. It was a slightly late submission at the end of last week. Since submitting it, I have identified a few small typos, one of which changes the meaning slightly, so I spoke to the secretary and we agreed that I would just make those corrections and resubmit the written submission. But, apart from that, no.

CHAIR—Thank you very much. You may start with a short opening statement. When you have finished, we will go to questions from members of the committee.

Prof. Stewart—My submission is in my capacity as a law academic. In particular, I have done research on the application of federal laws, particularly tax and superannuation laws, to same-sex couples and their children. I should also disclose to the committee, as I did in the written submission, that I was a paid consultant to the Human Rights and Equal Opportunity Commission inquiry into this that reported in May 2007. I was a paid consultant on that review only in the areas of tax and superannuation law.

To briefly summarise my submission, I have one general statement and then will home in on just a few specific legal aspects of the same-sex relationships material. In general, I agree with the recommendations of the commission that reform be done to bring same-sex couple relationships into equal treatment in federal law. In my submission I say, essentially, that I support the reform as to couple relationships and the creation of a couple relationship definition in the federal law that is non-discriminatory and formally encompasses both same-sex and opposite-sex relationships. I also generally support the recommendations of the commission and the action in these bills to try to accord full recognition in federal law for the children of same-sex couples. This is actually, legally speaking, a slightly harder task, a more complex task from a drafting perspective, so I have a couple of comments about the way that has been done in the bill but I wanted to make it clear that, overall, I strongly support the recognition of those children. I think that, as a matter of the best interests of the child and equality of all children in Australia, no matter what state or territory they are born and raised in, it is very important that they be given complete equality at federal law.

Having said that I generally support the reforms and that, overall, I support the mode in which this has been done in the various bills, I have a few specific comments. I thought it might be appropriate to explain to the committee my comments on pages 2 and 3 of my submission. Some have suggested that having a single uniform definition of 'couple' might be the simplest way to go, and I think the Human Rights and Equal Opportunity Commission suggested something like that—that the word apply across all federal laws—because obviously we have nearly 100 laws that might refer to this notion. In some ways, I would support that. From a drafting perspective that would be simple. But I do acknowledge, and I think it is clear in these bills, that different federal laws have different definitions of 'couple' for different purposes and it is appropriate, then, to amend those specific definitions to remove the discrimination rather than necessarily change the whole structure of the federal law with one uniform definition. I do support the idea that we would have an amendment to the Commonwealth superannuation law's concept of 'couple', an amendment to the Evidence Act's concept of 'de facto relationship' and so on. I think that is appropriate.

In the areas of tax and superannuation, the committee may well be aware that, particularly in superannuation and in the Superannuation Industry (Supervision) Act, we have the concept of an interdependency relationship. There has again been some suggestion that that concept of a broader caring or companion type, interdependent, living together relationship might be appropriate here. I have strongly argued and published elsewhere—and I continue to hold the view—that that is not an appropriate way to recognise couple relationships, whether same sex or opposite sex. So, I make the submission that I think it is appropriate to leave that definition of interdependency relationship where it is to cover companion or carer type relationships and that the way the bills change the definition of couple relationship is appropriate, to keep those two concepts separate.

The other things that I comment on briefly in the submission, again, are in relation to the superannuation amendments—in particular, the Superannuation Industry (Supervision) Act. The goal of the reform is to create equal treatment, obviously, for members of super funds who are in a same-sex couple. I think it is important to

make the comment that the SI(S) Act regulates private superannuation funds, which obviously cover the bulk of the population, so these amendments will affect not only those who are under Commonwealth super but also those in private superannuation funds. That is a good thing; we get that broad coverage, but the SI(S) Act is not mandatory for private superannuation funds. Private superannuation funds are trust deeds. They are regulated under the SI(S) Act, but the SI(S) Act is, if you like, permissive rather than mandatory. I wanted to draw to the attention of the committee that the statement in the EM that this will automatically extend full equality is not strictly correct when it comes to private superannuation funds. I also want to point out that trustees of private super funds are understandably cautious and prudential and do not like to tinker with their trust deeds. It may be appropriate to require them to amend their deeds to ensure that we have full equality or to comfort them that amending their deeds will not cause any problems for them.

Another aspect of couple relationships is that, in the superannuation bill, there is a reference to registered relationships as a form of recognition and a form of evidence, if you like, of the existence of a couple relationship. It seems to me that that is sensible. We have an increasing number of state and territory regimes that would include some sort of registration process. Someone has already gone ahead and provided the state with that evidence and, as a matter of simplicity, I think that recognising that is a good thing. I actually argue that the bill should potentially be extended to allow the government power to prescribe international laws—that is, laws of other countries—that would relate to registered relationships and also to potentially consider the possibility of the evidence of a registered relationship as conclusive proof of a couple relationship. That is not just one factor in identifying the couple, but, if it could be attended and it was a prescribed registered relationship, that would be the end of the story.

On the question of the reform of the recognition of children of same-sex couples, as I said, I strongly support this. I think it is essential for the best interests of those children, both financially and in terms of parental responsibility for them. All the bills refer to this concept of a child being the product of a person's relationship with the other member of the couple or their partner. It is an odd phrase. It is not a phrase with significant precedent in relationships law. As I said, though, and as I think HREOC will submit or has submitted, it is difficult to draft this concept to fully recognise a child of a lesbian mother and a co-mother—that is, the non-biological mother—or a gay father and the co-father and to make sure we capture all the categories, if you like.

So my submission in the end, after I have thought quite hard about what I think about this phrase 'product of a relationship', is that it will do the job. It does encompass the right categories of children. It is, perhaps, a little clumsy, and in particular it is not that easy to interpret and we do not have a lot of assistance in the EM as to what is really intended by that. So I had a go at thinking about it. I went to the dictionary. What do we mean by 'product of a relationship'? It seems to me that what is intended is that there is some joint action or process, which obviously implies some joint consent to bringing a child into the world and raising that child. But all of this is a little implicit rather than explicit. One of the things I want to submit to the committee is the question of whether some more explanation of what this phrase means, in the statute or just in the EM, would be useful.

My final comment—and I realise I am going on slightly—is that one of the things to note about this recognition of a child is that there is, at least for many same-sex families, an easier way to do it that would encompass all the families. The bulk of children of same-sex relationships at the moment, I think the statistics make clear, are born to and raised by lesbian couples. In most cases, obviously, there is donor insemination generating these new families. An appropriate and easy way to recognise all of those families would be to amend section 60H of the Family Law Act, which is the section about the parenting presumption for a couple who raise a child where there has been assisted reproductive technology. At the moment the government appears not to have done that. It has not amended section 60H in relation to children and parents and in terms of parental responsibility. It has done it just to give the Family Court recognition of those families for property division purposes between the couple. To me that seems somewhat illogical. Why recognise for property division purposes but not for parental responsibility purposes that this couple is raising a child? It is a gap, I think, in the bill, and I would submit that, in addition to the 'product of the relationship' reforms that are in the super bills, it would be appropriate to extend that parenting presumption. That is my summary.

CHAIR—Thank you, Associate Professor. I notice that in your eminent work you produced a paper entitled 'Superannuation and same-sex couples: interdependent but not equal' in 2006. Would it be possible for you to provide this committee with a copy of that?

Prof. Stewart—Yes, I certainly can.

CHAIR—We had hearings yesterday in Sydney—the first day of hearings taking evidence in relation to this legislation. There is and has been a lot of discussion around the interpretation of 'interdependency', to the point where I think some people may put the argument, 'Isn't that good enough?' essentially—that you can live with somebody in a loving, caring and financially supporting relationship and that that is interdependent, whether it is two sisters, two brothers, two best mates or a same-sex relationship. What is your response to that?

Prof. Stewart—My response to that question, and the argument that I put in that *Sydney Law Review* article and that I also made when I was working with the inquiry last year, is that this interdependency relationship category is both overinclusive and underinclusive. There is a list of requirements for being in an interdependency relationship for superannuation and tax purposes. Obviously the tax laws were amended in relation to death benefits as well.

Those requirements, as you say, are potentially adequate to cover many couples, but they require too much compared to the normal list of factors that courts have been applying for 25 years in defining heterosexual de facto couple relationships. On the other hand, it is also a very complex set of requirements. Although you might think that this notion of interdependency relationship broadens the category, or perhaps makes it easier or encompasses other forms of companion or family relationship where people are financially sharing and living together, there is this quite complex list of requirements that have to be satisfied in order to fall into that category. To give you that list, you must have all of these things: a close personal relationship, living together, financial support and something called 'domestic support and personal care'. In particular, the concept of domestic support and personal care is not a factor that exists in the general list of factors that courts use to consider couple relationships.

You would think that in many couple relationships there is domestic support and personal care, but it is not something that has been identified by judges, looking at facts and evidence, as an appropriate category of care. In fact, the only legal interpretation of a phrase like that which has been done to date is actually in New South Wales law. Some of the New South Wales statutes identify two categories of relationship: a couple relationship and what they call a 'caring-type relationship'. They have in them this concept of personal care. There have been a couple of judicial decisions interpreting that phrase. The interpretation essentially required that it be care in the way that you would think of as a carer relationship—that is, someone who is seriously ill, requires physical assistance in dressing or whatever, or requires ongoing assistance with mental or physical health.

As I say, you would hope and you know that with many couples, if one member of the couple becomes ill, that form of care does take place, but with many couples who are healthy and happy there has been no occasion for that sort of care and most of us take care of our own personal mobility, health and welfare. So it seems to me that that additional condition in particular changes the kind of relationship we are looking at here. To the extent that we have had any judicial interpretation of this phrase, it takes us down that carer type analysis.

What I say in the submission, in summary, is that I think that same-sex couple relationships are much more similar as a category to opposite-sex couple relationships than they are to brother-sister relationships, parent-child relationships or companion-carer relationships. There is an overlap but judges and administrators reason by analogy and we want to give them the correct analogy, the simplest and most established analogy, to think about whether or not the relationship fits in the category.

CHAIR—Yesterday, ASFA produced those four criteria for us and put the case to us that it is really quite a restrictive category, that interdependency would be too restrictive to cover the intent of this legislation.

Prof. Stewart—In my view, that is correct. I have not read ASFA's submission, but it does not surprise me that they would say that. I guess you have to put yourself in the position of the person administering the fund. So ASFA represents the trustees of these funds. The trustees are constantly making decisions about payouts to dependents, either in the context of death or terminal or serious injury and so on. They need to understand well the kinds of categories that they are trying to fit people into in order to make decisions efficiently.

The death benefit category and the concept of dependant is actually a somewhat contested area in superannuation. As an example, if you look at the kinds of decisions that the Superannuation Complaints Tribunal has to deal with, around 30 per cent of those decisions relate to death benefits and who is an appropriate dependant. So you can see already this area is a bit tricky for the trustees. The decisions that they make might well be contested or controversial. In that context, then, I think that a trustee will be cautious. Although, as I say, when you think about the concept of an interdependent relationship, it sounds like it is a

broader or a more expansive category that may be a good idea, when it comes to a trustee administering the interpretation, they will be conservative because their decisions are potentially open to challenge.

Senator TROOD—It is not beyond our wit to define in legislation what we mean by interdependency in a way that gets around some of the problems you have been alluding to. Isn't that within the capacity of the legislature?

Prof. Stewart—I guess you could list a set of factors that get around that. There are lists of factors in a number of statutes. Some of the statutes just say, 'This is the relationship,' and some of them list factors. I would suggest, I guess, that if you were to think hard about the kinds of relationships that you want covered in this particular legislative regime you might come up with a list of factors that looks like the list of factors for a de facto couple relationship.

Senator TROOD—Part of my query about your position relates to the concern that some have suggested to the committee that the way in which this legislation is drafted essentially devalues marriage as an institution. It puts everything in together. It equates de facto relationships and same-sex relationships and marriage relationships—they are all part of the same. So, for those who are concerned as a matter of social policy that marriage remain an institution valued in society, putting all these things together diminishes the idea of marriage and, as a matter of fact, the rights and responsibilities that pertain to marriage are essentially the same as the rights and responsibilities that now seem to pertain to a whole series of other relationships. Allowing marriage to stand as an institution and yet defining entitlements by other means—interdependency relationships, for example—meets the concern of those who are particularly anxious about marriage not being devalued as a social institution. Do you have a reaction to that proposition?

Prof. Stewart—In my view, these amendments do not make any change to the legal recognition of a married relationship, and nor did the amendments that have been made in the past two decades to take account of opposite-sex de facto couple relationships. Marriage is still a highly privileged legal category, and obviously a highly privileged social category as well. I think that it is quite clear that when people make that decision to marry, when that is available to them, that means something very significant to them and to society. Thinking just legally, though, which is a bit less interesting in a way, once evidence of marriage is produced then that is actually conclusive evidence of your status under all of these laws. There is no requirement to go behind. If you like, it is a bit like a bond of privacy—the couple has decided to marry and, once the state is informed of that and given the certificate, the state accepts absolutely that that is correct. In fact, we know, for example, in immigration the state does go behind and inquire if it is a genuine marriage for some purposes. But, basically, we would say the state just accepts that category. There is no inquiry—married people do not have to live together. We know that members of married couples often live apart for many years for work reasons or whatever. Married people do not have to be raising children or be sharing financially or be providing domestic support and personal care for each other, although we know that many married couples do. So I guess I would argue that, from a legal perspective, the category is still really quite separate from any couple relationship type category that is recognised in this amendment.

Senator TROOD—And you are not persuaded that the legislation affects the social status of marriage as independently as a legal category?

Prof. Stewart—No, I am not persuaded by that. With more of a general citizen hat on rather than a law hat for a minute, it seems to me the legislation reflects a desire among members of the population who have not been able to have their relationships recognised to move towards that sort of social recognition—that is an aspiration. It seems to me that marriage is still what you might call the privileged category that is recognised in our society and retains that status.

Senator HANSON-YOUNG—Professor, following on from that, based on the fact that interdependency clearly in your view and in the view of many of the other submitters is not appropriate or a good fit for representing same-sex couples throughout this legislation, and given that the figure I have is that approximately 90 per cent of Australians have their super tied up in private funds as opposed to public funds, could you expand on what you believe are the recommendations the committee should take on board to ensure that, if we really want to achieve equality, it should not matter who your employer is?

Prof. Stewart—Thanks for that statistic. I did not know that it is 90 per cent but obviously the bulk of Australians have money in private superannuation funds regulated under the Superannuation Industry (Supervision) Act, so that definition of 'couple' will affect and is important for those funds. As I said before, the SI(S) Act is permissive, not mandatory, apart from its prudential and investment aspects. A fund will remain a complying fund, will remain within the system, even if it does not comply with, for example, all of

the definitions in the SI(S) Act as to 'dependent'. This was the case also for the interdependency reform. I do not know whether ASFA submitted this but when the interdependency relationship category was introduced to the SI(S) Act, that was permissive, not mandatory for private funds. We are in the same situation here. We make an amendment to the definition of 'couple' and to the definition of 'child'. With many private funds—and I do not know the numbers—the deed would cross-refer to the SI(S) definition of these categories. So they will automatically pick up these changes and there should not be any problem. In my submission, I think there will be a large number of trust funds out there, probably the smaller funds rather than the very large industry funds, that will have their own definitions of a couple, for example, in the deed, and an amendment to the deed is required. Trustees are cautious and do not like amending trust deeds for tax reasons and prudential reasons.

ASFA, I think, would submit that they do not see this as such a problem. It may be that they know their industry members better and that they can encourage members to change deeds when required, and that this will not be a problem—it will trickle through the industry. My view is I am not sure about that. As with interdependency, I am not sure how many deeds have been amended to pick up the category. I am concerned that most people are in these funds and so it is not clear to me whether it is appropriate to mandate that amendment of private deeds. Treasury would not like to do that. The SI(S) Act is permissive, not mandatory. They do not want to change that structure, whether on the other hand it is appropriate to recommend to government that they publish advice that there would be no adverse consequences of amending the deeds to pick up these categories or whether ASFA can do that. I do not have a concrete recommendation for you but I draw it to your attention that it is not mandatory for the private deeds.

Senator HANSON-YOUNG—In your submission you talk about the appropriateness of having different definitions of a couple—you point to the Evidence Act. Could you explain for our sake and clarify why it is appropriate to have different definitions rather than one across-the-board definition that can be used by everyone and every act?

Prof. Stewart—This is obviously only a very small subset of federal laws. It may be that in many statutes, the one definition is perfectly appropriate so that one could have a definition that applies across 50 statutes.

Senator HANSON-YOUNG—For example, the couple relationship.

Prof. Stewart—Yes, this concept of couple relationship. But it must be acknowledged that in different statutes different things are provided, or the purpose of the couple definition serves a different purpose in the different statutes. So in the Evidence Act, it serves the purpose of ensuring that the other member of the couple does not give evidence. Just to give a couple of examples, the Evidence Act has the purpose of ensuring that a member of a couple cannot be required to give evidence. There is a good criminal law reason for that evidence prohibition: not only is it emotionally difficult for the member of the couple, but also the evidence is not trustworthy. It is appropriate then to bring same-sex couples within exactly the same sort of regime and definition that is already applying for opposite-sex couples. There is a reason for that particular list of factors. We want to encompass all relationships that satisfy those factors. There is a narrower one in the Commonwealth superannuation definition that has a different purpose: it provides death benefits, so it involves paying out of government money so it is a more limited category. Generally speaking, a couple must live together for three years or else provide additional further evidence of the relationship. Again, it is appropriate that we would bring same-sex couples within that restrictive definition. That is my submission.

Senator BARNETT—Thank you for your evidence. I want to look at page 6 of your submission and the definition that you referred to as 'product of the relationship'. You say that there is no definition of the new concept or phrase in the explanatory memorandum. In your opening statement you referred to that particular definition as 'a bit odd'. Can you expand on why it is a bit odd and confirm that this is a new concept or phrase that has not been used before to your knowledge?

Prof. Stewart—It is correct that to my knowledge it has not been used before. I want to put on the record that it is possible that it has been used elsewhere and I have not found it, but it was new to me when I initially read it. Perhaps the use of the word 'odd' is not appropriate.

Senator TROOD—A stronger language has been used; 'ugly' was used yesterday.

Prof. Stewart—The word 'product' is a strange word or at least an unusual word for us to be thinking about for family relationships. On the other hand, if you have never had to look at the way statutes try to define these relationships you may come across things that surprise you also. For example, the parenting presumption in the Family Law Act has these strong requirements for consent to assisted reproductive conception. We tend to think, 'You're bringing a child into the world, of course you consent.' But we have this strict statutory wording

there. So I suppose my view was: 'What does that mean? Speaking as a lawyer, how do I interpret the phrase?' It is not accurate to say there is no explanation in the EM, there are three examples there that highlight a couple of categories that are in and one that is clearly out—that is, a child from a previous relationship is clearly intended not to be caught by this definition. I think that is appropriate. I guess I would still like to see—it seems to me the requirement of consent is important here. It seems to me that is implicit in this concept, but getting there requires taking a few steps into the dictionary and potentially looking at case law to see if there is any other context which would be relevant.

Senator BARNETT—Thank you for that. You are here as an expert witness. You have confirmed on the record that it is new, as far as you know, in terms of this particular definition. We will obviously need to ask the department whether they have picked it out of thin air or where they got this definition of 'product of the relationship'. As Senator Trood alluded to earlier, it has been referred to in other forums and by other witnesses in much stronger language, including the word 'ugly'. You have quoted the Oxford dictionary in your submission, giving the definition 'a result of an action or process' and then you go on to set out your views as to why the explanatory memorandum should include some sort of definition. I think it is still a puzzle, for me and for many others, as to exactly what this means and what the consequences of it may mean for families and family relationships, particularly for children, who historically have been born of a relationship rather than being a 'product' of a relationship. I want to ask you about your recommendation on page 6 where you say there should be:

... a requirement of consent in the nonbiological partner in the relationship, and timing of this consent (at the date of conception? Or birth?) as enabling the child to be considered a 'product of the relationship' ...

Can you flesh that out for us? Is there any particular duration of time for which the relationship should endure after which the child would then be the product of the relationship? Should it be at conception or at birth?

Prof. Stewart—To some extent, as you say, I have question marks in the submission. Again, I do think it is useful to look at the terms of section 60H in the Family Law Act and the parenting presumption, which already imports a notion of consent, that being at least a prior attempt statutorily to encompass this decision-making process, if you like. I think it would be valuable to draw a line somewhere. One would want to minimise the potential for dispute here. Again, with superannuation trust deeds, trustees are administering these funds. It would be good to have clarity as to who is in the category and who is not. So I guess what I am suggesting there is that to me it is implicit in that phrase 'product of the relationship' that there is consent to the process of conception and then birth and raising a child—this long-term, lifetime process. It does not mean the relationship has to stay together for life; we know relationships do not always do that and that would not be appropriate, but it seems to me you need that clear consent at the time of the decision to conceive the child and care for the child.

Senator BARNETT—And do you have advice in terms of the duration of the relationship at that time?

Prof. Stewart—No, I do not have any recommendation about that. As far as I know we do not require that in section 60H, but I would hasten to add I am not a family law expert. The definition does say that they must be in a couple relationship, so I suppose what you are looking at is a decision-making process where there already is a couple relationship as defined in the statute.

Senator BARNETT—And what is the duration of time?

Prof. Stewart—There is no specific duration generally given, but a couple relationship is people who are living together with close personal response.

CHAIR—Senator Barnett, we will need to move on.

Senator BARNETT—I have one final, very short question. Does it cover stepchildren?

Prof. Stewart—In my view it would not. There is very little law on what stepchild means, but, coming back to Senator Trood's point about marriage, the concept of a stepchild currently in the law seems to require that there is a subsequent marriage—the child is of a previous relationship and then is recognised as the stepchild of the new married partner of the parent. At the moment that is the only category in which we would recognise the concept of a stepchild. I think the EM makes it clear that it is not intended that children of previous relationships be recognised in this 'product of a relationship' category.

Senator PRATT—Do you think it is really necessary to have a new clause for 'product of the relationship'? Or is it really about making same-sex couples eligible, as has happened in some states, for recognition of the children they have created within assisted reproductive technology and to bring what has happened at many state levels into line with what has happened nationally?

Prof. Stewart—One possible solution, I suppose, is this concept of the parenting presumption, so an easy reform that the bills currently do not do is that amendment to section 60H of the Family Law Act. That amendment would only cover children being raised by women in a lesbian relationship. If you made that presumption gender neutral you would encompass both a male and a female partner of the birth mother of the child.

Senator HANSON-YOUNG—Would that be a recommendation?

Prof. Stewart—I do recommend that that be done in addition to the other definition rather than instead of because I think it is not inclusive enough; it does not cover all potential children that you would want to bring into the category.

Senator PRATT—I am concerned that there may still be some children in the care of same-sex parents who might miss out on, for example, a death benefit. An example might be a lesbian couple who, should they have had legal access, might otherwise have chosen to get married. In the case that they are not married, one partner's stepchild does not acquire stepchild status. Compare that with a married couple with a child of the same age. Should the parent providing most of the money to the family die unexpectedly, you would have a stepchild in both families, one who might be eligible for a death benefit and one who is not. A complicating factor might be, for example, an older biological child of the parent who has died who is also making a claim against that death benefit. You might actually have a child who is highly dependent but is discriminated against in that family arrangement. Is something like that possible?

Prof. Stewart—Is it possible to take questions on notice? I am happy to comment in writing on a scenario, if there is one. Speaking briefly on the stepchild issue, the superannuation laws—and it is particularly Commonwealth superannuation laws that we are amending on the whole; the SI(S) Act is slightly different obviously—do not intend to extend superannuation death benefits under Commonwealth schemes to stepchildren. Generally speaking, it is quite a limited category. So in that context, I do not think it is necessary to expand the definition.

Senator PRATT—What about children who are dependent, irrespective of the biological relationship?

Prof. Stewart—These are laws where it costs government money so there is a more restrictive category in these laws than in some others. The concept of dependant in the SI(S) Act, which covers the private super funds, does include the concept of a financial dependant, which would pick up children who are financially dependent even if not biological.

Senator PRATT—I am only concerned, should there be someone who is eligible and someone who is not, to know if there is any discrimination that remains, not necessarily whether a child is eligible or not eligible. It is only by the status of their parents that I am concerned to interrogate whether all that discrimination has been removed or not.

Prof. Stewart—I know that we are over time now. As HREOC would say, it is difficult to be clear. In the end, in spite of my view that the phrase is new and needs some definition, my submission is that this phrase 'product of the relationship' does achieve the elimination of, I would say, most if not all forms of discrimination. You have highlighted a scenario that I would need to think about. As I say, I am happy to put in a further submission to the committee if that would help. In my view, this phrase 'product of the person's relationship' with the couple partner does achieve most elimination of discrimination. That is why I support it.

Senator PRATT—Thank you.

CHAIR—Professor, perhaps when you get the *Hansard* sent to you you can look at the example from Senator Pratt. If you are able to afford the time and send us some comments which might help clarify that situation, we would appreciate that. On behalf of the committee I thank you for your submission and thank you for your time today in making yourself available. It is most appreciated.

[10.08 am]

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

Evidence was taken via teleconference—

CHAIR—Good morning and welcome to our hearing this morning. The Catholic Archdiocese of Adelaide has lodged a submission with us which for our purposes we have numbered 27. Do you wish to make any changes or amendments to that submission?

Mr Russell—No.

CHAIR—Would you like to provide us with some brief comments to begin with and then we will move to questions.

Mr Russell—Thank you for the opportunity to appear before you today. As in our submission, the views that we have and will express in respect of this current inquiry can and should be taken as indicative of our position with regard to same-sex recognition in law for bills under current and future consideration and also in general terms. It cannot be said that because a legislative instrument such as the bill in question does not amend the federal Marriage Act it does not affect marriage in some way. De facto marriages have been recognised for a variety of reasons; however, in common they lack the initial public commitment to the conjugal state, which we believe is integral to marriage and which is why the Catholic Church remains opposed to the recognition of de facto marriages in law. We well recognise that Australian jurisdictions have made laws in respect of de facto marriages since the 1970s. We note that while different in some critical ways to marriage, de facto marriages have been recognised in law and in public policy as being of benefit to society. Over time more and more of the benefits of marriage have been given over to de facto marriage relationships, confirming their similarity in terms of the public perception to marriage itself.

In terms of the acts amended by the bills in question, the federal legislature has seen fit to describe marriage and de facto marriage in a collective term known as 'marital relationships', inferring a similar character in terms of the law. We cannot limit our comments solely to formal marriage. The church at all times remains vitally interested in the progress of society and the common good. The public perception that de facto marriages are marriage-like in all but a few characteristics means that any change to de facto unions to include same-sex unions acts negatively upon society in a similar way as would same-sex marriage, we believe.

We described in our submission the relationship between marriage and the state as one of mutual benefit, but it is clearly more than that. There is a narrative intrinsic to marriage that has held its form more or less from antiquity. Some of the public goods of marriage, such as public reputation, are intangible. The legal recognition of the marriage state gives rise to these goods even though there may be neither financial benefit nor direct expression in law. In this bill and in omnibus legislation to come we are being asked, we believe, to accept the inclusion of another form of relationship within this scheme, one that lacks the primary characteristics of marriage in either of its legislative forms, and this we do not accept.

In 2004 the then federal government moved to include within the Marriage Act the common-law definition of marriage as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. The reason for this amendment as we understand it is that there were pending court challenges to the Marriage Act from the same-sex couples who had married in other jurisdictions. As we know, the amendment was welcomed and applauded by both major parties. We wonder, nearly four years thence, whether or not the current debate would have been fought out in the context of amendments to the federal Marriage Act had not that decisive moment occurred in 2004. While this is pure speculation and meant as no reference to any particular person or group at that time, we ask the committee to think about what type of arrangement we would now be considering if in fact de facto marriage was also held as being off limits in terms of that action back in 2004, or any possible action since.

We are once again, we believe, at a significant moment in our history. What is primarily at stake here is not the removal of discrimination; it is not even the recognition in law of same-sex relationships. It is in reality principally about marriage and how future generations will understand the nature and public place of this institution. We are considering a bill and a framework for further bills that will bring about changes to an institution that is foundational to our society. As we said in our submission, we cannot expect to alter the foundation of society without affecting the structure itself. In the words of the 2003 document from the Congregation for the Doctrine of the Faith on such matters:

If, from the legal standpoint, marriage between a man and a woman were to be considered just one possible form of marriage, the concept of marriage would undergo a radical transformation, with grave detriment to the common good. By putting homosexual unions on a legal plane analogous to that of marriage and the family, the State acts arbitrarily and in contradiction with its duties.

We have argued that, while the HREOC report identified numerous instances that show that same-sex couples are treated differently from married couples in federal law, it does not necessarily follow that such differences are discriminatory in a negative sense. Quoting again from the same document:

The principles of respect and non-discrimination cannot be invoked to support legal recognition of homosexual unions. Differentiating between persons or refusing social recognition or benefits is unacceptable only when it is contrary to justice. The denial of the social and legal status of marriage to forms of cohabitation that are not and cannot be marital is not opposed to justice; on the contrary, justice requires it.

The pursuit of justice must be the primary guiding principle in any inquiry of social concern. That is why when speaking in general terms we believe we should use the term 'the removal of unjust discrimination', because the implication there is that requirements of justice have been met in determination of the facts. The church certainly supports the removal of unjust discrimination; however, as Aristotle warned: it ever remains unjust to treat unequal things equally.' Thank you.

CHAIR—Thank you. We will now go to questions.

Senator BRANDIS—Mr Russell, I would just like to be perfectly clear about for whom you speak. The reason I ask this question is that I am told by the secretary that your submission is the only submission we have received from any organ or entity within the Catholic Church to this inquiry. Do you speak on behalf of the Archdiocese of Adelaide? Is that correct?

Mr Russell—That is correct.

Senator BRANDIS—Are you the author of the submission?

Mr Russell—Yes, I am.

Senator BRANDIS—Please do not think me rude, but I wonder whether you would explain to us your qualifications. Are you a professional theologian? Are you a priest? What is your authority to speak on behalf of the archdiocese or to explain Catholic theology or Catholic social teaching in this matter?

Mr Russell—There are two questions there, I think. The answer to the first is that I have no formal qualifications in the area. I have been working for the diocese for a number of years and working in a similar field expanding the same sorts of arguments for many years. With respect to authority, in every case when I make a submission of this type I submit it to my superiors, namely, one of the bishops in Adelaide, to get their opinion as to the correctness of it. At all times I seek and refer to the official church teachings, which I quoted from today, in the forms of documents, letters et cetera. That is where that is formed.

Senator BRANDIS—This submission has been looked at by one of the Catholic bishops in Adelaide?

Mr Russell—Yes.

Senator BRANDIS—The reason I ask these questions is that I myself have made my own private inquiries of the Catholic Church and I can tell you that the view that you propound in your submission, at least in some respects, is not the view of other, more senior people in the Catholic Church. It is not, for example, the position of the Archbishop of Brisbane, Archbishop John Battersby, whose brief remark to me about this bill was, 'We don't have a problem with it.' I do not want to say that Archbishop Battersby had read every word of the bill, but the principle of removing discrimination against people in same-sex relationships, as long as there was no equivalence to marriage, did not present Archbishop Battersby, who is a very accomplished theologian, with a problem. May I respectfully suggest to you that the view that you propound is a view that is not universally shared within the Catholic Church in Australia.

Mr Russell—I am sorry, Senator, I do not accept that conclusion. The removal of unjust discrimination is an absolute thing that the church totally supports and in that sense I certainly agree with the comments as you relate them of Archbishop Battersby. I guess what we are saying—and you mentioned this yourself—perhaps he has not seen the bill in question. It is a matter of form rather than intention.

Senator BRANDIS—I have a problem in understanding your submission. On page 7 you quote from a work by His Holiness the Pope when he was Cardinal Ratzinger. You quoted him as saying:

The call for homosexual partnerships to receive a legal form that is more or less the equivalent of Marriage …departs from the entire moral history of mankind … If this relationship [Marriage] becomes increasingly detached from legal

forms, while at the same time homosexual partnership are increasingly viewed as equal in rank to Marriage, we are on the verge of a dissolution of our concept of man, and the consequences can only be extremely grave.

May I say, as a practising member of the Catholic Church myself, I have absolutely no difficulty with that statement. But you seem to infer from that statement a different claim. In your executive summary on page 4 of your submission you say:

The formal recognition of same-sex relationships in law is a direct threat to the very institutions upon which our society is built: Marriage and the family.

Would you not agree with me that it is one thing to say that the equivalence of same-sex relationships with marriages is a threat to marriage, a proposition which I think is largely uncontroversial among the witnesses we have had before this committee, but it is quite a different thing to say that the formal, legal recognition of same-sex relationships is of itself a threat to marriage? Because merely by recognising and giving some legal acknowledgement to same-sex relationships may I suggest to you that you are not, contrary to your submission, equating them with marriages.

Mr Russell—I guess I would have to disagree with that. I take the papal quote which says 'to receive a legal form that is more or less the equivalent of marriage' clearly to mean that that is exactly what this proposal in this bill does.

Senator BRANDIS—I think this is where we have a difference. The proposition I would put to you is that the very thing that this bill does not do—nor is it the very specific declaration of intent either by the government or by the opposition that the bill should do—is equate same-sex relationships with marriages. If I may say so respectfully, the error into which you seem to have fallen is in the second paragraph of your executive summary where you say:

De facto relationships are recognised and accepted broadly as either as a form of Marriage or a Marriage-like relationship.

As I think you said in your opening remarks, in fact that is not the Catholic Church's position. De facto relationships are not marriages; they are not 'marriage-like relationships'. There is a fundamental theological and moral difference between a marriage and a de facto relationship, and it is quite contrary to the church's teachings to homogenise the two.

Mr Russell—Agreed. As I quite clearly said, possibly what I have failed to do there is to make the distinction clear about why we are effectively arguing that it is in fact a marriage-like relationship and why we are interested in it at all. That is purely because, as I think I tried to say and perhaps did not make clear enough, when we look at our society and the common good—let us put aside the Catholic view for a minute; let us look at what society believes in terms of that, and—

Senator BRANDIS—No, let us keep to the Catholic view, please, because you speak for the Catholic view. That is the particular point of view which you have come to propound before this committee and that is fair enough; everybody has their particular point of view. I would like to tie you back, please, to what you assert the church's position to be.

Mr Russell—Senator, I am sorry, I think I have made that quite clear. The church's position in respect of marriage is quite clear. I have said that we do not accept fully the status of de facto unions as such but we recognise nevertheless that society, for whatever reason—we can go into the history of that if you like—has chosen to recognise them and, by passing and giving over many of the benefits and recognitions that are attributed to marriage, has in fact recognised them, at least in a public sense, as being very similar to marriage.

Senator BRANDIS—I think this is where we have a difference. It seems to me that what you are saying is because facto marriages are marriage-like relationships and because to recognise same-sex unions would be to put them on a similar legal basis to de facto marriages it follows that to do that would be to put same-sex relationships on substantially the same basis as marriages and therefore to devalue marriage.

Mr Russell—In the public perception, yes.

Senator BRANDIS—The point I put to you—and I think it is consistent with the text of His Holiness from which you have quoted—is that, because there is a profound moral and theological difference between marriage relationships and de facto relationships, to equate same-sex de facto relationships with heterosexual de facto relationships is not to equate either of those two things with marriages, which have a unique and privileged status—which, in my view, ought to—and it mischaracterises the church's position to say that de facto relationships are marriage-like relationships.

Mr Russell—I will take that as a statement, Senator, and I have to say that I disagree with it.

Senator BRANDIS—Thank you.

Senator HANSON-YOUNG—On page 8 of your submission, under the heading 'Discrimination and Justice' is a sentiment that you have referred to numerous times throughout the rest of the submission. You refer to the fact that discrimination may not necessarily be wrong. I was hoping that you could give a tangible example of where discrimination is wrong and we may be able to understand the benchmark you have set to say when it is wrong and when it is perhaps not necessarily wrong. To me it seems quite vague. Who decides that benchmark? The purpose of this legislation is to set out in law what rights should be granted to which people and you have not really clarified what is and what is not wrong, so I would like a tangible example, if you will, of when discrimination is wrong.

Mr Russell—For any person to be discriminated in employment because of the nature of their relationships or their orientation is totally wrong. People are hired and fired on the basis of whether or not they have an aptitude and an ability to do a certain job. I guess none of these things are absolute, perhaps, but in all cases it is absolutely wrong. The church is quite clear on this. Discrimination against persons on the basis of any reason like that is not acceptable whatsoever. I certainly do not want to have to go through the whole HREOC report and pull it apart item by item. The government has found, we understand, many more cases where people are treated differently. As I quoted from Aristotle—to treat things that are not equal as being equal is not necessarily the right thing to do. We can argue, as I did with the example on superannuation, from a different perspective and say that the nature of superannuation has changed to the degree that everybody should have access to those benefits in a similar manner. So we could say it was probably discriminatory in those terms and we could make that argument. I simply point out that to say that, because people are treated differently, is a matter of discrimination and that that discrimination is therefore wrong is not a sufficiently well-structured argument to come to a determination that something needs to be done about it. It may be the case but I do not necessarily see the argument.

Senator HANSON-YOUNG—Thank you for your example. If people should not be discriminated against based on their sexuality or their gender in their employment, surely the superannuation that they earn through that employment should not then be subject to discrimination regardless of their gender or sexuality? To me there seems to be a lack of consistency in your argument there. Either you grant rights to somebody or you do not. In saying that I would also like to flesh out an argument or position put by a witness yesterday, where she stated very clearly, that extending the privilege that others already hold does not necessarily take away the privilege of the current holders. Therefore if you already believe, as your submission is stating, that de facto couples, and in this case heterosexual couples, should be able to access these benefits then why should same-sex couples not be able to as well? There seems to be a lack of consistency in your argument, I believe.

Mr Russell—I accept that you see it that way. Just going back to the argument about superannuation, I think that in making that argument in my submission I am trying to suggest that there are clearly cases—at least one in respect of the one I put—where we could clearly make an argument for that. I have no problems in accepting that people make provisions for their superannuation in a different mindset and in a different framework that we once used to. It is no longer seen as something that is particularly to do with marriage and the family. It has broadened out to be a form of retirement savings, and people should have the right to determine who that goes to. As I quoted in my introduction today from the Pope, let us not make discrimination based on the distinction between same sex and heterosexual as a defining factor; let us look at whether or not it is genuinely needed for other reasons that we can argue apart from that. That is why I gave the example of superannuation. We are not against changes per se but we are saying: what are the real arguments? Just to say as a blanket statement that it is discrimination and therefore something should be done about it is not, I think, advancing the argument at all and I would welcome the broadening of those arguments and the debate. I am not trying to shut down the debate by any means.

Senator HANSON-YOUNG—So in summary though, you did just say that people should be able to be entitled to give their superannuation to the person they choose?

Mr Russell—Yes.

Senator BARNETT—I have a rhetorical question to start with. In answer to some of the questions from Senator Brandis I wonder whether you believe there would be merit in some of your other colleagues in a similar or more senior position within the Catholic Church responding on notice to those questions to get some clarity as to the position of the Catholic Church throughout the country. You are obviously representing the South Australian diocese and we respect that and understand that, but I ask you to consider the merit on notice perhaps to clarify the position of the Catholic Church in other parts of the country and at a national level.

Mr Russell—Thank you for that thought. I will take it on notice and will seek to clarify that. I cannot comment on what any of my colleagues or peers in the other states—

Senator BARNETT—I am not asking you to. I am drawing it to your attention. For the committee's sake and for everybody's sake I think it would be of great merit. I do have a couple of questions, firstly, with regard to your statement on page 4 of the executive summary and elsewhere in your submission that says:

The developing lack of distinction between Marriage and same-sex unions will inevitably invite a challenge to the Federal Marriage Act.

It seems that this is consistent with your view that this legislative proposal undermines marriage as an institution both socially and morally. I would ask you to assist us in providing evidence or views or arguments in support of the view that the federal marriage act is likely to be challenged.

Mr Russell—I did give an example in my submission of how I saw things—the developments in California, for example. It seems to me that that is consistent with what I have observed elsewhere around the world, particularly in Western jurisdictions where it seems that perhaps the more radical of same-sex lobbyists want—and I could certainly provide some evidence on notice perhaps—as the ultimate goal, absolute equivalence with marriage. I suggest to you, and perhaps with reference to the 2004 marriage amendment, that ultimately that is where this kind of action by the more radical elements within the same-sex lobby, as evidenced elsewhere, is going to take us. The fact that at this juncture we are looking at advancing a whole set of rights as a set—and that is basically what it is when you look at the omnibus legislation in particular, I think—and what we are effectively doing is removing any sense of distinction in law and in public understanding over time, firstly, between same-sex and de facto and then between de facto and marriage. I think, ultimately, at some point the argument will be made: why shouldn't we be allowed to be formally married in terms of the federal marriage act, because relationships in all other matters are treated virtually identically anyway?

Senator BARNETT—I can fully understand where you are coming from because the impetus behind the Marriage Amendment Act 2004 was, I think, founded in Federal Court and other court decisions in terms of its interpretation of marriage. That is why the amendment was moved, and enjoyed bipartisan support in the parliament, to define marriage in the act as being between a man and a woman. So it seems that part of history supports your view, but if you have any further advice or evidence to support that view we would be more than happy to receive that advice on notice.

Mr Russell—It is mainly from what I have seen—and I mentioned the California experience. The rest of it essentially could take the form of quotations from various acts et cetera, but I think in general, as you have observed, there is an understanding that same-sex lobbyists in particular want to see an absolute equivalent with marriage. In fact, there were two submissions that I read from same-sex groups to this inquiry, and I think the Australian Coalition for Equality may have been one—please do not quote me—that did say that that was their ultimate goal. So I think that is a fairly well understood principle. Again, I absolutely support the removal of unjust rights. Regarding what Senator Brandis was saying earlier, perhaps this is more about form than about intention.

Senator BRANDIS—Maybe it is, if I can just jump in, Senator Barnett, but it seems to me that there are two equivalences being created here where they should arguably be only one. You seem, as I said before, to be creating an effective if not a technical equivalence between marriages and de facto marriages. But I do not think you should given the church's teaching about the uniqueness and solemnity of marriage. Once you make that equivalence then of course I can see why your train of thinking leads you to the conclusion you have just stated, but it seems to me, if I may say so with respect, that, by adhering strictly to the church's teachings about the uniqueness and solemnity of marriage and not making the equivalence between marriage and de facto marriage, you do not need to go down that track.

Mr Russell—Yes, but the church does not operate in isolation. We are part of this world and we believe that the church helps inform society and we want to contribute to the betterment of society and the common good. That is why I think we are quite entitled to make observations of this nature.

Senator BARNETT—Mr Russell, I have two other questions. Your submission does not touch on the definition that has caused some concern to some witnesses, and that is the defining of a child as a product of a relationship. Do you have a view on that?

Mr Russell—I certainly do. I think it is a rather unfortunate statement. To view children as products of anything I think devalues children in general terms. That is why I think there at least should be some sort of

revision of the terminology. Further to that, I think that the way it is framed also tends to give tacit support to IVF and perhaps even adoption in some sense, although it does refer to the product of a couple—I realise that—so perhaps it is IVF more than adoption. But I thought that was actually off the table in total terms. The thought that a child can somehow accrue over time numerous people who are effectively parents—and I noticed this in the referral of powers bill as well—just seems to me to be a nonsense. I cannot see what is advantaged here. I can certainly see that children in such relationships may effectively be disadvantaged at some future time by not being acknowledged in someone's superannuation through the natural relationships which formed part of their growth as children, but I think there must be other ways to do it than to simply refer to a child as a product.

Senator BARNETT—Thank you, Mr Russell. We do not have time today, unfortunately, but if you wish to provide further views or a greater explanation of your views in regard to that particular aspect of the legislation, obviously that would be welcome. My final question relates to removing the words 'husband and wife' and replacing them with 'partner' and removing the words 'marital relationship' and replacing them with 'couple relationship'. I can only assume that—and I am seeking your response or confirmation—that action in this legislation put to the Senate is the foundation for your view that the formal recognition of same-sex relationships in law is a direct threat to the institution of marriage. Is that correct, or can you provide some clarity?

Mr Russell—I think there is certainly evidence of it. As I tried to point out, the fact is that existing laws mention marital relationships—and this is a reference back to you, Senator Brandis, as well—and the law recognises that marital relationships are inclusive of that being marriage and de facto marriage—in other words, a relationship of that type is what we have currently in law. Then we are removing that and creating a use of the word 'couple'. In earlier use—certainly, when I was a lad—that still meant husband and wife or man and woman. We are redefining that and making that the cover-all phrase. That really quite disturbs me. I cannot see that we really need to do that. In some other states they have used the term interdependency, which I am sure you are looking at as well. It exists in one of the bills to be amended, from memory.

Senator BARNETT—Mr Russell, in light of the time, if you had further and better particulars for the Senate committee, we would welcome them in regard to that matter or any other matters that have been brought up this morning. Are you able to advise whether the church is likely to provide a further response?

Mr Russell—I can certainly ask for it and refer it in terms of what Senator Brandis was saying. I thank you for this clarity on marriage, too. I thought that was exceptional. I will certainly see if I can get that back to you. Bishops are very busy people, as I am sure you will understand, and I know you are, but I will certainly make an attempt to do that.

Senator BARNETT—Thank you very much.

CHAIR—Mr Russell, thank you for your time this morning. We do not have any other questions for you. Thank you for taking the trouble to put a submission in to our inquiry.

Mr Russell—My pleasure.

Proceedings suspended from 10.42 am to 11.04 am

CANNON, Mr Tim, Research Officer, Australian Family Association

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

CHAIR—I welcome our witnesses from the Australian Family Association. Ms Conway and Mr Cannon, thank you for your time this morning. We have your submission. For our purposes, we have numbered it 22. Just before I ask you to make an opening statement, do you want to make any changes or amendments to your submission?

Ms Conway—No.

CHAIR—Do you wish to provide us with some brief comments on your submission and then we will go to questions?

Ms Conway—Thank you. We are here today to talk about the value of marriage. Essentially we are concerned about this type of legislation which is attempting to treat, or will in effect treat, marital relationships as being the same in character, in nature and so on as other couple relationships. There are specific provisions in the bill which do have that very practical effect of substituting couple relationships for the term 'marital relationship'. Even at that simple level of terminology the bill is actually confounding what we believe are quite correct distinctions between marital relationships and other relationships. There is longstanding legal jurisprudence around marriage, recognising marriage as a special relationship in society, recognising that it needs special accommodation and special provisions in the law. That has been going on for hundreds of years or more.

Recently we embarked on a social experiment. For very good reasons, legislators some 30 or so years ago decided that there were certain situations in the community where people were living in long-term relationships. When people looked closely at these relationships they found that they were actually very marital in character. There were concerns to provide for the women in these relationships in particular, and these were the days before there was a large degree of workforce participation by mothers in our community. There were concerns about the women and children in these relationships. When people looked closely they found that these women had been living on a shared domestic basis with the same man for a long time, they found that there was a high degree of commitment in the relationship and an intention to stay together, and they could often see that there were children who had been procreated in the relationship. Essentially they said, 'Look, although they do not have a marriage certificate, if we have a look here we see that, on the facts of the matter, these people are essentially married.' Therefore, legislative provisions started to be made recognising these de facto married relationships and spouses. That is where we started.

At the time there were some social conservatives who said: 'Hang on a minute. It seems like a nice thing to do but this may have ramifications for marriage.' At that time, I guess there was very little social science research that could shed light on the question, and a lot of people felt that it was the right thing to do. Today, at the beginning of the 21st century, there is a growing and significant body of social science research. This research has been carried out by social scientists who are not particularly project-marriage and not particularly socially conservative. Nonetheless, large numbers of research papers in highly reputable internationally peer reviewed journals have indicated to us that, across a whole range of measures, marriage seems to be qualitatively different to other relationships in the community. For example, married couples seem to be healthier and happier and children in families based on the marriage of their parents seem to do better. Once children suffer the removal of one of their parents from the family household their risks of adverse outcomes are elevated.

If you look at the situation for other types of relationships in the community, other types of family structures, you find that, according to the research, there are indications everywhere that there are elevated risks for a whole raft of adverse outcomes. Researchers are finding that family structures not based on marriage tend to have poorer economic prospects or financial conditions in their households. They tend to have poorer health. The children tend to have more problems at school, more behaviour problems, more mental health problems. Studies that follow young kids through find that some of these children also go on to have difficulties forming lasting and solid relationships, particularly marriage, when they enter into adult life.

From substance abuse through to poor educational outcomes, the risks seem to be elevated when family structures are not based on marriage. Obviously there may be problems—there may be selection effects—and certainly the researchers always look for these in their studies. You could argue that in many cases some people are not equipped for the commitment and the long haul of marriage, for whatever reason. We might say

that some people are never going to make it maritally anyway. But the social science researchers have been looking for these effects all the time and, yes, they find them but they also find that there are changes that cannot be accounted for by those selection effects. So the term 'the marriage advantage' is something that is used now among social scientists in some sectors.

This has practical ramifications for social policy in Australia. Do we take stock of where we have gone with our social policies and our legal changes and do we ask: 'Have we contributed to a growth in the number of family households based on non-marital relationships?' Do we seriously examine that now, because there are very, very serious social costs in the community, in particular for children who are caught up in these less than optimal family settings? We would say it is time to take stock. Given the social science research we have got, it is no longer appropriate to just rush headlong down the path of ill-considered changes to legislation and social policy provisions that can have the effect of further weakening the understanding of people in the community of the importance and the value of marriage.

From our perspective, we would say that we need to get out there, the government needs to lead the way and we need to have very strong and clear messages to people in the community that marriage is a worthwhile institution, that it is something that people should be encouraged to make good life choices about so that they can maximise their chances of having a successful marriage. There are a whole lot of things that we could say about that.

Here today we are discussing legislation in which there were previously provisions made for de facto married couples. Those provisions were begun because it was recognised that these couples essentially were marital in nature—except for the piece of paper, they were effectively married. So we started out with that and now we get to the point today where we say that it is a discrimination to allow some couples, heterosexual couples—and we are no longer talking about the marital nature of those couples—to be automatically recognised under these schemes but to exclude other couples: same-sex couples and so on. We would say no. Actually we have overstepped the mark here. We have made these concessions without fully considering where they would take us as a society.

There is a very strong reason here to get back to the distinction between marital and other relationships. There are a whole range of relationships in the community other than true marital relationships. Yes, there are some people in the community who are effectively de facto married couples and many people who have taken the step to formalise their marriages and proceed down the conventional path to marriage. But there are many other couples in the community who are essentially in relationships, often sexual relationships, or domestic situations for a whole variety of reasons. We should not shut our eyes to the fact that many cohabiting couples in Australia are cohabiting on highly contingent and conditional terms, so they are only there while the going is good, while everything is working out, while they are at university or until they decide to go overseas. These are some of the things that make these relationships quite contingent, conditional relationships. In some cases we even have, to put it crudely, your basic shacking up—essentially people sharing a sexual relationship but very little else. They share a domestic setting, but the research overseas and here as well indicates that the financial situation of some of these couples is so far removed from the financial situation of married couples that we really need to be paying attention. Some of the research has indicated that cohabiting couples are much less likely to have shared bank accounts or shared financial goals, to share the bills, to share the parenting task with children and so on. The social sciences are revealing quite definite and distinctive differences in the character of many cohabiting couple households when compared to married couple households.

So I think that, if we are going to make special provisions and automatic recognitions in situations like superannuation, we need to be wised up to the reality that there is a whole spectrum of possibilities in the nature or the character of couple relationships in Australia today. It seems to us that it is a gross injustice to treat a couple shacking up in the same way that you would treat a married couple or de facto married couple who are seriously in it for the long haul, or a same-sex couple who have a high degree of commitment and a shared life on a range of levels, including finance. To treat those types of relationships in the same way that you would treat these contingent, conditional, short-term cohabitations is very concerning to us.

CHAIR—Ms Conway, I just wanted to remind you that we are keen to ask you some questions, so if you want to wind up that would be useful.

Ms Conway—Essentially, in our submission we indicate that there is scope to recognise particular relationships in the community that do have a high degree of commitment, a shared domestic basis and financial interdependence. We do not believe that a sexual test should be muddying the waters here. We are talking about marital relationships or other special relationships in the community with a high degree of

interdependence and commitment that ought to be acknowledged and recognised. Beyond those relationships there is a whole variety of relationships out there that simply should not be put on the same level as these types of relationships. I suppose we want to make it clear that we do not believe there should be a sexual test for these other non-marital relationships. Sexual relationships should not be part of the indicia. We are looking for commitment, interdependence and a shared domestic life. We know that in the community there are a number of reasons why people are in those situations. They may be same-sex couples who have a sexual relationship, same-sex couples who used to have a sexual relationship or two elderly women who have basically decided to spend the second half of their lives together.

Senator HANSON-YOUNG—Thank you for the presentation. I guess it is fleshed out in your submission, because it was not overly lengthy. My questions touch on the fact that in your submission you tend to keep putting de facto relationships, and the de facto relationship that we recognise in law currently as a heterosexual one, in the same boat as marriage. Before I can figure out where you are coming from, I want to clarify if you consider de facto relationships to be the same as marriage.

Ms Conway—Originally, when we started talking about de facto relationships in Australia, and probably in many other countries in the Western world, we were talking about de facto marriages. That is why the term de facto was used. Instead of de jure marriage, we were talking about de facto marriage.

Senator HANSON-YOUNG—But what I am asking you is: do you believe that de facto relationships deserve the same rights as marriage and that they are seen as the same thing? Do you believe that?

Ms Conway—We think that there are certainly some couples out there who essentially have a marital relationship and there is an argument that we should treat them the same. There is another argument, which I suppose I am not here today to argue, that says, 'Look, that's all very well and good, but if we recognise these people then we open a floodgate.'

Senator HANSON-YOUNG—But you are here representing your organisation.

Ms Conway—Yes.

Senator HANSON-YOUNG—You are the policy expert, you are the spokesperson, so does your organisation consider de facto relationships and hold them in the same esteem as marriage?

Ms Conway—No, we think it is a step down because of the commitment issue. When a couple decide to commit to a marriage and stick together, that step is very important, whereas a lot of these de facto married couples have fallen into that commitment over time; it has sort of evolved out of a set of circumstances.

Senator HANSON-YOUNG—Okay, so you do not consider that de facto relationships are the same as marriage.

Ms Conway—We think that some of them are very close.

Senator HANSON-YOUNG—But there is no statute in law or anything that sets the benchmark for that.

Ms Conway—We have lost the sense of the distinction between a cohabitation and a de facto marriage.

Senator HANSON-YOUNG—Except for the Marriage Act, which is a pretty big one.

Ms Conway—We are talking about de jure marriage there, but in terms of de facto marriage couples we have lost our sense of the distinction between de facto marriage couples and mere cohabitations in our laws and in our social policy.

Senator HANSON-YOUNG—But a de facto couple is different to a married couple. There is a different value there; that is what you are saying.

Ms Conway—I am saying—

Senator HANSON-YOUNG—There seems to be a bit of inconsistency.

Ms Conway—No, there is not. If you talk about a scale, we believe that everybody should be encouraged, if they are that way disposed, to enter into a proper legal marriage, make the commitment first up because that is the best way to embark on married life. However, we recognise that there are some couples who fall into that commitment over time. We do not believe that is a good way to start, but we believe that their relationships are qualitatively different to the people who are just conditionally cohabiting.

Senator HANSON-YOUNG—In essence, you do not believe that people in de facto marriages are held in the same esteem as those who do eventually get married or decide to get married beforehand? You still see marriage as different.

Ms Conway—We are not talking about esteem; we are talking about—

Senator HANSON-YOUNG—You talk about value all the way through your submission—the status of marriage in society, the value that the community and the government put on it—so that is esteem.

Ms Conway—Yes, I guess if you want to talk about it like that, but we are talking about very specific language, about legal preferencing and discrimination in favour of a particular relationship style as a good basis for family life.

Senator HANSON-YOUNG—Following on from that, if those people who have chosen to be in a de facto relationship are not considered to be in a relationship—which has the same value both in society and also in law because the Marriage Act exists—then opening up that opportunity to recognise same-sex couples as de facto really does not support your argument for saying that these bills, which are purely talking about superannuation and the Family Law Act, are somehow diminishing marriage. I do not understand the link.

Ms Conway—I guess the link is that we believe that we made some missteps some years ago; Australia and the Western world took some wrong turns with regard to de facto relationship recognition. We believe that society has begun to lose a sense of the importance and value of marriage as a foundation for family life. You just have to go out to our suburbs—

Senator HANSON-YOUNG—But we are not talking about marriage; that is the point.

Ms Conway—Well, I am, because—

Senator HANSON-YOUNG—But you said that it was different to being in a de facto relationship. This is the issue.

Ms Conway—I am saying that there is a difference. I am saying that there is a difference between a de jure marriage, which is the preferable institution, and a de facto marriage, but I am also saying that there is a huge difference between a de facto marriage and a mere cohabitation on conditional grounds—a huge difference.

The law at the moment in the states, and increasingly federally, recognises and casts the net very wide to catch a whole range of de facto relationships, and in many cases we have dropped off the term 'marriage' and we have now cast a net quite wide and we treat these de facto relationships as equivalent to marriage. In a whole raft of laws right across the country, those types of relationships are treated as equivalent to marriage. Therefore, the push today, and with a range of other issues, is to say: 'De facto relationships are treated the same as marriage. Why can't we—same-sex couple relationships—be treated the same as well?'

Senator HANSON-YOUNG—What the bill is referring to is recognising that same-sex couples should be given the opportunity, if they are in a de facto relationship—that is, not shacked up, whatever that means; I think that is open to interpretation—

Ms Conway—If I could just interrupt you there, I made quite a clear distinction between committed, interdependent relationships, including same-sex relationships, in that boat. My clear distinction is between those types of relationships and contingent, conditional cohabitation—same-sex or heterosexual—for whatever reason, including some that are essentially sharing a bed and virtually nothing else.

Senator HANSON-YOUNG—Okay, but what we are talking about today is giving same-sex de facto couples—that is, people who do have that long-term commitment; they have made a choice that this is the relationship they want to be in—the choice, with the superannuation that they have earned over their working life, to share that with their partner. That is a right that heterosexual de facto couples currently have. I understand your concern about the parameters of other groups, but that is actually not what is on the table today.

Ms Conway—What is on the table today is a further broadening of the scope of the relationships we are going to include when we say that they have got these automatic entitlements. I know we have already made some significant steps with regard to heterosexual cohabitations—and we are saying, yes, we have gone too far on that—but we are saying today that we are going to open it right up and we are going to substitute couple relationship for marital relationship and we are going to start merging the boundaries and merging these categories and treat them all the same.

Senator HANSON-YOUNG—Okay; I still do not think there is a consistency in your argument. There has been a lot of debate this morning already about the way children are defined and looked at in this bill. Can you explain to me whether you believe it is right to discriminate against children in general—between one child and another child—in terms of the entitlements they are able to receive? In this legislation, that would be superannuation from their parents. Do you think it is right to discriminate based on who their parents are and

who their parent's partner happens to be? At the end of the day, children do not get to choose—we do not get to choose who our parents are—so how can we discriminate against those children? How do you define that? Do you believe it is right that we should?

Ms Conway—I think I am on the record on numerous occasions as saying that children need to be put in the centre of public policy and that adults should make their decisions in the best interests of children at all times. I have been on the record for quite a few years basically saying that.

Senator HANSON-YOUNG—So, in relation to these amendments to legislation, do you believe that it is right to discriminate against one child versus another child based on who their parent happens to be in a partnership with?

Ms Conway—As I have indicated, I have acknowledged and I believe that there should be accommodations for significant relationships in which there is a high degree of commitment, on a shared domestic basis, and there is interdependence, including financial interdependence. I have already said that today. We are not opposed to accommodating that kind of a relationship. All that I have said is that we should not ask for a sexual test with that type of relationship. These relationships are not marital in character, and by looking at the sexual relationship that is going on in that situation we are confusing the boundaries about marital and non-marital and we are treating those types of relationships as if they were marital.

Senator HANSON-YOUNG—So then do you support the recommendation to change the definition of 'the child' to ensure that no child is given fewer rights in terms of entitlements because of who their parents decide to have a partnership with?

Mr Cannon—What we are most concerned about is that the language of the bill expressly replaces the distinction of marital relationships. The entitlements that the bill effectively deliver to children and the persons in relationships are not so much the issue. The issue is that this bill undermines marriage in the way that it approaches those issues by equating marriage with couple relationships. We think that the way this bill has been drafted and the approach that it has taken—whether that is intentional or not we are not sure—

Senator HANSON-YOUNG—I do not think so. Obviously you have not been here for all of the witnesses but—

Mr Cannon—We do have the concern that this bill, because of the way it approaches these issues, undermines marriage.

Senator BRANDIS—Ms Conway, I do not want to re-agitate the exchange between you and Senator Hanson-Young, but may I say that it seems to me that there is a fundamental inconsistency in what you are saying to us. On the one hand, you are saying—to quote your words—'marriage is qualitatively different from other couple relationships in society'. Then in your written submission you criticise the social policies of the latter half of the 20th century which diminished the value of marriage. I agree with all of that. I absolutely and emphatically agree with that. But then you go on to say, 'But relationships which are not marriages—that is, de facto relationships—are nevertheless to be treated as if they were marriages.' And you say, 'There is a huge difference between those relationships and co-habitation relationships.' What I want to put to you, Ms Conway and Mr Cannon, is that the fundamental difference, when we come to assessing and treating relationships, is between marriages and relationships which are not marriages. When I say marriages, I mean de jure solemnised marriages—two people who advertently, consciously decide to declare to the world that they intend to remain committed to one another to the exclusion of all others for life. Surely that is the most important distinction between different categories of relationships.

Ms Conway—We would agree with you, but I am just tracing the reasoning behind—

Senator BRANDIS—You are in some of the things you say, but then on other things—for example, in the fourth paragraph of page 2 of your submission—you say:

> Government, if it is serious about defending the status of marriage, must recognise and accept the necessity for discrimination and the need to discriminate between genuine cases of defacto marriage and other forms of contingent cohabitation.

I would turn that around, if I may, Ms Conway, and say that government, if it is serious about defending the status of marriage, must recognise and accept the necessity for discrimination between genuine cases of marriage and all other forms of cohabitation. Why would you part company with me on that?

Ms Conway—I guess, in a sense, we could almost be saying the same thing.

Senator BRANDIS—That is why I am a bit perplexed by your submission, because you seem at some points to be saying that, but at other points you seem to be saying that de jure marriages and de facto marriages are both marriages and then the distinction is between marriages and other forms of relationships. I am saying to you: de jure marriages are sua generis. They are unique. They are special. They are morally, legally and ethically different from all other forms of relationships.

If society chooses to privilege marriage then that is a good thing; but, conversely, if society does privilege marriage, then relationships other than marriages—what you call de facto relationships, which are not the privileged relationships—are relationships in which there are other indicia including a bona fide domestic relationship based on a degree of commitment which may be a very deep degree of commitment. In those relationships I cannot see why you would say 'We should discriminate between heterosexual and homosexual relationships.' Do you agree with that?

Mr Cannon—If I may, Senator Brandis, the recognition that de facto relationships were given was according to the degree to which they corresponded with de jure marriage.

Senator BRANDIS—But you criticised that trend in social cause in your submission.

Mr Cannon—We think that undermined the status of marriage to a degree.

Ms Conway—We acknowledge the good intentions at the time and the reasons.

Senator BRANDIS—The road to hell is paved with good intentions.

Mr Cannon—That is where the law is at the moment: de facto marriages are recognised. We think the degree to which they are recognised should still be contingent upon the degree to which they do correspond with actual marriage. We believe that the changes made by this legislation will cause de facto relationships to correspond less to de jure marriage and, for that reason, we think it further undermines the status of marriage.

Senator BRANDIS—As Senator Trood says, I think it is the opposite. I think there is a bit of a verbal pea and thimble trick, if I may say so, in that submission, because you slip in this word 'marriage' to describe de facto relationships and then you say, 'If we acknowledge same-sex de facto relationships, we are treating them as if they were same-sex de facto marriages and then, by the back door, we have acknowledged same-sex marriage.' Nobody, as I understand it, is saying we should acknowledge same-sex marriage—in this forum anyway. What it seems to me would arrive at the very policy outcome you want, without unjust discrimination against gay people, is to say, 'Marriage, de jure marriage, actual marriage is a unique privileged sui generis social institution and then there are other forms of committed relationships, none of which are marriages.' There are de facto heterosexual relationships, de facto homosexual relationships and other codependent relationships which have the characteristics of being on a domestic, permanent, loving basis, but none of them are marriages. Why cannot we serve the cause of respecting marriage, while at the same time avoiding unjust discrimination, by approaching it that way?

Ms Conway—I think that, generally speaking, your proposal is the right one but we have a problem—

Senator BRANDIS—You can stop there. I have no more questions if you agree with what I have said!

Ms Conway—I think we have a problem when we start treating marriage as a creature of late Western law rather than seeing marriage as a natural institution that has been around for a long time, right through the early part of Christendom people—essentially like Romeo and Juliet. They would just go and get married. There was no state apparatus or legal framework. There was the commitment and the promise of the couple and the intention to live on a shared domestic basis, faithfully and fruitfully. These were the indicia of marriage. So I am reluctant to go 100 per cent with you, because I do not want people to come away from this process today thinking that marriage is a creature of our law.

Senator BRANDIS—Marriage is a religious and a social institution. I think that is uncontroversial. To some people it is a religious institution, it is a social institution and it is regulated by law. That much is uncontroversial. I think the area into which you fall—and in fact you almost argue against your own position—is saying, 'De facto marriages are the same as de jure marriages.' De jure marriages, as far as I am concerned, because of their unique status, are the only relationships to which all the attributes of marriage attach. All the other relationships, including permanent de facto relationships, are not marriages—by analogy or otherwise.

Mr Cannon—Senator Brandis, in terms of a bill like this which concerns de facto marriages as well as de jure marriages, our concern is that the provision for de facto marriages was intended to cover people whose

relationships did approach marriage. The new legislation will broaden that to a degree that we think is harmful to marriage. The common approach is to treat marriage as equal to de facto marriage.

Senator BRANDIS—Well, I certainly agree with you, Mr Cannon. One of the opposition's criticisms of this suite of legislation is the homogenisation of de jure marriage with other forms of de facto relationships. We do not support that. I do not support that. But, with respect, I think that, by your equating de jure and de facto marriages as being in effect the same social institution, you fall into the same trap.

Ms Conway—I think I have only said that there will be certain—and I will not use the term 'de facto' straight off—relationships between a man and a woman for which, after a significant passage of time and life events, somebody will say, 'Look, they were more or less married.' That was the original reason for acknowledging the existence of de facto marriages in the community.

Senator BRANDIS—Sure. I understand.

Ms Conway—That was the terminology. Right up until recently, the partners in those de facto relationships were called de facto spouses, which is a hangover from the original reasoning process which saw after a significant passage of time the characteristics of marriage in those relationships. As to those relationships, most people did not think when we started that there would be a large number of people in the community being recognised in that way.

Senator BRANDIS—Yes.

Ms Conway—It was always thought to be an unusual situation as a result of poverty or because a partner was not able to obtain a divorce. There were these reasons in the community. All this was the rationale for admitting this concept of de facto marriage into the statute books. Rightly or wrongly, that was the rationale. But we have today a rationale by which people say, 'Oh, look at all these de facto heterosexual couples. They are not married but they get treated like married couples. We're the same but we're just same-sex couples. Why can't we be treated like married couples?'

Senator BRANDIS—It all depends on the purpose. I think you said that you do not favour discrimination against homosexual people. So just because, for certain purposes, two people in a committed homosexual relationship may be afforded similar treatment—for example, in relation to superannuation—to that for two people in a committed de facto heterosexual relationship or two people in a marriage, that is not to equate the relationships; that is merely to say that in certain circumstances society treats particular relationships as having the same consequences for the purposes of the application of other laws.

Senator TROOD—Ms Conway, whatever the prominence of de facto marriage, I would have thought that you would wish to emphasise the point that de facto marriage is different from de jure marriage and that you would wish to maintain that distinction. I must say I am sympathetic, as Senator Brandis is, given the trend in this legislation, which seems to accord an increasingly large number of rights—and perhaps even responsibilities—to those in a de facto relationship, which brings them to some measure of equivalence with marriage. If that is your anxiety, then I can certainly acknowledge the importance of that trend. I think it is an undesirable trend, and that position has been put to us in other submissions to the inquiry. If that is the essential point you want to make, then I think you have at least some members of the committee in support of your proposition.

Ms Conway—I think it would be good if we started distinguishing between a de facto marriage and cohabitation and got that clear in our heads. If studies were done, I think large numbers of people in cohabitation would be shown to have quite different characteristics, in their family structure and household and domestic bases, from those of the ideal that we talk about when we talk about these kinds of legal changes.

Senator BRANDIS—Apart from the fact that one is different genders and one is the same gender, what is, in your view, the difference between a committed cohabitation relationship—not a marriage—between a man and a woman and a committed cohabitation relationship between a man and a man or a woman and a woman? Do you think there is a difference, apart from the gender identity?

Ms Conway—I think—and we have certainly taken this view for a long time—that a heterosexual relationship that is to some degree open to life is creating a natural family in which there are organic connections. If they have a child, that child will be the child of this woman and this man—he will be the father of my child; she will be the mother of my child. There is something there that opens up—

Senator BRANDIS—So is it the possibility of procreation that for you is the difference?

Ms Conway—I think that is the difference.

Senator BRANDIS—What in the case, though, of a relationship in which one of the parties is infertile, the woman is past the age of childbearing or, for reasons that seem appropriate to them, the couple decide never to have children and through contraception act on that intention. What then is the difference?

Ms Conway—In those situations there is still always the possibility of a child. There is always that fruitfulness that is nascent or potential there in that relationship. I think the law has traditionally treated a couple's life—there was always this remote possibility in some situations that there was this fruitfulness at the heart. I guess that, traditionally, society understood that fruitfulness in more than biological terms. It saw it in other ways as well: in social and emotional ways. There are books to be written on that. Yes, in the situation of a couple that uses contraception continuously with the full intention of excluding children, you are moving away from the traditional concept of what a marriage was about. Certainly, there are couples who are married who have taken that course. We would take the view that using contraception in that way can diminish the marital character of the relationship, but there is always the potential. Even if a couple were childless, there may have been children that were conceived and miscarried along the way. We can never know these things. So this is the reality at the heart of a heterosexual relationship, particularly one that is not using contraception 100 per cent of the time.

CHAIR—Ms Conway, we are way out of time now, so I think we will need to finish your presentation and evidence before this committee this morning. I thank both you and Mr Cannon for your submission and your availability this morning to present evidence to this committee.

Mr Cannon—Thanks for the opportunity.

Evidence was then taken on the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, but later resumed on the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008—

[2.17 pm]

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

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

CHAIR—Before I go to the officers from HREOC, I want to say that the next three witnesses we are hearing from this afternoon have lodged submissions in respect of both of the bills that we are inquiring into—that is, the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 and the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008. For the benefit of witnesses and senators, I would like to explain, as we did yesterday, that, at the end of the hearings, we are attempting, in conjunction with Hansard, to produce a separate transcript in relation to each bill so that we can report separately on each bill. It will make it a lot easier for the purposes of that reporting. So I ask witnesses to speak briefly to the first bill and then we will go to questions. After that, we will go to the second bill.

I now officially welcome representatives from the Human Rights and Equal Opportunity Commission. We have submission Nos 19 and 34 from you in respect of these two pieces of legislation. Do you want to make any amendments or alterations to these?

Mr Innes—No. We do not have any amendments to make.

CHAIR—I remind senators that these are officers of a Commonwealth agency and shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of them to superior officers or to a minister. The resolution of the Senate prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. I also remind the witnesses that, if you wish to claim that answering a question would be contrary to public interest, then we would need an explanation for the basis for that claim. As I said earlier, we are trying to deal with each bill separately, so—

Senator BRANDIS—Madam Chair, before we proceed could I seek a little guidance from the chair, please. The rule about not asking representatives of Commonwealth instrumentalities questions of policy is, of course, one which I respect, but this particular agency, can I suggest to you, is in a slightly unusual position. It is the author of a report on the same sex, same entitlements issue, which addresses very directly and frankly the core issues of policy with which we are now seized in considering this bill. If you read the submission, Madam Chair, as I am sure you have, the submission is full of expressions of opinion about policy. I have no criticism of that; I think it is appropriate that a body such as the Human Rights and Equal Opportunity Commission, just like a body such as a law reform commission, should address the policy meat of the issue and I do not think it would be doing its job if it did not. But, in view of those considerations, and of the content of these submissions, about which we are inviting this evidence, might I ask for a reasonable degree of liberality in the application to these witnesses of that rule?

CHAIR—I hear what you say, Senator Brandis, and I think we have been doing that in the last day and a half. I am simply reflecting, for our purposes and for the witnesses' purposes, that there has actually been a resolution of the Senate—

Senator BRANDIS—I understand that.

CHAIR—that an officer of a department of the Commonwealth or of a state shall not be asked to give opinion on matters of policy—I take that to be government policy. We have had, I think, a degree of flexibility in dealing with this, and I understand that HREOC from time to time do publish reports that reflect views and opinions about policies which government may or may not pick up. So I think—

Senator BRANDIS—My point, Madam Chair, though, if I may, is this: I think we may take it that the bill as drafted and as passed through the House of Representatives now reflects the policy of the government. These submissions speak to that bill. I do not think it would be fair to the committee—in fact, I think it would be an offence to the committee—were we to be constrained from pursuing opinions expressed by these witnesses in their submission on the basis that it is directed to matters of policy.

CHAIR—Again, I just remind people, as is my duty as chair, so that they may be aware of the resolution of the Senate. I do not want to speculate here on what questions may or may not be forthcoming, but I also

remind witnesses—to protect our witnesses—that if in fact they are unable to answer a question then that can be referred either to a higher agency or to the minister. I am sure in this instance common sense will prevail, but it is my duty as chair to just remind you of the parameters within which we operate in that we need to be cognisant of the resolutions of the Senate, which do set the boundaries upon which our questions can be based. The first bill we are going to look at is the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008. I ask the witnesses to provide a short opening statement in relation to that bill first. We will go to questions and then we will deal with the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008.

Mr Innes—Thank you for the opportunity to appear before the committee. I will make some general introductory comments and then I will focus on the first bill, if I may. The Human Rights and Equal Opportunity Commission welcomes the introduction of this legislation that proposes to remove discrimination against same-sex couples and their children. During 2006 we heard stories from same-sex couples Australia wide and about their experiences of discrimination. These stories form the basis of the *Same-sex: same entitlements* inquiry. As you are all well aware, we heard extensive evidence about discrimination in Commonwealth superannuation funds. The financial and personal impact of this discrimination is thoroughly set out in our report. The *Same-sex: same entitlements* report recommended that the federal government should amend Commonwealth laws that discriminate against same-sex couples and their children in the area of financial and work related entitlements. The bill that you are considering implements the recommendations of the *Same-sex: same entitlements* inquiry and we are delighted that these reforms have commenced so soon after the publication of our report.

I would like to make some brief comments about the approach taken in the superannuation bill—and, as you have requested, I will come to the family law bill at the appropriate time. Firstly, I want to talk about couple relationships. We welcome the new definition of couple relationships contained in the superannuation bill. We particularly support the explicit reference to same-sex couples in the definition of partner. Further, we support the addition of registration of a relationship as evidence of the existence of a couple relationship.

With respect to interdependency relationships, we are aware that the Senate is interested in the question of recognition of interdependent relationships. The *Same-sex: same entitlements* report clearly documents our position on interdependency relationships. We do not believe that an interdependency category that includes same-sex couples should be introduced into Commonwealth legislation governing superannuation. Firstly, characterising same-sex relationships as interdependent relationships suggests that same-sex couples are different to and lesser than similarly situated opposite-sex couples. Secondly, the criteria for interdependency relationships may be more difficult to establish than those for opposite-sex married or de facto couples. Same-sex relationships should be assessed under exactly the same criteria as opposite-sex de facto relationships. And, thirdly, the consideration of the question of recognising interdependent relationships should occur through a separate policy process. The clear purpose of this legislation is to remove discrimination against people in same-sex relationships, and in the commission's view this should not be confused by inclusion of people in interdependent relationships.

The most complex aspect of these reforms relate to establishing a parent-child relationship. During the *Same-sex: same entitlements* inquiry, we spent many hours considering and discussing the best way to remove discrimination experienced by children in same-sex families. We congratulate the government for its proposed definitions of 'child' and 'child of a couple relationship'. We think they remove discrimination against children in same-sex families. We are aware that we have come to a different view to the other leading commentators in this area, including Professor Millbank, who I think submitted to you yesterday. Professor Millbank's approach involves simultaneously reforming parenting presumptions in the Family Law Act and state surrogacy laws and then extending this recognition of parental status into all federal laws. We agree that this approach would bring greater consistency to the legal recognition of children, both in federal laws and between federal and state laws. However, in the absence of uniform reform of state surrogacy laws that include same-sex couples, this approach will not bring equality to all same-sex couples.

Fathers who form families through surrogacy, however rare, would not be considered to be parents in that context. Consequently, we prefer the more inclusive approach represented by the definition of 'child' in this bill. However, I do note that we think there should be an additional amendment to Commonwealth superannuation legislation to ensure that the entitlements available to a stepchild are also available to children in same-sex families. Madam Chair, I will leave the family law amendments until the appropriate time in the hearing.

CHAIR—Thank you. Before we go to questions, I want to remind senators that we have two pieces of legislation here that we need to deal with. Perhaps if senators could limit their questions to one or two each, that would be useful.

Senator BRANDIS—Mr Innes, was the Human Rights and Equal Opportunity Commission consulted in the drafting of this bill?

Mr Innes—Senator, this was a question which I think you asked me at estimates. My response then was that we had several meetings with the department—and I think I have subsequently forwarded the dates of those meetings in which our views were sought—but we did not have any more input than that in the drafting, apart from, of course, the input in our report.

Senator BRANDIS—Did the Human Rights and Equal Opportunity Commission see and sign off on a final draft of the bill before the bill was published?

Mr Innes—We did not see the bill before the bill was published.

Senator BRANDIS—You have read the bill now.

Mr Innes—Yes.

Senator BRANDIS—Is the bill for all purposes substantially identical to the views of the Human Rights and Equal Opportunity Commission?

Mr Innes—Subject to the issues which I set out in my opening statement a moment ago, yes, it is.

Senator BRANDIS—So you are really here not so much to critique the bill as to endorse it?

Mr Innes—Senator, we would critique the bill if we had concerns about the content of the bill. As it happens, to a large degree the bill lines up with the recommendations which we made in our report. I do not want to give the impression that we are endorsing the government's legislation because that is our role; we are endorsing it because we have critically looked at the bill and, subject to the issues that are raised in our opening statement, we endorse it as carrying out our recommendations.

Senator BRANDIS—Thank you for your candid answer. You are perfectly entitled to do that, of course, but it does mean that you come before this committee from a somewhat different point of view than that of most of our witnesses, because what you are really doing is self-corroborating. You have produced a report which the previous government considered and the new government considered, you are consulted in relation to a bill to give effect to that report, the bill has been produced and you say you support the bill. This is really ticking off on your own work, in effect, isn't it?

Mr Innes—I do not know that that makes our views any less credible or relevant, Senator Brandis.

Senator BRANDIS—No, I do not say it does.

Mr Innes—But what you are suggesting is—

CHAIR—Perhaps we should let the witness finish what he is saying, Senator Brandis.

Senator BRANDIS—I merely say that the independent mind that you brought to the issue when you considered it afresh in the *Same-sex: same entitlements* report is now encapsulated in the bill so that your appearance before this committee is not the bringing of a fresh or independent mind to the bill but merely, as I said a little earlier on, self-corroborating or reaffirming your own anterior position.

Mr Innes—I agree with you that it is not bringing an independent mind to the bill. It is certainly not bringing a fresh mind to the bill, because this is an issue which we have considered over a number of years, but we looked at the bill and examined it. In other words, we have not just ticked off on the bill. We have brought to bear on it all of the knowledge and expertise that we gained during the time of our inquiry and assessed the bill in that context. You could argue, I suppose—although I do not see a lot of point to it—that we are in a better position in that sense to do it because we are more informed.

Senator BRANDIS—There is one issue on the merits that I wanted to explore with you. You have already mentioned in your opening statement the question of interdependent relationships. I understand perfectly clearly what you say and why you say what you have done and I have read with care your discussion of these matters in paragraphs 26 and following of your written submission. Can I put a proposition to you and invite your comment on it: the position that same-sex relationships are demeaned by being treated on the same footing as other interdependent or co-dependent relationships as a matter of logic can only be maintained if you make the implicit assumption that co-dependent or interdependent relationships other than same-sex

relationships are of an inferior character and—to use the argot of your profession—discriminate against people in those relationships. Why do you assume that permanent, loving domestic relationships of a character other than same-sex relationships are inferior to permanent, loving domestic relationships between same-sex partners?

Mr Innes—What we would say is that interdependent relationships are different to couple relationships. Couple relationships, whether they be same- or opposite-sex relationships, are a different type or category of relationship. The recommendations which the commission made, and which this bill and the government choose to follow, deal with couple relationships and putting same-sex relationships on an equal basis to opposite-sex relationships. We are not in the business of making any judgements about interdependent relationships except to say that they are a different type of relationship to sexual couple relationships, which is the category into which same- and opposite-sex relationships would fall.

Senator BRANDIS—Why do you say they are different? Is it only because we assume opposite-sex or same-sex couple relationships, to use your language, are sexual and we assume other co-dependent, permanent, loving domestic relationships are not sexual? Is the presence of a sexual element to the relationship the thing that matters to you?

Mr Innes—That is one of the issues.

Senator BRANDIS—Are there others? If so, what are they?

Mr Innes—We would say the question of interdependent relationships should be considered in a separate process. The point of this legislation is, as I have said, to remove discrimination experienced by same-sex couples and their children.

Senator BRANDIS—We are considering it now. Maybe in a—

Mr Innes—If I can finish my answer, Senator—

Senator BRANDIS—Can I just interpolate and say—

Mr Innes—Madam Chair, if I could finish my answer.

CHAIR—Senator Brandis, I think that is only fair.

Senator BRANDIS—I am very happy for Mr Innes to finish his answer but I wonder if he could keep his sentences relatively short so we can have a proper dialogue.

CHAIR—Senator Brandis, I am the chair here. Mr Innes has asked if he can finish his answer and I think we should afford him the respect to allow him to do that.

Senator BRANDIS—Certainly—as long as we can have a proper dialogue.

CHAIR—Mr Innes.

Mr Innes—Thank you. Many financial and work related entitlements and benefits are only intended to flow through to those in couple relationships or their children, and it would be a significant change in the law to include interdependent relationships in that context. That is another one of the differences that I am highlighting. Including them in future reform could have a detrimental impact on some interdependent relationships, especially if they receive welfare payments and that may change. Couple relationships are innately different to interdependent relationships, and that is the basis for the commission's recommendations in this regard.

Senator BRANDIS—Thanks, Mr Innes. As far as I could follow you, you have offered three reasons why they are different, and none of those, with respect, seem to me to be conclusive. First of all, you have said they should be considered through a different process. That may or may not be so, but here we are in a Senate committee and we are seized of this issue by reason of the very fact that it is one of our terms of reference. Can I suggest, with respect, that we do not get caught up on process—we are part of this process as we speak. Secondly, it involves significant change to the law, you say, but of course the bill involves significant change to the law, so that does not seem to me to be a conclusive reason to treat them as innately different. Thirdly, you have said it could be detrimental in some circumstances, particularly financially. That is a consequential issue, but it does not tell us why they are innately different. You seem, with respect, merely to be restating the question rather than answering it by asserting they are innately different. Let me approach it slightly differently. Wherein, between one category of permanent, loving, domestic relationships and another category of permanent, loving, domestic relationships, lies the essential difference?

Mr Innes—I am sorry that you could not follow my previous answer, Senator, but I am not sure that I can—

Senator BRANDIS—I think I did follow it. That is why I am asking you the question again. Between one category of permanent, loving, domestic relationships—for example, same-sex couples—and another category of permanent, loving, domestic relationships—that is, non-same-sex couples who nevertheless enjoy a relationship having those features—wherein lies the essential difference?

Mr Innes—As I was saying, I am sorry that you could not follow my previous answer, but the key difference, I think, is the one that you recognised as the first one that I mentioned, in that we are talking about a sexual relationship. The other differences, I think, I have already set out.

Senator BRANDIS—So we come down to the significance of it being a sexual relationship, essentially. Let us assume—

Mr Innes—That is not all I said.

Senator BRANDIS—No, I heard exactly what you said, and you repeated it, but I am not persuaded that any of the other reasons you advanced are reasons of principle rather than reasons of process or consequence.

Mr Innes—I understand that, Senator. I just do not want your summary of my answer to be necessarily the answer that is on the record because I do not necessarily agree with your summary.

Senator BRANDIS—Sure. If the innate difference between these types of relationships, the qualitative difference, is the presence or the absence of a sexual relationship then why would we discriminate against and treat as inferior a form of permanent, loving, domestic relationship merely because a sexual dimension may be absent? Aren't the permanency of its character, the fact that it is in form a domestic relationship and, most importantly of all, the fact that it is based on love and commitment more important in defining the relationship than the existence or nonexistence of a sexual dimension to it?

Ms Temby—The commission's view is that an interdependent relationship is not inferior; it is just different in character.

Senator BRANDIS—Okay.

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

Senator BRANDIS—I think we all—

CHAIR—Senator Brandis, I am going have to move to other senators.

Senator BRANDIS—I am just coming to the conclusion, Madam Chair.

Senator BRANDIS—I think we all accept that there are different features. That is not controversial, and I am pleased to hear you say that you do not think that they are inferior. But can I suggest to you, Mr Innes and Ms Temby, with respect, this. For argument's sake, let us say this bill is passed in its current form. If in a couple of years time HREOC was given a reference from the government of the day as to discrimination against interdependent couples, and you approached the task at hand of eliminating discrimination—not through the prism of same-sex couples but through the prism of interdependent relationships—wouldn't the logic of your position produce the opposite conclusion? Wouldn't you then be saying: 'Well, these relationships are not inferior, though they have different characteristics. Therefore, shouldn't they be treated equivalently to interdependent same-sex and opposite-sex relationships?'—and, in the service of your work to eliminate discrimination from the law, you would recommend that they do be treated equivalently?

Mr Innes—That might be the case if the prism we were looking through was not based on the international obligations which Australia has under the International Covenant on Civil and Political Rights and the United Nations Convention on the Rights of the Child because they do not in fact address interdependent relationships in the way that they address couple relationships.

Senator BRANDIS—I think we know that, but surely you are not going to limit yourself, Mr Innes.

CHAIR—Senator Brandis, I need to go to another senator now.

Senator BRANDIS—Your statutory charter does not limit you to looking at this issue of discrimination through the parameters of those two international instruments, does it? My point is, if you are looking at a priori, you might arrive at the opposite conclusion.

CHAIR—Order! Senator Brandis! We are going to other senators now. We have two pieces of legislation to consider in this time, so we need to go to other senators of other parties to provide some equal time for questioning.

Senator FEENEY—Mr Innes, I want to consider this question of interdependency for a moment longer. In your report you did touch upon this question and have cited that. I wondered if in your deliberations that gave rise to the report you considered the discrimination that may or may not exist for interdependent couples. In particular I would be interested in any remarks you might have about, firstly, existing state law or other remedies for interdependent couples—things like wills for instance. Secondly, I would be interested in hearing a little more from you if possible about which benefits may flow to same-sex or couple relationships that were not intended for interdependent relationships.

Ms Temby—To take the second part of your question first, if you look at the Commonwealth superannuation funds governed by the legislation that you are considering, they are defined benefit funds that will provide for a reversionary pension to the surviving partner of the superannuation fund member. In this case one of the intentions of superannuation is to provide for the dependants of the superannuation fund member and that is most commonly thought of in terms of the immediate dependants of spouse or partner and children. It is not our understanding that an intention of those kinds of funds is that a reversionary pension type of benefit could flow to someone who is in an interdependent relationship. A person in that relationship still might receive a superannuation entitlement, but that would go through the estate and it would be a lump sum benefit. It may or may not be subject to tax concessions depending on whether that person is considered a dependant in the taxation law, which is slightly different to the way it is considered in the superannuation law. We would see that as being an appropriate way to proceed. There are some benefits that are most appropriate for the immediate family—spouse or partner and children—and other benefits or entitlements like a lump sum benefit through an estate that should go, appropriately, to the person who is closest to the superannuation fund member. It is not necessarily appropriate that it should be in the form of a reversionary pension.

Senator FEENEY—Would you say those existing relationships mean that there is a satisfactory remedy and that there is presently no discrimination in that respect?

Ms Temby—The subject of our inquiry was not to look at the entitlements that were available to people in interdependent relationships. We were looking at discrimination between same-sex and opposite-sex couples. However, through our investigations, it became apparent that people in those kinds of relationships in the area of superannuation would receive an entitlement in a different form.

Senator FEENEY—You have not said anything about—

Ms Temby—The first part of your question.

Senator FEENEY—And whether there are any existing state laws or other remedies such as wills which should be germane to this discussion.

Ms Temby—It is our understanding that all states and territories have now reformed their laws so that same-sex couples are not discriminated against in most laws. There are exceptions where discrimination remains in every state and territory. All of the laws regarding intestacy and wills et cetera have been reformed, so there is no discrimination between same-sex and opposite-sex couples in those areas in the states.

Mr Innes—But that was not the major focus of our inquiry. I just put that small caveat on Ms Temby's answer.

Senator HANSON-YOUNG—In trying to achieve equality between same-sex and opposite-sex couples in superannuation it seems to me that a glaring issue—and it has been raised a number of times by different witnesses—in the current bill is the lack of mandate in terms of private superannuation. I have some rough figures, and it looks as though 90 per cent of Australians have their superannuation tied up with private super funds. Therefore, the changes that we are discussing are really only going to be guaranteed changes for the 10 per cent of Australian couples—and an even smaller number, I guess, are those in the 10 per cent that fit into the same-sex couple category as well. My question to you is: do you think that we should be mandating something to ensure that the couple relationship definition, which is used to include same-sex couples, should be part of this legislation?

Ms Temby—Yes. We have raised in our submission that we have a concern about private superannuation funds that are governed under the regulatory regime of what we call the SI(S) Act—the Superannuation Industry (Supervision) Act. That is permissive legislation, so there is no requirement for them to alter their definitions. We have recommended that consideration be given to some kind of mechanism that would require the trustees of those superannuation funds to incorporate the new definition into their legislation. This kind of discrimination is most significant for people who are in defined benefit superannuation funds, and there are not very many private superannuation funds that are defined benefit funds. Many people in the private sphere currently do have the benefit of the interdependency category, which, as was outlined in our report, we have other problems with. Certainly we do think that that is something that consideration should be given to.

Senator HANSON-YOUNG—We heard from a witness this morning that currently a number of superannuation funds that refer to the SI(S) Act directly might not be inclined to adopt this new definition unless there were some type of mandate to do so.

Ms Temby—We would not know whether that were the case or not, but certainly this legislation does not require the adoption of this definition in those funds.

Senator HANSON-YOUNG—And therefore could you foresee that there would be a certain percentage of the population who would be discriminated against because we have not mandated that?

Mr Innes—It is certainly possible.

Senator PRATT—As a follow-up to that, what is the best way of remedying such problems? Should such provisions be subject to equal opportunity and antidiscrimination legislation that prevents discrimination against one couple, which for all intents and purposes bar their gender would be the same as any other couple, in preference to another couple?

Mr Innes—That is one way to do it, but the difficulty with doing it that way is that the onus is then placed on the couple to take the issue on if the fund acts in a different way. It may be better to mandate the use of the definition so that the onus is not then placed on the person discriminated against to address that discrimination.

Senator PRATT—That makes sense. Could you highlight for us the impact on the human rights of children when there is a failure to recognise a parent-child relationship for the purposes of things like superannuation—although there are many other aspects. I am sure in the course of your inquiries you have looked at the human rights of children and how they are affected by their legal relationship with their parents.

Mr Innes—I am not sure where to start really, because the impacts are right across the various areas of the 58 laws that we found discriminated, and the best interests of the child was one of the prisms which we used to look at this legislation, and there are impacts and stories in our report in all areas of these laws. But, in terms of superannuation, the impact for children is a sort of flow-on from the disadvantage that partners in same-sex couples face because of the need for funds to go through people's estates and then be taxed or taxed at a higher rate.

Ms Temby—If the superannuation fund member who dies and who would leave a benefit to the family is the non-biological parent—so there is not a direct link between the child and that parent—then currently in Commonwealth defined benefits schemes that are being amended neither the child nor the partner would have an entitlement to a reversionary pension, which is significantly more valuable than the lump sum that might pass through an estate, especially if they are also not considered dependants under the taxation law, and so it is taxed at a higher rate.

Senator FEENEY—What would happen in that instance if it were a stepchild and had no biological link to the parent?

Ms Temby—Stepchildren are specifically provided for, not in all of the legislation but I think in about four of the pieces of legislation here. So it would depend on whether there were provision for stepchildren in the legislation.

CHAIR—Thank you. We will conclude our evidence in relation to that piece of legislation.

Evidence was then taken on the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, but later resumed on the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008 —

[3.34 pm]

EGAN, Mr Richard John, National Policy Officer, FamilyVoice Australia

CHAIR—I now reconvene this public hearing and welcome the representative from FamilyVoice Australia. Family Voice Australia has lodged two submissions with us, being Nos 4 and 3, in relation to each of the bills. Before we commence, Mr Egan, do you need to make any amendments or changes to those submissions?

Mr Egan—No.

CHAIR—You are giving evidence to us in relation to the two pieces of legislation but we do want to try to produce transcripts for two pieces of legislation and two reports.

Mr Egan—I can accommodate that easily.

CHAIR—I ask you to make, for the purposes of brevity, a short opening statement in relation firstly to the same-sex superannuation bill and then at the conclusion of that we will take questions and we will go on to the second piece of legislation. If you would address the same-sex superannuation bill firstly, that would be appreciated.

Mr Egan—Sure, Madam Chair. My understanding is that this bill proposes to amend nine separate statutes, each of which deals with various forms of superannuation and pensions for public officers, including defence personnel, Governors-General, judges and parliamentarians. I think the traditional reasons for the Commonwealth to provide appropriate pensions, including reversionary benefits, for spouses and death benefits for the children of married parliamentarians, judges, servicemen and servicewomen and so forth are obvious and do not need restating. But it is our submission that it is not at all clear why a person should be the recipient of a taxpayer funded pension merely because they had a same-sex relationship with a parliamentarian, judge or serviceman or servicewoman. I note that the explanatory memorandum of the bill reveals that the measures in this bill will result in an approximate increase in unfunded liability on commencement of the act totalling $112.5 million, so it is not a small amount of the taxpayers' money at least from the point of view of the taxpayer. So that is our general point about the bill.

I would like to make some comments about the definition of 'couple relationship', which is key to the new provisions of many acts if they were to be amended. I am using as the example what would be new section 4B taken from schedule 1 of the bill as applied to the Parliamentary Contributory Superannuation Act 1948. That definition effectively reduces marriage to one of the indicators of whether a couple relationship exists. In fact, there is not even a conclusive index to that but merely a possible indication that a couple relationship exists. On any reading, that has to be seen as a significant downgrading of the status of marriage, at least insofar as that particular act and also the other acts that are being amended in a similar fashion. The fact that persons were legally married to each other at the time is simply one of the things that a decision maker has to take into account in trying to establish whether a couple relationship existed. In fact, in this definition not all married couples would qualify as being in a couple relationship—and it might be a surprise to many married parliamentarians to find that they are not in a couple relationship. If, for example, their marriage is not of three years duration or more, they are not in a couple relationship. If for any reason the decision maker decides that they were not living on a bona fide domestic basis at a particular time, then they were not in a couple relationship, notwithstanding that they were legally married and not divorced or formally separated. I find that quite astounding.

Another comment on this goes to the definition of children as the product of a couple relationship. Unlike some of the commentators, I am not particularly reacting to the concept of a child as a product. I think that, although we use that in fairly mechanical terms, normal sexual relations between a husband and a wife do in fact produce a child, and in one sense that is a perfectly respectable definition of a child. My objection goes to the fact it is a biological nonsense when applied to persons in a same-sex relationship. Children do not result from that relationship in any way at all. The fact that one partner might undergo a process which produces a child, whether that be by artificial insemination or some other form of reproductive technology and another person consents—whatever that might mean—to that process does not make the child a product of that relationship in any meaningful way that I can see.

A more fundamental concern is that this bill is the first in a whole tranche of legislation that is yet to come and is setting a benchmark for what may be done in terms of redefining parent-child relationships. I think there is a fundamental concern in two aspects: one is giving permanent parental status to a person who is not a biological parent of a child, merely because they happen to be in a sexual relationship at a particular period

with the biological parent of that child. I think that is bad law and it is bad social policy. Also, giving this form of recognition gives at least tacit approval to the various means of bringing such children into existence, whether by surrogacy or IVF and artificial insemination. It is certainly our submission that it is never in a child's best interest to intentionally bring it into the world intending to deprive it permanently of either a father or a mother. In our submission, the overwhelming weight of evidence is that children flourish best when raised by a father and a mother; that men and women contribute different things to parenting; that they cannot easily substitute for the other; and that, therefore, the Commonwealth ought not to be doing anything which appears to give approval to such practices. We would maintain this, notwithstanding that a small number of children may stand to gain some financial benefit from the provisions in this act. We think, on balance, that is outweighed by the damage to children's best interests of the Commonwealth appearing to approve the deliberate bringing of children into the world depriving them of either a father or a mother. I will stop at that point. Thank you.

Senator BARNETT—Thanks very much for your advice. On the presentation of your argument regarding the definition of a couple relationship, I think you referred to it as astounding. I would like to just draw you out on that a little bit. I am looking at page 5 of your submission and refer to your introductory comments. You are saying that if you are in a marriage relationship of less than three years then that does not meet the criteria as set out in this bill for being defined as a couple relationship?

Mr Egan—Yes, the way the definition of couple relationship is structured at 4B in schedule 1, as I identified earlier, is that, for the purpose of this act, a person had a couple relationship with another person at a particular time if the person ordinarily lived with that other person as that other person's partner on a permanent and bona fide domestic basis at that time. Subsection 2 goes on to give some specification to that in that you are only considered to be living on a permanent bona fide domestic basis at a particular time if you have been living together for at least three years—or there may be some other evidence to be taken into account. Then, in subsection 4, five indicia are given to establish whether you were in a bona fide domestic relationship. The second of those is that you were legally married to each other at the time. Marriage is just reduced to, as I said, one of five possible indicia that you were in a bona fide domestic relationship.

Senator BARNETT—So, if you have been married for two years and six months—or less than the three-year time frame—and you are legally married, you are saying that you are not automatically in a couple relationship?

Mr Egan—That is correct.

Senator BARNETT—That is disturbing. What are the consequences for those people in that category?

Mr Egan—The benefits that flow to those in couple relationships would not flow to married couples in those circumstances.

Senator BARNETT—Why would the government wish to draft legislation that would have that effect?

Mr Egan—I have no insight whatsoever into the mind of the Rudd government.

Senator BARNETT—All right.

Senator BRANDIS—You would be like most of the ministers of that aforesaid government, Mr Egan!

CHAIR—I do not think we want unparliamentary comments at my committee hearings.

Senator BARNETT—I just want to pick up on your comment on the cost to the taxpayer. I think you referred to $112 million. That is the unfunded liability?

Mr Egan—Yes. I am no financial expert on government matters, so I am sure all the senators would understand better than I would what exactly that means.

Senator BARNETT—I am just getting some clarity that rather than year to year it is an unfunded liability.

Mr Egan—I just note that that was not mentioned in most of the public comment when the government's budget measures on this broad question were being discussed where savings of $67 million a year were being widely reported.

Senator BARNETT—We had evidence before from other witnesses, including the Catholic Church, that this was leading ultimately to a legal threat to the institution of marriage and also views have been put by a number of witnesses that it undermines marriage. Can you express your views with respect to those comments? Is there any evidence to support that view?

Mr Egan—In a sense it does not pose a direct legal threat to the status of marriage because the Marriage Act is a stand-alone provision. But I think in terms of logic and social policy it may do. Traditionally, the position has been that marriage is unique because it is the union of a man and a woman voluntarily, entered into for life to the exclusion of all others. That is acknowledged through a public ceremony that is recorded. Traditionally benefits have been given to married couples because marriage is held to benefit society. It benefits both men and women and it benefits particularly children as it is the most desirable environment for children to be raised in. If this bill is followed, as announced by the Rudd government, by changes to all 100 federal laws that mention marriage except the Marriage Act and if in every single one of those laws the benefits and treatment of married couples is now extended to same-sex couples on the identical terms then it would seem to me a logical argument if I were coming from the same-sex lobby to say, 'Now you've given us all the benefits of married couples, why would you not allow us to have marriage itself?' I think it is a threat to marriage in the sense that it provides a strong and reasonable argument for reviewing the bipartisan decision in 2004.

Senator FEENEY—Mr Egan, thank you very much for your evidence today. I heard and understood your remarks earlier concerning children and the rights of children to have a mother and a father. Obviously, you would accept—indeed, it is a matter of fact—that there are children presently in the Commonwealth of Australia who are the children of same-sex relationships. I was wondering what you might say you believe should prevail in regard to those children who exist here and now and how it is you think those children could avoid discrimination, other than through the sort of legislation we have talked about today. I am interested in hearing your plan B, so to speak.

Mr Egan—Our view would be that a child in that situation is essentially the child of a single parent. We simply do not accept that a parent of a child having a sexual relationship of a same-sex nature with another person in and of itself gives rise to a parent-child relationship between that sexual partner and the child. If you compare children in same-sex settings to the children of single parents then there would be no discrimination at all.

Senator FEENEY—Would your view extend in a similar way to de facto heterosexual relationships where, for argument's sake, the mother is partnered with a man who is not the father of the child?

Mr Egan—We think it was a social policy mistake to start treating de facto relationships in any sense as equivalent to marriage and certainly would still prefer that the whole package of social benefits be directed at married persons and families based on marriage.

Senator FEENEY—Exclusively so.

Mr Egan—Exclusively so, for the reasons that in the long run anything done to privilege cohabitation as equivalent to marriage for benefits purposes is counterproductive to the interests of children. Any increase in cohabitation, any increase in making it attractive to young people will result in long-term harm to children because, as the Australian Institute of Family Studies study showed very clearly, cohabitations break up at a much greater rate than marriages. Sadly, fewer and fewer of them are leading to marriage today and yet more and more children are being born in situations of cohabitation. That means more and more children are ending up with broken families—parents who are not living together. So why would you want to treat that as equivalent to marriage in a way that at least potentially could encourage its incidence?

Senator FEENEY—I appreciate your point in those respects. What I am interested in hearing is: do you essentially say as a matter of public policy, as social policy, that children in those sorts of circumstances essentially are permanently consigned to some form of disadvantage?

Mr Egan—That would depend on how you structured particular benefits. If you structure, say, the pharmaceutical threshold benefit or the Medicare benefit on the basis of a sort of triad of mother, father and children, then, yes, it is difficult. In a sense, what we would say is that the real family unit—that is, the biological parent and the child—would still have access to the same thresholds and so on; it simply does not include the expenditure on the same-sex partner, who, in our view, is not a part of the natural family.

Senator FEENEY—Is not recognised.

Mr Egan—Yes.

Senator FEENEY—Thank you.

Senator BRANDIS—Mr Egan, I have a lot of sympathy for much of what you say, and in particular I have a lot of sympathy for the observation you have just made that we made a social policy mistake in treating non-

married cohabitation relationships, de facto relationships, as being the equivalent of marriages. I have a lot of sympathy with what I take to be implicit in what you say, that society has a very strong interest in encouraging people who wish to establish permanent domestic relationships in fact to marry and that there should be incentives to marry and disincentives to be in a cohabitation relationship which is not fulfilled in marriage.

Having said all that, though, let it be assumed that a de jure marriage, a registered marriage, is a unique and special and valuable institution and that a cohabitation relationship which is not a consecrated marriage is an inferior institution, although it might have intrinsic values of its own. What I cannot understand is why you then go on to say that a same-sex relationship which, apart from the identity of the gender of the two participants, in all other respects resembles a de facto cohabitation relationship, a committed cohabitation relationship between a man and a woman which is not a marriage, is a threat to marriage.

Mr Egan—We are only saying that, in our view, a whole range of social benefits should only be given to married couples—

Senator BRANDIS—I do not disagree with that.

Mr Egan—and that there is no case for giving that whole package of benefits, without defining them one by one, in general to any other relationships.

Senator BRANDIS—Let me go that far with you.

Mr Egan—We would place same-sex relationships on exactly the same basis as de facto relationships. We think benefiting either of them undermines marriage.

Senator BRANDIS—I am not sure that that follows. We seem to be in complete agreement about the importance of privileging marriage, but we obviously must acknowledge, because it is the reality, that there are many permanent, committed, loving, domestic relationships between both opposite-sex and same-sex participants which are not marriages but which, other than the different gender mix of the relationships, resemble one another. Why should we treat two gay men who choose to live together and share their lives and who are engaged in a loving relationship which they intend to be permanent but do not claim is a marriage—and none of the witnesses before this committee have claimed that that is a marriage—with any less respect than a man and a woman who also choose not to marry but nevertheless want to live in a permanent, committed, domestic relationship?

Mr Egan—I think I am agreeing with you that they should be treated the same way and given no benefits that are in that package of benefits society gives to married couples to enhance marriage.

Senator BRANDIS—Let me stop you there before you verbal me. I did not say they should be given no benefits, but I am acknowledging—

Mr Egan—No, I am not saying you are saying that, but I am saying that.

Senator BRANDIS—Sure. Nevertheless, is it your position, Mr Egan, that people in a heterosexual de facto relationship should be treated on the same footing as people in a homosexual de facto relationship where both of those relationships are characterised by them being a permanent, loving, committed domestic relationship?

Mr Egan—To repeat our position: we think marriage is the only couple relationship that society ought to give formal legal status to and ought to provide benefits to. If society for whatever reason wants to give benefits to people other than married couples, it should be on some basis other than that they are couple relationships. For example, in superannuation, if you want to give preferential tax treatment on the payment of a death benefit for something broader than married couples, then let a person name whatever beneficiary they choose, whether it is the cat haven, their tennis partner, someone they happen to be having homosexual sex with or someone they happen to be living in a de facto heterosexual relationship with. We will have no objection to that because you are not purporting to put that on the same status as married couples, but we do not support treating either de facto heterosexual couples or same-sex couples in a—

Senator BRANDIS—Quasi-married—

Mr Egan—catch-all class of couple relationships. That applies however you handle the terminology, whether you say ‘married couples and other couples’ or whether you subsume married couples into ‘couple relationships’. The substantive result is the same, and we object to that on principle. Society fails to do its duty to marriage, which is a unique, natural, cross-cultural, millennia-old institution, not simply by preserving the Marriage Act and letting married couples have the status of marriage but by backing up that status with a raft of benefits and assumptions about marriage and what marriage involves.

Senator BRANDIS—I understand that. I do not agree with everything you say, but there is a certain logic to your view which seems to be essentially similar to the way I would analyse this—that is, you do not seem to be saying that there should be any discrimination against same-sex couples in a de facto relationship—

Mr Egan—Our view is that the state has no—

Senator BRANDIS—no, let me finish—by comparison with heterosexual couples in a de facto relationship. You are merely saying—

Senator FEENEY—Discriminate equally.

Senator BRANDIS—that they should be treated equally but they should in neither case be put on the same footing as a married couple—

Mr Egan—Our submission was that the state essentially has no interest in the sexual activities of its members, apart from the criminal law questions, in terms of the assigning of benefits. The state has an interest in supporting marriage and the institution of marriage through a package of benefits, but no benefits should be assigned to anybody else on the basis of who they have sex with. That is just not of interest to the state.

Senator BRANDIS—Sure. I understand that point. Your position has a purity about it, a simplicity about it—and I say that not at all in a pejorative sense. You simply say that we should privilege marriage and treat all other non-marital relationships the same—that is, accord them no benefits.

Mr Egan—As of no particular interest to the state.

Senator BRANDIS—I understand. Thank you.

Senator HANSON-YOUNG—Thanks for appearing, Mr Egan. I understand where you are coming from. I think there is some inconsistency. Correct me if I am wrong. If what you are saying is that heterosexual de facto couples deserve no rights under this legislation as well, then neither should same-sex couples. Is that your position?

Mr Egan—Our position is that the payment of reversionary benefits and so on under superannuation schemes for public officers should only go to spouses and their children.

Senator HANSON-YOUNG—Let me clarify again: are you saying that the only people who should be entitled to these rights and entitlements are those who are married? Therefore, even heterosexual de facto couples who are currently entitled to them should have that stripped.

Mr Egan—The taxpayer and society have no particular interest in funding pensions for mistresses.

Senator HANSON-YOUNG—Okay. That is where you are consistent. You believe that heterosexual de facto couples should not receive the benefits that they currently do and, therefore, in following through that argument, neither should same-sex couples.

Mr Egan—Neither is married, so yes, it follows.

Senator HANSON-YOUNG—I have one other question which I put to one of the witnesses earlier today. When we talk about the needs and the rights of the child, do you believe that it is right to discriminate against children regardless of the fact that they do not get to choose who their parents are, they do not get to choose the sexuality of their parents or who their mother or father decides to have a partnership with and therefore they have no choice in the situation that they find themselves in? Should a child be given the same rights regardless, or do you think that it is right to discriminate against individual children?

Mr Egan—We strongly object to the discrimination against children that is involved in legally tolerating means of bringing children into the world with the intention of depriving them of a father or a mother. Certainly, it is grossly unfair to children to allow artificial insemination of women who are not intending to raise the child themselves with a man who is going to be the father of the child. Certainly, bringing children into existence by means of surrogacy to be raised by two men or by two women is grossly unfair to the child. So the fundamental discrimination against the child is being enacted by the adults who, to suit their own desires, have brought a child into existence in that way. For society to approve of that, as it were, by treating those relationships as if they were real parent-child relationships when they are not at all would be a further discrimination against the child that cannot be outweighed by the possible payment of a death benefit from a non-biological parent.

Senator HANSON-YOUNG—But, regardless, there are children out there, and there may very well be more children born, who do not fit into your category of being born to a married man and woman. Do you then

believe that the state has every right to discriminate against them? Because they have not chosen, regardless of the fact—

Mr Egan—Let me clarify. The child of a de facto heterosexual couple will be the true child of both parties to the relationship because the parenthood is derived biologically. It is not by being in a de facto relationship with the other parent that they become a parent. They become a parent biologically. Under the Superannuation Act the child of a de facto couple would be entitled to a death benefit from either of the parents. So that is quite a different circumstance to the same-sex couple, where it is impossible for a child to be truly the child of both parents.

Senator HANSON-YOUNG—But just a moment ago you advocated that we should not be giving these entitlements to any de facto couple, regardless of whether they are male and female, male and male or female and female.

Mr Egan—Yes. Senator, I will just explain it again for your benefit. A child is a child of both the father and the mother, regardless of whether they are married or not. So one is not privileging the de facto relationship in an equivalent way to marriage by allowing the child to receive a death benefit from either of its parents.

Senator HANSON-YOUNG—So you do not support the discrimination for children to receive the benefit? All children should be able to receive the benefit regardless of the decisions of their parents.

Mr Egan—A child should be entitled to receive a death benefit from any of its true parents. Its true parents are those who are its biological parents or its parents by adoption. There are only two ways of becoming a parent—biologically or by adoption.

CHAIR—Thank you, Mr Egan.

Evidence was then taken on the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, but later resumed on the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008 —

[4.31 pm]

CROOME, Mr Rodney, Committee Member, Australian Coalition for Equality

IRLAM, Mr Corey, Committee Member, Australian Coalition for Equality

MORGAN, Mr Wayne Kenneth, Consultant, Australian Coalition for Equality

Evidence from Mr Croome and Mr Morgan was taken via teleconference—

CHAIR—Welcome. Is there anything you would like to add to capacity in which you are appearing today?

Mr Morgan—I am a senior lecturer in law at the ANU College of Law. I appear in that capacity as an expert and also as a consultant to the Australian Coalition for Equality.

Mr Croome—I am a spokesperson for and a committee member of the Australian Coalition for Equality. As well as appearing in that capacity today, I will bring to the table my parallel experience as a spokesperson for the Tasmanian Gay and Lesbian Rights Group.

Evidence was then taken from Mr Irlam on the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, but later resumed on the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008—

CHAIR—Mr Irlam, I invite you to provide us with an opening statement in relation to the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008.

Mr Irlam—Ninety-eight per cent of respondents to a survey by the Victorian Gay and Lesbian Rights Lobby in 2005 indicated within the gay and lesbian community support for some form of legal recognition for same-sex couples. Further, it is the Australian Coalition for Equality's opinion that it is a widely held view within both the gay and lesbian community and the broader community that individuals deserve a choice for how their relationship is recognised as a couple. As such, with these two principles of choice and equality for diversity of that choice at the forefront of our minds, we support the following: equal access to the institute of marriage. We note for the benefit of the committee that we agree with the arguments that marriage will be held in high regard with a special status within society. Obviously, however, we do not support the discrimination faced by same-sex couples who may wish to enter into that formal recognition, but we note that today's discussion is not about marriage; it is about the choice of registered relationships, de facto relationships and, by decision of the opposition, interdependent relationships.

I move then onto the second point that we support: the unique and stand-alone recognition of registered relationships in federal law. Those individuals who choose to enter into a formalisation of their relationship should be acknowledged for their opting in or their signing up to the relevant rights and responsibilities of such a formalised relationship. We recommend, however, that these registers are placed in the act's interpretation act and should remove the terms 'state' and 'territory' to permit future inclusion of international formalised relationships.

Thirdly, we support de facto relationships, both opposite sex and same sex, within society as akin to one another. I would note to the committee that the inference by using the terms 'opposite' and 'same sex' in law amounts to a small amount of discrimination against those people who have either asexual or indeterminate sex. Perhaps a more appropriate term in law would be 'regardless of gender'.

The fourth category is interdependent or caring relationships. We feel this is an important and emerging form of relationships deserving of equal treatment in federal law. The needs and statistics of these relationships are largely unknown. I note in my readings of the inquiry's submissions that I was unable to find a single personal submission from a companion or a spinster sister presented to this committee. Further, I note that in the organisations' submissions that claimed to put in interdependency there was no study, no research, no consultation and not even a town hall meeting with people who were in an interdependent relationship about what their needs were or what they wanted. We therefore submit that an independent inquiry is required into the specific needs of an interdependent relationship. I bring to the committee's attention the opinion that in society people of a de facto relationship are often seen as two halves of the same whole, whereas people in an interdependent relationship are seen as two individuals. We believe also that the distinct recognition for those who opt in to a formalised mode of relationship recognition is appropriate.

Our submission does not go into detail regarding the definition of 'child'. However, we note and support the concerns that the term 'product of the relationship' should be redrafted along the lines of the submission made

by the New South Wales Gay and Lesbian Rights Lobby. I thank you for affording me the opportunity to appear before the committee. I will ask Rodney or Wayne if they would like to open with a brief comment.

CHAIR—Mr Morgan or Mr Croome, do you have anything you want to add to that?

Mr Croome—I would like to add a couple of comments to what Mr Irlam said. My comments will briefly address two of the issues that Corey raised—firstly, interdependency; and, secondly, registered relationships. It would appear to me from where I sit observing the current debate this committee is a part of that the debate has broadened from the issue of recognising and entitling same-sex relationships as de facto partners to one about recognising and entitling a more diverse range of relationships. The first issue here, as I mentioned, is the issue of interdependency. I think it is important when we discuss this issue to be certain of what we are talking about. My understanding of that word—and my understanding is covered by my experience of this in Tasmania—is that we are talking about people in companionate and familial relationships. Corey has already mentioned older spinster aunts—I think that was the term. That is one example. There are also carers and the people they care for, people in diverse ethnic and Indigenous family arrangements. There are a wide range of definitions here and what they all share in common is that they are not conjugal relationships, not romantic relationships. As I said, they are companionate and familial.

As Corey said, we support the recognition and protection of these particular partnerships in a way which has already occurred at, for instance, a state level—and again I refer to Tasmania, which has gone further than the other states in this regard. When Tasmania did come to the recognition of these relationships it conducted exactly the kind of inquiry—looking at what their needs are, what rights and entitlements they wish to have—that has not yet occurred at a federal level. So we recommend that in principle and we would also recommend, as Corey said, that they not be considered conjugal relationships but that they be recognised in their own right as interdependent—that they not be included in the same category. It can be quite confusing and difficult for, say, the older spinster aunts, to whom Corey has already referred, to be considered to be in a conjugal relationship when they are not.

Of course, that brings me to the subject of recognising same-sex relationships. The same principle applies in reverse. When we are talking about the recognising and entitling of same-sex relationships, we need to recognise that they are on the whole conjugal, sexual or, if you like, romantic relationships and that the love and commitment in those relationships is of the same kind—not greater, but of the same kind—as that of people in opposite-sex de facto or married relationships. It therefore makes sense from a cultural point of view to classify same-sex relationships as de facto or ultimately as married couples—but, of course, that is not a subject of today's discussion. It also makes sense from a legal point of view, because there will be rights and entitlements which flow to those relationships, particularly in the area of parenting, which do not necessarily flow to the interdependent relationships that I mentioned earlier.

In the Tasmanian context, that is certainly the case, where parenting rights are restricted to significant relationships—that is, opposite- and same-sex conjugal relationships—and do not flow to interdependent relationships. At a federal level, of course, there will also be areas of law where interdependent relationships may not be appropriately recognised. One of those that has already been identified in the discussions around this issue is social security.

The same issue of respecting, entitling and recognising relationships for what they are rather than what they are not applies to registered relationships. We are concerned to point out that a registered relationship is neither a de facto relationship with a certificate nor marriage by another name. A registered relationship is a new kind of legally recognised relationship. When a couple, for instance, in Tasmania or the ACT, register their civil partnership or their significant relationship, what they are doing is choosing specifically to no longer to be considered a de facto couple. If they are an opposite-sex couple, they are also choosing specifically not to be married. They are seeking this particular kind of recognition, and it is our contention that that choice should be recognised in federal law in exactly the same way it is recognised and respected in state and territory law. This is why we are concerned that one of the proposals that has been put forward is a recognition of these relationships as proof of the existence of a de facto relationship. As I said, when couples choose to enter into these formalised relationships, they are choosing to no longer to be considered a de facto couple. That would seem to be a mischaracterisation of their relationship. To sum up, the principle is one of respect—respecting the choices that people make and the nature of the relationship they are in.

CHAIR—Senator Hanson-Young needs to go, but she might be able to quickly ask some questions before she leaves.

Senator HANSON-YOUNG—I have three questions. I might just ask them and then if you could answer them that would be great. If I have to leave, I apologise; I will read the *Hansard*. My first question is: in the last two days we have heard a lot of criticism from a number of different witnesses—although not all; most witnesses support the changes. But it was reflected on a number of times that the definition of a couple relationship somehow undermines the statute of marriage. I would like to hear your response to that.

The second question I have is in relation to the issue of the way the legislation currently stands. It has been pointed out by a number of witnesses that it would be a furphy if these laws passed to suggest that somehow we have achieved equality for all people, because without mandating private superannuation funds to recognise the definition of couple relationships, including both same- and opposite-sex couples, it would not actually be achieving equality for all because we know that 90 per cent of Australians receive their super from a private fund.

Thirdly, yesterday the CPSU, when they gave their evidence, failed to give an appropriate example of their own members who may be disadvantaged if this bill does not pass in a timely manner. I ask the panel whether they know of examples of people and what level of disadvantage they believe would occur if this bill did not pass in a timely manner.

Mr Irlam—As for the definition of a couple relationship undermining the status of marriage, I will refer the committee to a submission from COULD Parkin, where he quotes a *Wall Street Journal* article by Darren Spedale and William Eskridge. It reads:

There is no evidence that allowing same-sex couples to marry weakens the institution. If anything, the numbers indicate the opposite. A decade after Denmark, Norway and Sweden passed their respective partnership laws, heterosexual marriage rates—

that is, opposite-sex marriage—

had risen 10.7% in Denmark; 12.7% in Norway; and a whopping 28.8% in Sweden. In Denmark over the last few years, marriage rates are the highest they've been since the early 1970s. Divorce rates among heterosexual couples, on the other hand, have fallen.

The article goes on to talk about those statistics. It continues:

In addition, out-of-wedlock birthrates in each of these countries contradict the suggestion by social conservatives that gay marriage will lead to great increases in out-of-wedlock births and therefore less family stability for children. In Denmark, the percentage of out-of-wedlock births was 46% in 1989; now it is 45%. In Norway, out-of-wedlock births jumped from 14% in 1980 to 45% right before partnerships were adopted in 1993; now they stand at 51%, a much lower rate of increase than in the decade before same-sex unions.

To the senator who is leaving: that is what I would say on whether this undermines the institution of marriage. Shall I move on to the next question?

CHAIR—Yes.

Mr Irlam—That was about mandating private superannuation funds. We respect the opinion provided by ASFA with regard to the fact that there is a financial implication. However, I would also point out to the committee that this is not taking money that the person is not entitled to; this is money that they have put into their superannuation fund after many long years of hard work. The fact that they are in a same-sex relationship should not be a reason to discriminate against them. We have established that. We also should establish in this committee that the fact that they are in a same-sex relationship and we are recognising it now but the fund may not have financially catered for that should also not be a reason to discriminate against someone. I dare say that, if the statistics from ASFA are correct and it is 0.4 per cent of the population that is affected by this, recent trading on the stock exchange perhaps would have had a more detrimental effect financially on the overall defined benefits scheme than a handful of couples could.

Senator FEENEY—It might be useful to point out that ASFA in fact support the bill.

Mr Irlam—They do support the bill, but they are asking for government funding in order to enforce the bill, to make it mandatory. I do not agree with that position. I believe you should make it mandatory for private superannuation funds. I also support the position that they did not did not articulate very well, which was that public superannuation funds should also introduce an interdependency category.

I was asked about the disadvantage of not passing this bill in a timely manner. I am happy to present to the committee a letter that was sent to Dr Nelson, upon his announcement, that presented a case study of a gentleman who is a retired RAAF wing commander who now has—and I cannot be exact on this—24 per cent or 26 per cent heart capacity. He may not survive till September, when this bill goes through. However, I have

not sought to find an answer to such an insensitive question as whether anybody has passed away during the delay.

Senator BRANDIS—Mr Irlam, there was one thing you said in your opening statement—I hope I heard you correctly—when you were addressing the issue of interdependent relationships. I thought you said that your position was that they deserve equal treatment under federal law. Is that right?

Mr Irlam—We have no issue with equal treatment under federal law. However, we are concerned that the legislation would mandate equal treatment yet not seek to confirm whether those in an interdependent relationship would like that equal treatment.

Senator BRANDIS—That is a different question.

Mr Irlam—If it proves that, through investigation, through survey, through an independent inquiry, those individuals personally affected actually do seek this reform that has been fought for by the gay and lesbian lobby for a number of years then we would 100 per cent support it. But to impose rights and responsibilities such as removing individual income through social security et cetera is perhaps not what we support.

Senator BRANDIS—I understand that point, but let us get back to the fundamentals. We have had before us the HREOC people. You would have heard them, Mr Irlam, say that it is the wrong approach to treat the same-sex entitlements and that interdependent relationships deserve equal treatment—that that is a matter for another occasion, in effect. Acknowledging, as of course I do, that same-sex de facto relationships and dependency relationships may have different features, including primarily, as Mr Croome has pointed out, that one would ordinarily expect to find that a same-sex de facto relationships had conjugal features and one would not ordinarily expect to find other forms of interdependent relationship had that particular feature, I wonder if it is not a false issue here that, if you accept that different though they are, they deserve equal treatment, and allowing for the issue you quite properly raised about whether partners of codependent relationships want to be so treated, it does not sound to me that we have much of a disagreement at all.

Mr Croome—I am sorry, but I was not sure whether your question was addressed to me.

Senator BRANDIS—It was really addressed to Mr Irlam, but I am happy for any of the three witnesses to address it. Why don't we let Mr Irlam go first and then you come in next, Mr Croome.

Mr Croome—Certainly.

Mr Irlam—In 2004, when the private superannuation definition was brought in under the category of interdependence for same-sex couples as well as interdependent relationships, there was grave discomfort within the same-sex community about being recognised as a companion relationship—for the reasons that I have already stated and the fact that society does not equate them. For you to legislate that they are the same will not address the issue of society interpreting them as different, unless you are intending to spend a Work Choices style funding model to educate people about the similarities between them. So I question how we—

Senator FEENEY—That type of government advertising has now ceased.

Mr Irlam—I would like a little bit to educate the community on these reforms, however, Senator Feeney. Senator Brandis, I would just ask you to consider the social ramifications of the political solution that is being discussed here today.

Senator BRANDIS—I am primarily focused, as you know, Mr Irlam, because we have discussed this, on the social justice aspects of this. I cannot immediately see how, if we eliminate discrimination against gay people in relationships, which I believe we should and which is the announced intention of this bill—which was supported by the opposition in the House of Representatives, as you know—it diminishes the socially just outcome of such a course to extend it to other relationships which, in your words, deserve equal treatment under federal law, and allowing for the caveat that you have placed upon that observation.

Mr Irlam—I might defer to Mr Croome on this one.

Mr Croome—I would just like to reinforce what Corey was saying. There are social distinctions which are important to recognise and respect in law. For a very long time, same-sex partners often laboured under the label of being 'long-time companions' or 'just good friends', with a very strong feeling that that mischaracterised their relationship or that those kinds of terms were being directed at them in an attempt to diminish the conjugality in their relationship—to ignore it; to push it to one side. In the same way, as I said before, there will be some interdependent partners who will consider it inappropriate that they should be put in the same category as a conjugal partner. For example, two older women living together in a companionate relationship may not want to be considered lesbians.

It is very important that we distinguish here between treating relationships equally in the law and treating them the same. This is where I come back to the Tasmanian precedent. In the Tasmanian Relationships Act, we are able to treat relationships equally but to distinguish them along this line of conjugality. So we have 'significant relationships' and 'caring relationships', which, to all intents and purposes, except in the area of parenting, have the same entitlements but are distinguished in a way that provides the respect we need to provide them in law and socially.

At the risk of diverting the discussion, at this point I would also like to address the question of marriage that Senator Hanson-Young raised, because it is directly related to the point I was just making. Also in Tasmanian law there are terms—the ones I just described: significant relationship/partnership—in the same way as is currently being proposed in federal law, with a couple relationship. A range of different relationships come under that umbrella, including marriage. So traditional marital related terms—like husband, wife and spouse—have been removed from a whole variety of Tasmanian statutes and the term 'personal relationship' has been put in their place to cover and provide equal respect for all of the different relationships that I have just been talking about. That does not mean that the status of marriage is diminished or reduced in Tasmanian law or in Tasmanian society. People still get married in Tasmania at the same rate as before and marriage is still considered the important institution that it was prior to the enactment of that legislation in 2003. Having those umbrella terms—'personal relationship' in Tasmania; 'couple relationship' in federal law—is simply a way to provide equal respect to all relationships, regardless of their conjugality, regardless of their matrimonial qualities, but simply recognising that they are based on love and commitment and that is why they are important.

Mr Irlam—Could I also just add to that. It would be wise to consider that, if interdependency in 2004 were introduced but not taken up by a number of superannuation funds—and we heard here before that there will be an automatic take-up of the amendment to the terms 'spouse' or 'de facto partner' et cetera—there is a financial implication that I do not think is being considered or submitted to this hearing or this inquiry that should be investigated prior to acting on that.

Senator BRANDIS—Thank you. That is a fair point. I think we are very conscious of that, although we have not been favoured with the data by, for example, Treasury, who might be in the position to provide it to us. Mr Croome, do you think that the Tasmanian model, from the point of view of the interest whom you represent, works pretty well?

Mr Croome—I did not catch the end of that question.

Senator BRANDIS—I am asking whether, overall, you are quite satisfied with the operation of the Tasmanian model.

Mr Croome—Certainly, I am more than satisfied with the terminology that is used in order to provide respect and recognition for a wide diversity of relationships, if that is what you mean by 'the Tasmanian model'. Sometimes when people talk about the Tasmanian model they are referring to the relationship registry, which is characteristic of Tasmania. I am also quite pleased with that model. My only critique of the operation of that in Tasmania is that I feel it has been underpromoted—it has not really been promoted at all—so they are not the benefits of registering a relationship by the Tasmanian authority—

Senator BRANDIS—Do not worry about that. That is not a matter for us.

Mr Croome—In terms of the broad conceptual framework, yes, I think it is one that, as I said, conforms to the principles of choice and respect which Corey and I have been talking about.

Senator BRANDIS—I think the issue here is that there are two different aspects to this: one is about recognition and status and the other is about financial outcomes. As I interpret what both you, Mr Croome, and you, Mr Irlam, are saying to us, you do not have a problem with the financial treatment of interdependent relationships being equivalent to the financial treatment of same-sex de facto relationships but you want their different characteristics and status recognised and acknowledged.

Mr Croome—That is correct. It is a caveat, and I am sure Corey would agree—he has already said this—that there may be some areas, particularly financial entitlements, where it might be inappropriate to recognise interdependent relationships, particularly regarding social security.

Senator BRANDIS—Sure.

Mr Irlam—I will caveat just to say that, yes, we would recommend it but, as with the Tasmanian model, that there be two definitions underneath that umbrella term and not just two categories of criteria.

Senator PRATT—Just by way of clarification to the points that we have just been making, in meeting the test for 'interdependent' versus the test for 'couple relationship' it would surely seem illogical to have same-sex couples who meet the criteria of 'couple' to be forced to go into an 'interdependent' criteria when really the characteristics of their relationship have more in common with the definition of 'couple' as it pertains to heterosexuals. Would that be correct?

Mr Irlam—That would be correct. However, it is being proposed here that you could include opposite-sex de facto couples in with same-sex de facto couples and, regardless of gender, interdependency. I would draw the distinction and say that de facto couples in loving sexual relationships do have different characteristics and should not be imposed upon with regard to registered relationships—in the same way marriage is not—as to the need to live together, the need to necessarily have financial dependency on each other or the rather convoluted term of domestic care, which, as has previously been presented here, does not really have a definition. There is a clear understanding of de facto. It is an easy change to make. Apart from political convenience for some conservative members of parliament, I can see no reason why we would recommend doing so.

CHAIR—We do not have any other questions from the committee's point of view. Unless you have something you want to say to finish your presentation, we will adjourn this committee hearing.

Mr Morgan—If I may, I will briefly make a statement. Following on from what both Corey and Rodney have said, the purpose of my submission was to put forward a model that would achieve exactly the sorts of things that we have been talking about this afternoon. In other words, in respect of both the superannuation bill and the family law bill the Commonwealth must recognise that in Australia we now have these three independent categories of relationships—and another one, if we include interdependency. In other words, we have marriage, presumptive de facto, registered relationships and then interdependent relationships. There must be schemes put in place to recognise, where it is appropriate, all of these categories independently. That was the purpose of my submission, which puts forward a model by which this is achieved and it is also so in the alternative to include interdependency, although to include interdependency in all areas of Commonwealth law, and I am speaking slightly outside superannuation for a moment, would require a referral of power. But apart from that certainly there is already sufficient power to recognise marriage and de facto and registered relationships as free and independent. Even though we are now on the superannuation bill, I note this is a particular problem with the family law bill in the way that it treats registered relationships. This is just one of the factors to be taken as evidence of a de facto relationship. So, yes, the major point of my submission is to put forward a model in which respect for diversity is there and by which equal treatment of all of those can be achieved in a simple form but in an independent way that recognises the separate states of each.

CHAIR—That has sparked another question from Senator Pratt.

Senator PRATT—I want to ask the three of you about the extent to which these debates about the two bills that we have before us—and I note in the referral of the superannuation bill that the whole HREOC report in relation to 58 laws was also referred to this inquiry—will define and will need to be interpreted across a whole range of reforms that need to happen to address a wide range of other inequities that still need to be addressed within the law.

Mr Morgan—My response to that would be that that is exactly the purpose of the model that I put forward. It is a model that could be repeated in an omnibus fashion throughout all Commonwealth law. That would be the point of doing it. There is respect for diversity and ease in drafting. I believe the model that I put forward achieves that. So the same model should be copied under all of the reforms to all of the areas of Commonwealth law that currently discriminate.

Mr Irlam—I should point out to the Senate committee that the model that Wayne is talking about allows for reference to the term 'de facto' or whatever term is used plus adding or subtracting criteria from that standard. So with regard to superannuation, if there were one particular fund that required three years of living together but the standard norm required two years of living together that could be included in that model. I am happy to provide further details as the committee directs on that aspect if it so wishes.

My final point is that the Australian government was taken to the United Nations by Edward Young some years ago over this particular issue. If the committee decides to backdate this legislation, I would ask it to consider backdating it to the date of that finding rather than 1 July 2008. It would be disappointing to see Mr Young, the partner of a retired veteran, not being able to receive entitlements purely because we took too long to act on the issue even though we were directed by the United Nations to do so. Thank you for your time.

CHAIR—We will take those matters into consideration. Mr Morgan, Mr Croome and Mr Irlam, thank you for your submission and for making yourselves available to appear before the committee. I thank all of the other witnesses who have given evidence today. I declare this meeting of the Senate Standing Committee on Legal and Constitutional Affairs adjourned.

Committee adjourned at 5.10 pm