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STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008

THURSDAY, 7 AUGUST 2008

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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Thursday, 7 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, Farrell, Feeney, Fisher, Hanson-Young, Marshall and Trood

Terms of reference for the inquiry:

To inquire into and report on: Family Law Amendment (De Facto Financial Matters) Bill 2008

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Committee met at 11.00 am

ROHR, Ms Natascha Jane Ingrid, Member, Women's Legal Services Australia

YATES, Ms Heidi, Member, Women's Legal Services Australia

CHAIR (Senator Crossin)—We are now dealing with the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008. I welcome representatives from the Women's Legal Services Australia. You have lodged a submission with us, which for our purposes is No. 9. Before you provide us with a short opening statement, do you want to make any changes or amendments to that?

Ms Yates—No.

CHAIR—I invite you now to make a short statement, and then we will go to questioning.

Ms Yates—We would like to thank the committee for the opportunity to appear today. WLSA, Women's Legal Services Australia, is a national network of community legal centres that specialise in women's legal issues. As you may have noted, our submission focuses specifically on the way that this bill will affect women and children.

Ms Rohr—Women's Legal Services Australia welcomes this bill and strongly supports the proposed changes. When de facto relationships were first recognised for the purposes of property proceedings in the early 1980s the reform was driven by the need to protect the less powerful party in unmarried relationships, which was traditionally the woman, in circumstances where the reality of the couple's relationship involved mutual support, both financial and emotional. The typical example of this kind of case was where a woman who may well have wished to marry had lived with a man and perhaps raised children and been out of the workforce. On the breakdown of such a relationship it was necessary to refer to a presumptive model to recognise the functional nature of the relationship.

Since the introduction of state and territory de facto schemes more and more couples have entered into de facto relationships. All states now offer equal presumptive protection to opposite sex and same sex de facto couples and it is now appropriate to unify the way that de facto relationship property disputes are dealt with across Australia, and to afford parties in de facto relationships access to the Family Court. Particular reasons for this position include, firstly, access to the Family Court, which is a specialised forum. Since the time de facto property relationship rights were first introduced in state acts the Family Court has developed into a highly specialised forum to resolve family relationship disputes, and particular procedures including access to conciliation and mediation, and simplified procedures for consent orders, now make it a more appropriate court for de facto disputes than the generalist state courts are. In particular, de facto couples with children suffer an additional process burden in that at present they may be in the position of having to litigate in two courts at once if they have both parenting and property proceedings on foot.

A further major issue that leads us to support this bill is access to the superannuation splitting scheme for de facto couples. Superannuation has become an increasingly important asset and it is now often the most valuable asset for distribution. Women's Legal Services is aware of cases, for example, where couples rent long term where superannuation is in fact the only asset that is to be split on relationship breakdown, and we say that it is now appropriate that de facto couples have access to that scheme. This is particularly significant again for women, who statistically have less accumulated superannuation and may have been out of the workforce or in less well paid jobs for significant periods of time.

Ms Yates—A further reason why we support the bill is from a children's rights perspective. It is essential that when distributing property the court consider the future needs of the parties, specifically the resources required by the primary caregiver to housing care for the children after separation. As we all know, only some of the existing state and territory de facto schemes allow for consideration of future needs. Further, when it comes to spousal maintenance, the Family Law Act requires a party to financially maintain their ex-partner if that partner is unable to support themselves because they are caring for the children. We also submit that spousal maintenance orders can support a child's right to an adequate standard of living upon separation by providing the primary caregiver with additional income. At present a primary caregiver cannot access maintenance payments in some jurisdictions and in others can only receive such payments until the children become 12 years of age. Those are both really important reasons why we support the bill today.

As you might have noted in our submission, we propose two key amendments to the bill. The first amendment relates to the definition of 'de facto relationship' and the way that the bill recognises relationships that have been registered in states or territories. At present the bill provides that registration of the relationship is one of the factors that the court can take into account when determining whether or not a de facto

relationship exists. In contrast, as we have detailed in our submission, we submit that in the first instance registered relationships should be recognised as an independent third category of relationships rather than being subsumed back into the category of presumptive de facto relationships or, at the very least, that evidence of registration would be conclusive proof that the parties are in a de facto relationship. We also submit that this approach would promote certainty and simplicity and reduce the amount of precious court resources that would need to be dispensed in disputes about the nature of the relationship.

Ms Rohr—There is a second proposed amendment to the bill put on behalf of Women's Legal Services Australia. We submit that the new regime should be available by consent retrospectively to couples who separated before commencement but have not yet finalised their matter by an order in a state court. At first glance it might be hard to see why a more financial party to any de facto dispute would consent to the jurisdiction of the Family Court, given that the future needs component may provide increased rights to the less economically powerful party in some cases. However, we can see that there might be several reasons that they would do so and that it would be useful to some de facto partners to be able to access the family law regime retrospectively.

The first of those reasons is the availability of superannuation splitting in the Family Court, and we can see that there might be a situation where because of this there would be no need to sell or split other assets for a just and equitable outcome to be entered into. Another reason is reduced costs. Because of the greater expenses of proceedings in state courts, particularly if there are also parenting proceedings on foot, it may be preferable even for the more financially strong party to pay a future needs component to their former partner rather than a similar amount in additional legal fees to lawyers.

The third reason is access to mediation and conciliation processes, which again could create a net saving despite the different substantive provisions with respect to future needs. Finally, the advantage of accessing the Family Court for both parties, where parties agree; the process of obtaining consent orders in the Family Court is far simpler and cheaper than in most state courts. With access to a greater body of precedent couples might have a greater degree of certainty with respect to possible outcomes, which again could assist in negotiation when compared with the position in state courts around Australia.

Senator FEENEY—I want to take you to that part of your submission that goes to resource implications. We have heard in evidence and we have looked at the most recent Census data with respect to same sex de facto couples, and on the basis of that evidence we are advised that there are some 26,027 male same sex couples and 23,339 female same sex couples and, perhaps most pertinently, that some 3,486 Australian children live in same sex families. In the broader context of the Family Law Act and the amount of litigation that goes on in that jurisdiction that is a small number, and that is why I am interested in hearing more from you about the resource implications. I had essentially been operating under the working assumption that the resource implications were very marginal. I am interested in hearing more from you about why you believe that is not the case.

Ms Yates—In talking about the resource implications we are looking at not just same-sex but also opposite-sex de facto couples accessing the Family Court for property, and so that is a greater proportion of the population than those statistics we were just looking at.

Senator FEENEY—Yes, but that happens now, does it not?

Ms Rohr—In most states it does not. In all states, with the exception of Western Australia, opposite-sex de facto property litigation occurs in state courts, so effectively that litigation would be transferred to the Family Court.

Senator FEENEY—From the Supreme Court?

Ms Rohr—From the Supreme Court, the District Court or the local court in each of the states. In terms of resource implications, we assume the resourcing in the state courts would go down at the same rate that the resourcing in the Family Court would have to go up, but that should be taken into account when resourcing the Family Court for these matters.

Senator FEENEY—Is that principally derived from opposite sex de facto?

Ms Rohr—That is right.

Senator FEENEY—That is just as a sheer matter of statistics?

Ms Rohr—That is right.

Ms Yates—There are other considerations. In WLSA's experience, a large number of opposite sex de facto couples who are separating and looking at property settlements simply do not pursue proceedings in their local, state or Supreme Court because of the expense, the complication and the lack of certainty in terms of the limited precedents available. We are concerned that not only matters that are currently in state and Supreme Courts transfer across but perhaps an increased volume of cases will want to be using the Family Court processes, which are more efficient and which provide for mediation and conciliation. The volume overall across both courts will in fact increase.

Senator FEENEY—Do you have any modelling?

Ms Yates—No, I am afraid not.

Senator MARSHALL—I would like to ask about the spousal maintenance. Is this issue that you have raised with respect to some of the state legislation when people fall out of the Commonwealth jurisdiction in terms of child support? How big is this issue?

Ms Yates—We are looking at the difference between child support and spousal maintenance. Spousal maintenance tends to be dealt with in the same proceedings as property settlement, and so child support occurs on one hand and is based on the formula, of course. When we are looking at property settlement for either de facto or for married couples it is that question of whether or not in addition to the distribution of property it is appropriate for one partner to support the other in addition to any child support obligations that might be found in the application of the formula. The payment of child support and the amount of that is taken into account by both state and territory courts and the Family Court in looking at whether or not additional maintenance payments are appropriate.

Senator MARSHALL—In which states are you saying there is a problem? You stated that those in the care and control of such children cannot access maintenance payments from their ex-partner in three states.

Ms Yates—I understand that at present a primary caregiver cannot access maintenance payments from their ex-partner in South Australia, Queensland and Victoria, whilst in New South Wales and the ACT they are only available until the child reaches 12 years of age.

Senator HANSON-YOUNG—Thank you for your submission. Expedience and having a uniform process across the country will be helpful to everyone, but can you expand on why you think children in de facto relationships will benefit based on these changes? There is also talk about a lot of the criticisms of the bill as it appears at the moment, as we have heard from various witnesses over the last two days, in relation to the division of property but not the division of parenting responsibilities. Could you could touch on that as well?

Ms Rohr—Our submission is based on the bill and deals with the division of property. I understand that there have also been submissions on the definition of 'child' in terms of section 60H with respect to parenting. Our submission does not touch on that.

Senator HANSON-YOUNG—Do you have an opinion about that?

Ms Yates—We would defer to the more detailed submissions of people including Professor Millbank. We would generally support her submission on the grounds that, under the rights of the child, each child is ensured freedom from discrimination regardless of the marital status or sexual orientation of their parents.

Senator HANSON-YOUNG—Or gender?

Ms Rohr—Or gender. In section 60 a lot of the comments are about needing to make the language gender neutral.

Ms Yates—Certainly. We would support that submission generally and the detail of that submission on the basis that no child should suffer discrimination because of the gender of the parents.

Ms Rohr—In terms of the impacts on the children of their parents accessing the Family Court, where they could not before because they were in de facto relationships, we say that it is of benefit to all children for their parents to have access to justice in the most expedient and cost-effective way, and that there is a vast difference between proceedings in the Family Court and proceedings in most of the State Courts. The less money that is wasted on concurrent court hearings and more expensive Supreme Court proceedings the better.

Senator HANSON-YOUNG—Would you refute the claims from some of the other witnesses that we have heard from over the last week that this undermines marriage in some way, or the stability of marriage, and therefore children may be affected because if you have the same rights as parents in a de facto relationship

then what is the use of getting married? Tongue in cheek, that is pretty much what some of those submissions were referring to?

Ms Yates—WLSA's approach is one of practicality. We provide advice to women upon the breakdown of marriages and upon the breakdown of de facto relationships. What we are most concerned about is ensuring that the justice system that they access produces the most just and equitable outcome for those women and for their children. At present, the Family Court, as a specialist court, with particular ability to look at the future needs of the primary caregiver and their ability to care for the children, provides the most just and equitable outcome and therefore it would be most appropriate if both de facto and married couples could use that federal system. It also promotes consistency, simplicity of advice and I think amongst the community members a more consistent understanding of what their rights and obligations are.

Senator HANSON-YOUNG—Do you believe that, if we were to ensure that these changes were passed in the Senate, Australia would be upholding its obligations in relation to the Convention on the Rights of the Child?

Ms Yates—I would not go so far as to say that was absolute, but WLSA believes that the processes available in the Family Court do a better job of upholding the children's rights. We know that children's rights, particularly to an adequate standard of living, are at greater risk at the time of relationship separation when resources are split between two households, and we think that the ability to consider future needs as well as a more efficient process that results in less financial expenditure on court proceedings is in children's interests.

Senator BARNETT—Do you think the definition of 'de facto partners' as set out in the bill should cover interdependent relationships?

Ms Rohr—Women's Legal Services' experiences come from providing legal advice and representation to women following the breakdown of relationships, both in heterosexual and same sex relationships. We are not aware of any such need relating to interdependent relationships. We have not had any significant call from clients or from women accessing our service from interdependent relationships, and we are not aware of any social research that has called for that need to protect the interests of women or children.

Senator BRANDIS—Are you not against it?

Ms Rohr—We say that qualitatively it is likely that there are different issues arising from interdependent relationships and that we have no experience that would indicate there is any basis for legislative interference into the sphere of those relationships in the absence of social research or any call for legislation into that area.

Senator BRANDIS—Let us not get too caught up on social research. We need to consult our own consciences. What about the social justice issues associated with discriminating against people in interdependent relationships? Here the government is bringing forward a bill that in principle the opposition, subject to certain qualifications, supports, and in respect of which, if the Attorney-General is to be taken at his word, as I am sure he can be, is inspired by a desire to remove unjust discrimination against people in a certain category of relationships, that is, same sex partners. If we are going to do the socially just thing and remove discrimination against people in close relationships however defined, shouldn't people in all analogous relationships be treated on a non-discriminatory basis?

Ms Rohr—There are two questions there. One is whether those relationships are in fact analogous or whether they are qualitatively different.

Senator BRANDIS—I acknowledge that, yes.

Ms Rohr—The second point we would say is that, while it is certainly desirable to look into discrimination in all forums that it might occur, we would say that, when the law intervenes to cure discrimination, it should be done on a case-by-case basis in areas where people believe that there is a genuine discrimination.

Senator BRANDIS—I am sure that is true, but I would suggest to you that we should not dilly-dally in failing to address an issue simply because a particular witness may not be aware of social science research. There was certainly enough to inspire the Tasmanian and the ACT legislature when they turned their collective minds to this issue to think, 'If we are going to remove discrimination against same sex couples, why would we leave out in the cold other people who live in couple-like relationships that have this common feature, the same sex couples, that is, that they are permanent loving domestic relationships?' Leaving aside marriage, which everybody acknowledges has a special cultural and moral status, why would we privilege some permanent loving domestic relationships and discriminate against others?

Ms Yates—In relation to the Tasmanian and ACT scheme, they do recognise both interdependent and conjugal relationships. They do that in different ways. Of course in Tasmania you have the option of registering a caring relationship or a significant relationship. WLSA's position is not that interdependent relationships should be left out in the cold by any means but rather looking at how it can best address the discrimination faced by de facto couples and the discrimination faced by interdependent couples, and perhaps there would be different criteria for recognising those two types of relationships.

Senator BRANDIS—I agree with you. I think that is right, but surely the way to go about this is to identify the important signifiers and treat all relationships that answer to those important signifiers in a non-discriminatory way. For me, the phrase I have used, which is nothing more than my own, is to identify permanent loving domestic relationships between two people, which are not always sexual relationships, not always heterosexual relationships and not always homosexual relationships but have those three characteristics of being permanent loving domestic relationships. To me those are the core concepts here. If society does decide to deal with some relationships that answer to those characteristics, I cannot see why it is socially just not to deal with others. You are nodding. Does that mean that you agree with me?

Ms Yates—In the sense that WLSA supports the most flexible and broadest possible capacity for recognition of different types of relationships, both conjugal and caring relationships, whether people those to marry or choose not to marry, and recognises that you need to have legal remedies available in situations where the breakdown of those relationships is likely to result in inequity. Again, it comes back to the model that we use to ensure access to justice in each of those circumstances and whether we use one overarching category or different categories. The states, such as the ACT and Tasmania, have chosen to differentiate between those categories in some respects, between caring and other relationships. Broadly WLSA will support access to justice and most flexible recognition schemes for all types of relationships. In this case we have focussed our submissions on conjugal de facto relationships, both same sex and opposite sex, simply because that is where our expertise lies. In our experience the greatest need has come from those groups, but that would not stop us, of course, from supporting recognition of interdependent relationships.

Senator BRANDIS—We are very like minded. We were reminded yesterday by one of our witnesses of Aristotle's definition of 'justice' as being to treat like cases alike and different cases differently. If we were satisfied that the relevant core concept here was the existence of a permanent loving domestic relationship, albeit that such relationships might have a variety of other different features, but if that is the core concept then such relationships should be treated without discrimination, should they not, under my Aristotelian view?

Ms Rohr—It would be easier to answer that question on behalf of Women's Legal Services Australia if we were aware of any such need in the community. We did seek feedback across our national network on whether there had been any inquiries from clients for whom this interdependency category to which you refer would have been of assistance in accessing justice, and in fact we did not receive any responses that would indicate that that was the case. Apart from the hypothetical example of the spinster sisters, which I know gets passed around every time this issue is discussed, we are not actually aware of any cases in which it would have made a difference.

Senator BRANDIS—You have made it clear. That is a piece of empirical evidence, or non-evidence as it were, that has some relevance.

Ms Rohr—The fact that those cases are not known means that no feedback has been sought from those cases. It may be the case that the spinster sisters that are often used as an example would be horrified to know that their social security payments could be impacted upon by being considered interdependent.

Senator BRANDIS—We are conscious that this cuts both ways and there are ways to deal with that.

Ms Rohr—That is right.

Ms Yates—We agree in relation to the need to ensure that the broadest category of relationships, including interdependent, can access justice in appropriate ways.

Senator BARNETT—Senator Brandis has followed the line of questioning regarding interdependent relationships. I would like to ask you about a proposition that has been put to the committee that if people choose to live in a de facto relationship, and not a marriage relationship, the state or the government is presupposing that all those people, every single one of those people in those de facto relationships, wish to be considered as married couples for the purposes of this legislation, in terms of spousal maintenance, property matters, and so on. Do you think that is fair on all of those people? They have chosen not to enter a marriage

and have chosen to stay in a de facto relationship, but this law will treat them exactly the same? What do you think about that?

Ms Rohr—With due respect to Professor Parkinson, who I understand argues that relationships of this nature should be opt in rather than presumptive, our first position would be that this horse has already bolted, so to speak, and that in all states de facto relationships are in fact recognised presumptively, and that the future needs component, which is very similar to that in the Family Court are recognised now in Queensland, Tasmania and Western Australia, with some coverage in the ACT and South Australia.

Ms Yates—Perhaps it is essential in extending the Family Law Act to de facto couples that people do have that option of opting out through a binding financial agreement.

Senator BARNETT—That was my supplementary question. If you take the proposition you are putting that they should be treated in the same way as married couples, then if you are in a de facto relationship and you do not wish to be treated that way, is it your understanding that the legal process you would have to enter into would be some sort of agreement prior to entering into that de facto relationship where you would have it dealt with in a different way? Is that your understanding?

Ms Yates—Yes. Prior to or during the relationship at any time, if the partners reach an agreement about what they would have happen upon separation.

Senator BARNETT—Can you describe the nature of the agreement and how it would need to be consummated?

Ms Rohr—It is a binding financial agreement and it sets out the terms, including the intentions of the parties should their relationship break down. Certainly in the family law jurisdiction, and as far as I am aware in the New South Wales legislation, those agreements are available and need to be signed with a certificate of independent legal advice so that the parties enter into the agreement knowing what their legal rights are. That substance would not change if this bill were enacted, because it would simply be an agreement made in the family law regime rather than under the state regimes, as already occurs now.

Senator BARNETT—There is a requirement now, at least in some states, for a period/duration of three years or so of cohabitating together?

Ms Yates—Yes, as in the case of this bill, which provides for two years. It really reflects the majority of the state and territory de facto schemes in requiring that two-year time limit, unless there is a child of the relationship or one of the parties has made substantial contributions. Of course, the other thing is that parties are free, upon the breakdown of a relationship, to reach an agreement by consent about what needs to happen. If it was always the intention of both parties not to be subject or treated in the same way as a married couple, many couples reach an agreement on what they think is fair and just given their joint understandings of the nature of the relationship and the intentions of the parties coming in. Some of them choose to formalise that in a binding financial agreement and others have that mutual understanding and are able to reach an agreement based on that.

Senator BARNETT—Are you supportive of the definition of 'de facto'? It is obviously not as broad as what is in the evidence bill before this committee in another forum. I am not sure whether you heard the evidence earlier. Do you support the definition as it currently stands?

Ms Yates—We support the definition other than for the way it considers relationships that have been registered in state and territory registers. We believe that, in general, it is a just and fair way to assess whether or not someone is in a de facto relationship, registered relationships aside.

Senator BARNETT—When you talk about 'registered relationships', does that include marriage relationships?

Ms Yates—As we understand it, this part of the bill only deals currently with non-marriage relationships, so the parts of the act that currently refer to marriage relationships will remain.

Senator BARNETT—State and territory registers that you are referring to, some would say, are the registers in terms of significant relationship registers, as per Tasmania and the ACT. Is that what you are referring to?

Ms Yates—That is right.

CHAIR—Just following on from Senator Barnett, in your submission you are actually putting that if it is a registered de facto relationship that in itself should be substantial evidence and should stand alone, and so you would want the definition varied then to say married, registered de facto, de facto?

Ms Yates—Married, registered relationship, and de facto.

CHAIR—I understand.

Ms Yates—I am happy to talk to that a bit more if you would like to hear about our reasoning behind that.

CHAIR—It is in your submission. I just wanted to clarify what you would like to see the definition become if in our report we picked up that amendment, for example?

Senator FEENEY—I want to pursue the question of interdependent relationships. As I understand it, your evidence is that you are not aware of any such discrimination for such persons; am I characterising your evidence correctly?

Ms Rohr—We cannot say there is none. All we can say is that in general, as far as I am aware, we have very little or no experience.

Senator FEENEY—That is fair and reasonable. We have very little experience of it, too. There are no submissions from such persons before us. Are you aware of how the HREOC report treated the question of interdependency? It had a recommendation essentially asserting that interdependency should not be dealt with in this legislation?

Ms Yates—Yes. I am certainly aware that the recommendation with interdependence should be a separate category from de facto partners.

Senator FEENEY—Do you support that recommendation?

Ms Rohr—The experiences of our clients are that same sex and opposite sex de facto relationships have very much in common when it comes to the issues being dealt with on relationship breakdown. We have no experience of the problems that may occur on the breakdown of an interdependent relationship that would lead us to conclude that the issues were identical and should therefore be considered in the same category.

Senator FEENEY—Earlier I asked you about resource implications. I understand the government has announced as part of the train of this legislation the appointment of some four or five additional magistrates. Were you aware of that?

Ms Rohr—No.

Ms Yates—I am aware of that.

Senator BARNETT—Paragraph (5)(b) of the definition of 'de facto relationship' states:

… can exist even if one of the persons is legally married to someone else or in another de facto relationship.

That means you can be married and also in a de facto relationship. I asked you earlier whether you support the definition. Do you support that proposition and that analysis?

Ms Yates—That certainly reflects the practicality of the circumstances that our clients often find themselves in if partners have separated from their married spouse but have not yet gone through the divorce process. Perhaps over a period of several years up to 10 to 15 years if some parties have just never got around to divorcing but between when they separated from their marriage partner and when they come to us they may well have been in another long-term relationship where there have been substantial contributions made. Those cases are incredibly complex, because it could be that the first partner, the spouse, could make claims. It is outside of the two-year requirement; in cases of hardship they could be heard by the court as to a particular right to the individual's property.

Senator BARNETT—In talking about complexity, can you see the complexity that we are about to enter into if this definition is accepted, where you have a person in a marriage relationship, legally registered and so on, and then this proposition that has been put to us. Under the definition the way it is written, they can also be in a de facto relationships. The property and spousal maintenance issues arising from legally recognising both relationships must be profound.

Ms Yates—Complex as that might be I guess it reflects the reality of people's lives. At present when those situations arise it may be that they are caught in two proceedings, one in the Family Court and one in their local Supreme Court. The complexity of running two cases in that regard, compared with the current bill which provides for the court to take account of the circumstances of all the parties in one room, if you like,

with one set of documents means that there is a much higher likelihood of a fair and just outcome than the present situation where you might be looking at two sets of proceedings.

Senator BARNETT—Yes. The Marriage Act defines marriage as between a man and a woman exclusively entered into voluntarily for life. Many witnesses have put the view to us that it does undermine the current institution of marriage and the sanctity of marriage if you are legally recognising not only the person in a marriage relationship but that same person in a de facto relationship?

Senator FEENEY—That is the status quo now.

Ms Rohr—Yes, that is right. There is nothing preventing de facto relationship proceedings being brought in Supreme Courts when one of the parties was at the time of the de facto relationship still married. The difference will be a practical difference. It will be the difference that both proceedings can be heard in one court and perhaps even in one proceeding.

With respect to your second question about our views regarding undermining the concept and sanctity of marriage, Women's Legal Services Australia approaches these questions from a functional perspective and from the perspective of the interests of our clients, who are women and children, and as such it is a practical approach and not an approach that deals with that question.

Senator BARNETT—The institution of marriage is an important part of modern-day Australia and it is an important part of the family relationship. I think throughout the country people see it as special/unique, and it has been around for thousands of years, which provides an umbrella under which children grow, are nurtured and brought up. Let me ask you this as a final question: do you see the marriage relationship as a unique relationship and different from a de facto relationship?

Ms Yates—I guess we are dealing with the legal advice we provide to clients, so we are not in a place to comment on the personal or moral perspectives on which relationships are superior or special in some way to other relationships. What we are dealing with in our work is a question of what is a just and equitable outcome for partners upon relationship breakdown, whether that relationship be marriage or non-marriage.

Senator BARNETT—Are you telling me that the Women's Legal Services Australia does not have a view as to whether the marriage relationship is different from a de facto relationship? You have expressed a whole range of views this morning to the committee in putting forward an extensive submission on these matters and you are telling me that you do not know, and you cannot express a view, as to whether there is a difference between a marriage relationship and a de facto relationship, whether it is in law, socially, morally or in any respect.

Ms Rohr—Women's Legal Services Australia is a network of legal services. We deal with matters on a case-by-case basis. When we have inquiries about the legal rights and obligations of women and children, which we deal with, the perspective we come from is that we need to give legal advice and advocate legal reform that provides maximum justice for every single woman or child regardless of whether that child is the product of a married relationship or an unmarried relationship.

Senator BARNETT—So is the answer no?

CHAIR—Senator Barnett, you have had your last question and you have an answer.

Senator FEENEY—They do not make moral judgments.

CHAIR—Ms Rohr has provided you with an answer.

Senator BARNETT—I accept that the answer is no, and I take that on board.

CHAIR—No, you cannot accept the answer is no.

Senator BARNETT—That is my interpretation of the answer.

CHAIR—That is different.

Senator BARNETT—The record will be on the *Hansard*.

CHAIR—Senator Barnett, your interpretation is for you. The facts are that the answer no was not given. An explanation was given by the witnesses before us, and I will take from that that you have finished your questioning.

Senator BARNETT—The *Hansard* stands.

CHAIR—Do we have any other questions for these witnesses?

Senator FEENEY—No, thank you.

CHAIR—Thank you very much for making yourselves available this morning and also for your submission. The suggestions in your submission are most helpful.

[11.42 am]

DUGGAN, Mr Kym, Assistant Secretary, Family Law Branch, Attorney-General's Department

MEIBUSCH, Mr Peter, Principal Legal Officer, Attorney-General's Department

CHAIR—I welcome representatives from the Attorney-General's Department. Thank you for your time this morning. Do either of you have an opening statement or are you happy to go straight to questions?

Mr Duggan—We are happy to go straight to questions. We have a number of responses to questions we took on notice, which we can deal with now or later.

CHAIR—Perhaps we would deal with those now if you would like to.

Mr Duggan—In relation to the question put by Senator Brandis as to when the definition that is in the legislation was approved by the minister, that was in June of this year.

Senator BARNETT—The definition in the bill currently before us, the family law amendment bill?

Mr Duggan—Yes, that is right.

Senator BARNETT—Do you have a more specific date?

Mr Duggan—17 June. In relation to the question of when the government has made its position clear regarding encouragement of the states to enact relationship registers, I am advised that the Attorney wrote to his state counterparts in December of last year exhorting them in that regard, and I am also aware that on 30 April the Attorney made a number of press statements to that effect, that the government was encouraging states and territories to enact relationship register-type legislation.

Senator BARNETT—Can you give us some dates?

Mr Duggan—Yes, 30 April.

Senator BARNETT—If you have them there we would appreciate a copy.

Mr Duggan—I can certainly make a copy.

Senator BARNETT—What are the dates again?

Mr Duggan—The press announcements were 30 April.

Senator BARNETT—And the Attorney-General encouraging states to go down that track?

Mr Duggan—That is right. The other question was in relation to whether the definition either in this legislation or in the evidence legislation was the preferred current Commonwealth position. That is a matter on which we have had some discussion and we will put that matter to the Attorney and provide a formal response to the committee.

Senator FEENEY—Just to clarify that answer, are you referring there specifically to C and G in the indices?

Mr Duggan—There is also the issue of the genuine domestic basis of the relationship, which in our legislation is not in the—

Senator FEENEY—If I am right, the other criteria is the existence of a sexual relationship?

Mr Duggan—That is right; C was the sexual relationship.

Senator BARNETT—Just to expand on that, can you please repeat your answer?

Mr Duggan—As I understand the question from Senator Brandis or maybe from you, the question was which was the Commonwealth's preferred definition or which it was likely to be, and I am just indicating to you that this is a matter we think we should refer to the Attorney and we will seek his advice and respond to the committee.

Senator BARNETT—There were two parts to the question that we asked you on notice. One was the difference between the bill before us and the evidence, and the reasons for the difference, public policy or whatever reasons there were, and the second question I put to you was what definitions apply to other Commonwealth legislation. At the moment we have two. We have the Evidence Act, the family law de facto bill, and there are two difference definitions. My question was: what other Commonwealth legislation can you refer to that includes definitions of 'de facto relationships' and can you draw our attention to them so that we can compare the definitions, because then we might have three definitions?

Mr Duggan—To do a comprehensive list of that sort we would take the question on notice and get back to you very quickly. I understand the need for the committee to report soon. Certainly there are a number of bits of legislation that would have a range of definitions, and I just do not have the information comprehensively to hand within the timeframe. I will take that on notice and we will provide it.

Senator BARNETT—Thank you.

Mr Duggan—I appreciate the urgency of the matter.

Senator BARNETT—Can you answer the first question, which was the public policy reasons for C and G?

Mr Duggan—Yes, and we had some discussions about that previously, as you may recall. In relation to the reasons the issue relating to C is in there, our discussion was in relation to the referral legislation and the basis of that legislation. As you are probably aware, the Commonwealth's power in this regard rests entirely on the references of power from the states, and therefore it is necessary for our legislation to mirror as far as possible that legislation. That is the reason for the sexual part of it and the genuine domestic relationship part

Senator BARNETT—Just taking one thing at a time, the sexual relationship part is because the states have recommended to the Commonwealth that that clause be inserted in the definition and that be included? Is that correct and, if so, what was the Commonwealth's response to that?

Mr Duggan—No. The provision is based upon the referral legislation itself and what the states have actually sent to the Commonwealth and that is, for example, that a de facto relationship means a marriage-like relationship between two persons. We have sought legal advice, which is the discussion we had previously, as a result of what has actually been referred to the Commonwealth, and that is the reason we believe there is a need for that addition in relation to C, to make it very clear what it is that we are dealing with.

Senator BARNETT—I still do not follow this. I am sorry, but you say that it is because of what has been referred from the states to the Commonwealth, that you cannot change that and that you have no influence over that process and that what they refer is it? Is that your proposition?

Mr Duggan—In relation to this particular piece of legislation that has been referred, we cannot change that because it is a state piece of legislation. Whether the states choose at some future time to make further references to the Commonwealth of power is a matter for the states and territories.

Senator BARNETT—You have SCAG meetings.

Mr Duggan—Yes, indeed.

Senator BARNETT—Do these matters not get discussed and do you not have liaisons and ongoing meetings to work through these issues so that you come up with legislation that is in the best interests of the country?

Mr Duggan—Absolutely. This matter was before the Standing Committee of Attorneys-General for many years, and I indicated to the committee previously that it was a matter initiated by the previous Attorney-General, Daryl Williams. But the Commonwealth, when it comes to enact its legislation, works on the basis of what has been enacted by the states and territories, and I have explained to you that the legislation talks about the marriage-like relationship between two persons. Our advice is that the definition that we then enacted in the Commonwealth legislation is based upon the legal advice about what is encompassed in that definition.

Senator BRANDIS—I understand that. But are you not running two quite different things together? One is the reference of power from the states and the other is the desire for uniformity. It surely cannot be right to say that, if states refer power to the Commonwealth they are in a position to dictate to the Commonwealth every word of a definition provision. What they refer to the Commonwealth is a right to make laws in relation to a defined topic, do they not?

Mr Duggan—As I have indicated to you, the reference bill defines what the de facto relationship is that it is intended to cover. The New South Wales act states that this means a 'marriage-like relationship between two persons', and that is the basis upon which our definition is predicated.

Senator BRANDIS—You are telling us that your definition in the family law bill is based on the New South Wales definition in a domestic New South Wales statute?

Mr Duggan—It is based upon the extent of the Commonwealth constitutional power, which does not exist in—

Senator BRANDIS—We all understand that.

Mr Duggan—That is what I am saying. What we have to do is make the legislation as soundly and clearly based upon the reference as we can. We had this discussion previously. Our legal advice was that there was a need to reflect in the definition that we put in the legislation a definition that was as similar as possible to the definition that was put within the references of power acts.

Senator BRANDIS—In order to provide a constitutional basis for the Commonwealth law?

Mr Duggan—That is right.

Senator BRANDIS—Or for comity and consistency?

Mr Duggan—No, in order to give a strong basis constitutionally of Commonwealth law, which cannot exist except for the state references.

Senator BRANDIS—This is merely a definition provision which says that a court may have regard to certain specified matters not exclusively.

Mr Duggan—Yes.

Senator BRANDIS—I am still struggling to see how a state, in referring a power to the Commonwealth that the Commonwealth does not otherwise have under section 51, can be limited by the referring state to a non-exclusive definition in the state statute. Surely the non-exclusive definition in the state statute does not mark out the metes and bounds of the reference of power?

Mr Duggan—The definition in the referral bill, whether you regard it as exclusive or not, does not contain a list of factors. What it says is that it means a marriage-like relationship between two persons.

Senator BRANDIS—Are you reading from a document?

Mr Duggan—Yes, I am.

Senator BRANDIS—What document are you reading from?

Mr Duggan—I am reading from the Commonwealth Powers (De Facto Relationship) Act 2003 of New South Wales.

Senator BRANDIS—Is that the instrument that effects the reference of power?

Mr Duggan—That is right, yes.

Senator BRANDIS—Can you table that?

Mr Duggan—Yes.

Senator BRANDIS—I am sure we can get it from the library but it might be as convenient if you table it. Could you please read again the identification of the topic of the reference?

Mr Duggan—Do you mean the de facto relationship?

Senator BRANDIS—Yes.

Mr Duggan—It states that a 'de facto relationship means a marriage-like relationship (other than a legal marriage) between two persons.'

Senator BRANDIS—That is my whole point. That is what New South Wales has referred to you.

Mr Duggan—Yes, that is right.

Senator BRANDIS—That reference does not limit the Commonwealth to a particular definition, particularly in the case of a non-exclusive definition, of what a de facto relationship is. What that reference from New South Wales, and presumably from the other states as well, does is invest the Commonwealth with a power that previously inhered only in the state parliaments to make legislation in relation to marriage-like relationships. It does not tell the Commonwealth that you have to define marriage-like relationships in such and such a way, does it?

Mr Duggan—No, it does not specifically do that.

Senator BRANDIS—That is my point. The constitutional foundation of the treatment in the Family Law Act of de facto relationships is complete once the various states have passed acts in those terms, and the Commonwealth is then empowered in the exercise of its referred power to arrive at its own definition of what a marriage-like relationship is. I understand that it would wish for the purposes of comity to define those relationships much as they had been defined by the several states, but that is not a constitutional foundation of the Commonwealth's power to do so.

Mr Duggan—The Commonwealth is not able by definition to expand its powers beyond the powers that have been referred to it.

Senator BRANDIS—I accept that.

Mr Duggan—For example, we could not include in the definition of a 'de facto relationship', for example, interdependent relationships for that reason, because they are not marriage-like relationships.

Senator BRANDIS—To determine what has been referred to the Commonwealth you look at what in the act of the state parliament it says has been referred to the Commonwealth.

Mr Duggan—That is right.

Senator BRANDIS—That is what you have read to us.

Mr Duggan—That is right.

Senator BRANDIS—The state parliament has not referred a definition to the Commonwealth, it has referred a topic.

Mr Meibusch—That is right.

Mr Duggan—The class of persons, if you like, over which the Commonwealth now has power are those who are in a marriage-like relationship between two persons where they are not legally married.

Senator BRANDIS—Absolutely. I think we are in agreement with each other, but it seems to me necessarily to follow logically as well as being in fact correct in law that once that reference is made the Commonwealth is clothed with power to make laws in relation to marriage-like relationships and the Commonwealth is perfectly competent then to say in determining whether or not this is a marriage-like relationship the court may have regard to certain stated criteria. It is not limited by the state of New South Wales or any other referring state to say what those criteria are as long as they are comprehended by the broad genus of marriage-like relationship.

Mr Duggan—If your interpretation of my previous evidence was that I was suggesting that we were limited to what is in state de facto-type legislation, that was not my intention.

Senator BRANDIS—That is good. We are in agreement.

Mr Duggan—What we are limited to is the definition of 'de facto relationship' in the referring bill. Our advice is that the factors we have listed should reflect that definition to the maximum extent, and that is why paragraph C, for example, is in the definition.

Senator BRANDIS—This perhaps is where we do have a difference. I suggest to you that your advice would not say that the Commonwealth is legislating ultra vires unless it replicated identically the definition in the New South Wales bill.

Mr Duggan—Without wishing to expose the content of our legal advice and waive privilege in that regard, I would agree with the comment that the legal advice does not necessarily say that.

Senator BRANDIS—No, I am sure it does not.

Mr Duggan—But, if you like, the Commonwealth tends to proceed with us with utmost caution in relation to these areas.

Senator BRANDIS—I understand that perfectly. But it is one thing to say that for reasons of comity, abundant caution or good faith in dealings between governments you adopt a particular set of definitions that mirrors the New South Wales parliament's definition. It is quite a different thing to say that in order to effectuate the reference of constitutional power you have to do that, and it is the latter that you are not saying.

Mr Duggan—No, I am not. What I am saying is that our advice is that the definition that you have seen within the legislation now gives us the strongest link, if you like, constitutionally.

Senator BRANDIS—What I am saying to you is that within the reference of power that you have actually read from the New South Wales statute the Commonwealth has the capacity to define a marriage-like relationship as it sees fit, so long as it answers to the broad description of the reference. Test it this way. If New South Wales in its own state acts of parliament has certain criteria according to which the existence or non-existence of a de facto relationship is to be determined, and South Australia and Queensland have other criteria and so on, but each of the six state parliaments passed identical referring bills saying, 'We refer to the Commonwealth our power to make laws in relation to marriage-like relationships', then of course the

Commonwealth is going to have to have in its statute different terms from the statutes of the various state parliaments.

Mr Meibusch—I might also add one other point here. The state de facto relationships acts do define 'de facto relationship' in different terms.

Senator BRANDIS—I am guessing they do. I did not know that but I am assuming they would.

Mr Meibusch—A relevant consideration on this in relation to the differences between the evidence amendment bill definition in the de facto bill definition is not only paragraphs C and G of the section in the de facto bill but also the headwords, in that the test in the Evidence Act is that the person should have a relationship as a couple.

Senator BRANDIS—Which is itself, we have been told, not a defined term.

Mr Meibusch—That is correct. The de facto bill definition refers to parties having a relationship as a couple living together on a genuine domestic basis. Our advice was that to incorporate the words 'living together' would make it more likely to be held to be within a marriage-like relationship.

Senator BRANDIS—I have asked before for this advice to be tabled. Given that the states have all referred these powers and it is not controversial between the Commonwealth and the states, I cannot for the life of me see why the Attorney-General would wish to keep this legal advice concealed. Anyway, as I said before, that is a matter for him. I asked you before, Mr Duggan, in your earlier manifestation when you came back to speak to the family law bill, whether you would be able to provide those other details that I asked you about regarding the process of decision making.

CHAIR—We have done that.

Senator BRANDIS—I am sorry. I was late getting here.

CHAIR—My understanding is that you have finished following up the answers to questions you took on notice earlier; is that correct?

Mr Duggan—Yes.

Senator HANSON-YOUNG—I have a question in relation to a number of the concerns that have been raised by other witnesses over the past few days, and it is about the bill's approach to parenting presumptions for IVF children in subsection 60H. It has been suggested that gender neutral language be used. What is the department's view on that?

Mr Duggan—You are probably aware that section 90RB of our bill does make some amendments to subsection 60H, but in relation to the issue of parentage presumptions more generally the Commonwealth's position is that it is currently considering a request by state and territory ministers to consider amending subsection 60H of the Family Law Act to allow children of same sex relationships to be recognised as a child of the relationship for the purpose of the section. The words I am quoting are in fact from the SCAG communiqué in this regard. The Commonwealth is currently considering that request by the states and territories.

Senator HANSON-YOUNG—Would that deal with the criticisms and the concerns of various witnesses?

Mr Duggan—Yes, indeed. It is section 90RB of the legislation.

Senator HANSON-YOUNG—A number of witnesses were saying that was a back-door approach and that it would be better to amend subsection 60H up front so that we do not need to stick these other clauses in to amend something that is not right, anyway.

Mr Duggan—I have indicated the government's position on that. As I have said, the Attorney and the government are currently considering that issue as a result of the request by the states and territories.

Senator HANSON-YOUNG—I have two other brief questions. Concerns were raised by witnesses from the Women's Legal Service in terms of the workload that these amendments may impose on the Family Court. The EM refer to additional resources being provided. Can you clarify what that means and what the planning for that is?

Mr Duggan—Yes, and I think Senator Feeney has already alluded to that. The current government has confirmed the decision by the previous government that there will be four additional magistrates made available to the Federal Magistrates Court and one additional Family Court judge to deal with the additional workload.

Senator BRANDIS—Is that pending the publication of the Semple review?

Mr Duggan—The decision by cabinet is not dependent upon that. When magistrates are appointed, of course, it might well be a matter for consideration.

Senator HANSON-YOUNG—Are there any timeframes in terms of when those resources will come on board?

Mr Duggan—Not that I am aware of.

Senator HANSON-YOUNG—My last question relates to the states referring their powers to the Commonwealth. As a South Australian senator, can you let me know: if these amendments do not pass, where does that leave South Australia? And if they do I guess that deals with the problem, but where will we be in terms of accessing these rights?

Mr Duggan—If they do pass, at the moment South Australia is a non-referring state so the legislation would not apply in South Australia. My understanding of the situation is that the Attorney-General is still in discussion and consultation with the South Australian counterpart, but at the moment there is no referring legislation from South Australia.

Senator FEENEY—I would like to go back to the question of the reference of power. In terms of tracing the origin of C in the definitions, whether a sexual relationship exists, as I understand it because a sexual relationship is an attribute of a marriage you resolve that it would be an attribute of the marriage-like relationship, a de facto relationship, that you are seeking to define in the bill. Is that correct?

Mr Duggan—Yes.

Senator TROOD—You have drawn our attention to the New South Wales referral act. Is there reference in the same terms for those states that have referred?

Mr Duggan—Yes.

Senator TROOD—Is it in precisely the same terms?

Mr Duggan—I have not got them all in front of me. We have copies of them and we can provide them. My understanding is that, yes, they are in the same terms, because they are based upon a model bill drafted by the First Parliamentary Counsels Committee, which advises the Standing Committee of Attorneys-General. They drafted a suggested model. As I understand it, the four states that have referred have picked up that model.

Senator TROOD—I noticed this act is 2003. Are the other referring states' acts equally around that time?

Mr Duggan—Around 2004.

Mr Meibusch—Queensland referred power in 2003 as well, Victoria in 2004 and Tasmania in 2006. All state acts commence on proclamation, so it would require those acts to be proclaimed, before legislation introduced into the parliament implementing them can apply in those states.

Senator TROOD—I asked you when you were here in your earlier incarnation about section 4AA, and you presumably responded to that when I was not here. Were you able to provide the committee with some information about that particular section? The reason I asked you was that the definition of 'de facto relationship' was not in the evidence definition. It seems to be an addition. I would be interested to know why you think that adds to the definition or what the purpose of including that particular section is. On my reading it does not add a great deal to my understanding of the definition of a 'de facto relationship'.

Mr Duggan—I will just ensure that I have the right subsection. It is subsection 4 that you are referring to?

Senator TROOD—Yes.

Mr Duggan—That is the court determining whether a de facto relationship exists?

Senator TROOD—Yes. It seems to say, without too much parsing of it, essentially that there is a range of indicia, but the court can then consider other matters it might think relevant to determining whether or not there is a de facto relationship.

Mr Duggan—That is right.

Senator TROOD—Is that an ungenerous interpretation of its intent?

Mr Duggan—No, it is not ungenerous. That is a legitimate interpretation.

Senator BRANDIS—I would say it is an accurate interpretation.

Senator TROOD—Perhaps you could explain why you think that is a necessary dimension, because it seems to expand further the reference provided by at least the New South Wales government. It essentially seems to be saying that the New South Wales government has made a reference of power and as a result of that reference there is a need to determine a definition, and the drafters have come up with a definition and have felt so comfortable with the reference of power that they have been given that they can include a clause in the definition that actually says that the court can take out anything it likes in determining the nature of a de facto relationship.

Mr Duggan—Clearly the court would have to take into account matters that pertain to the de facto relationship and be guided by the provisions that are there in subsection (2) about the factors. Indeed, the provision is designed also to say to the court that, depending on the relationship, you give more weight to A or G or whatever it happens to be. For example, the provision is there to make it clear that in some circumstances a certain factor will be of more significance than another factor.

Senator TROOD—That is my understanding of the operation of the section, but I would have thought that has been accomplished by section 3 of the section.

Mr Duggan—That is simply indicating that if you have missed one out it does not mean that you have not got your relationship. The question here is that what you would give weight to in a particular circumstance depends upon the particular relationship that is before you.

Senator FEENEY—The court may exercise its discretion consistent with the legislation.

Mr Duggan—That is right.

Senator BRANDIS—It has to direct its mind to each of those matters.

Mr Duggan—That is right.

Senator BRANDIS—Your point is that it might ascribe a different weight to matters depending on the characteristics of the particular case before it.

Mr Duggan—That is right.

Senator BRANDIS—Is that what you are saying?

Mr Duggan—Yes, it is.

Senator TROOD—My anxiety in this whole discussion this morning is that the Commonwealth has, for the purposes of legislation, two different definitions of what is essentially the same institution, a de facto relationship, and that seems to be highly undesirable. It would be as equally undesirable as the Commonwealth holding two different definitions of the institution of marriage. My understanding is that in Commonwealth legislation there is a common definition of the nature of marriage. I am interested to know why the Commonwealth cannot reach a similar view on the definition of a de facto relationship?

Mr Duggan—With our discussion this morning we have outlined the reasons why the decisions are different. It is a matter for government as to whether those reasons are sufficient to have that then reflected in legislation. The sorts of reasons talked about particularly by my colleagues reviewing the evidence bill were issues of comity and issues related to the sorts of circumstances that their legislation might apply to. We have talked about issues relating to the extent of the references and issues of that sort. There is probably not much more I can say in relation to that.

Senator TROOD—I understand that. My summary of your position is that the Commonwealth, in responding to the references in both cases, has been hoist on its procedural petard, if you will, that is, it has reached a definition of 'de facto relationship' in relation to the particular references concerned, but nobody in the department has had the wit to realise that they are inconsistent or regarded that as being something of concern to the Commonwealth position on the issue.

Mr Duggan—I would take issue with the last statement.

Senator BRANDIS—Even I think that is a little unfair. It is not people in the department's fault. It is the Attorney-General's fault.

CHAIR—We have had numerous explanations today about why there is a difference in the definition.

Senator TROOD—I did not mean to reflect ill on the officers who are but servants of the government in this matter.

Mr Duggan—Indeed.

Senator TROOD—As a consequence of the Attorney's view on the matter, Senator Brandis is absolutely right.

Senator BRANDIS—I would like to sail to the defence of Mr Duggan, who I think has given a very manful and impressive attempt to defend a position that is logically untenable. What you have not told us is why we have inconsistent definitions of the same thing. What you have told us is how it came to be that we ended up where we were, which is no fault of yours.

Mr Duggan—In relation to the evidence bill, my colleagues very much explained at the end of their evidence the public policy reasons why their legislation may be regarded as having a broader definition than ours. They relate to the nature of the privilege being sought and the extent and nature of the relationship.

Senator BRANDIS—They did say that, but as Senator Trood has said, it makes as little sense to have inconsistent definitions of 'de facto relationship' as it would to have inconsistent definitions of 'marriage'. It is a nonsense. It is not your fault. It is the government's fault. In the form in which it now appears before this committee, it is a logical fiasco.

CHAIR—Mr Duggan, we have had explanations from your colleagues from other sections of A-G's, so that is a matter of your view, Senator Brandis, which may or may not be reflected in our report. Are there other questions from you, Senator Barnett?

Senator BARNETT—You mentioned earlier that the definition was promulgated on 17 June by the various Commonwealth officers. Is that correct?

Mr Duggan—No. I was asked when the decision was made by government in relation to that.

Senator BARNETT—That is what I am wanting to find out. Who made that decision?

Mr Duggan—The Attorney-General makes those decisions.

Senator BARNETT—Was it based on recommendations of the department?

Mr Duggan—The Attorney works on the basis of advice provided, yes.

Senator BARNETT—Did the department alert the Attorney-General to the different definition that is set out in the evidence bill?

Mr Duggan—There has been a range of briefing to the Attorney on a whole lot of these issues and the Attorney is aware of the difference, yes.

Senator BARNETT—The Attorney is aware of the difference but supported the definition as set out before us?

Mr Duggan—Yes.

Senator BARNETT—I would like to go to the same section in the entitlements bill and draw your attention to the different definition set out there for 'couple relationship'. Are you aware of that definition? It would seem that we now not only have two definitions but three definitions.

CHAIR—Are you in a capacity to be able to answer that question or should we leave that till those people from A-G's who are appearing before us this afternoon?

Mr Duggan—I am aware of the differences. I would prefer to leave that consideration. I will be here at that time.

Senator BARNETT—I am more than happy to delay it until that time, but let me ask you this: are you aware of the difference in that bill as well, and would you concur that there is a difference in that bill?

Mr Duggan—Yes, I think that is the reality. That is right; there is a difference.

Senator BARNETT—In fact, we have three different definitions?

Mr Duggan—It is done for a different purpose.

Senator BARNETT—Indeed. We will deal with that when we come to it this afternoon. I would like to ask your understanding of the referral from the other states, which Senator Trood touched on. Have you received confirmation from all the states that they will refer powers?

Mr Duggan—The current position, as I have outlined and my colleague has indicated, is that we have had four states that have passed legislation that is yet to be proclaimed—Queensland, New South Wales, Victoria and Tasmania. Western Australia has passed legislation of a limited nature, and refers powers in relation to superannuation only. The current legislation does not pick up that reference. The position with South Australia

is as I have outlined to you, that no legislation has been passed at the moment, but I understand discussions are continuing with the South Australian government.

Senator BARNETT—That is really what I am asking. Have those discussions confirmed, like in the case of South Australia, that they will refer powers consistent with the other states?

Mr Duggan—I am not aware of any public announcement being made by the South Australian government in that regard, and indeed we are not aware of any legislation being introduced, so I can take it no further than that.

Senator BARNETT—The point you made earlier is that you were looking for uniform legislation across the country. I am really trying to find out from you whether you are of the view that there will be a uniform approach in regard to these matters subsequent to this bill proceeding through the parliament?

Mr Duggan—To the extent that I can speak on behalf of the Attorney, it is legitimate to say the Attorney is hopeful of an outcome but that is as far as we could go. He is still discussing that with his South Australian colleague and obviously it is a matter for the South Australian government.

Senator BARNETT—We will have to wait for that. In terms of your understanding of the legal agreements that have to be entered into by various people in a de facto relationship, if they do not wish to be considered in the same way as people in a marriage or a marriage-like relationship, I would seek your response on whether they have to enter into a legal arrangement or some sort of legal agreement.

Mr Duggan—Indeed, the effect of the legislation would be that if you do not, excuse the expression, opt out by means of a binding financial agreement then the legislation, and provided your relationship fits the criteria otherwise that we have talked about, yes, it would be governed by this legislation.

Senator BARNETT—Finally, I would like to ask the question that I asked a witness who proceeded you. Do you accept that there is a difference between a marriage relationship and a de facto relationship?

Mr Duggan—The government's position is very clear on the importance of marriage, and the Attorney and the Prime Minister have made a number of statements in that regard. Clearly the government does regard marriage as a fundamental institution. Indeed, you may recall that is part of the difference between the Commonwealth government and the ACT government legislation. The current government's position is clear in relation to the importance of marriage in that regard.

Senator BARNETT—Notwithstanding the definition of 'de facto partners' in this bill and it being considered as a marriage-like relationship, you would have the view, which I presume is the government's view, that this bill does not actually undermine marriage or the institution of marriage? Is that your position?

Mr Duggan—That is certainly the government's position. They are separate things, the de facto relationship and the marriage relationship, in this legislation. It may be that they are treated in a very similar way, but they are separate things in the legislation.

Senator HANSON-YOUNG—I have one final question and it relates to whether a relationship is registered in any of the different states and territories. I assume that could be same sex or opposite sex relationships. Therefore, if it is registered, what is the department's response to that being used as conclusive evidence of the de facto relationship?

Mr Duggan—We have had a fair bit of discussion about the extent of the Commonwealth's powers in relation to what has been referred to the Commonwealth. When the legislation from the states, which I have referred to, was passed there was only one relationship register piece of legislation, which was in Tasmania. The relationships that can be registered under much of that legislation, our advice is, would include relationships that may not fit the common law definition of a 'de facto relationship'. They are in fact broader.

Senator HANSON-YOUNG—If it is registered?

Mr Duggan—That is right.

Senator BRANDIS—Is there a common law definition of a 'de facto relationship'?

Mr Duggan—We can have a discussion about that but, yes, there is.

Senator BRANDIS—I thought the reason we were going through all this agony over the statutory definition is because there was not a satisfactory common law definition.

Mr Duggan—As we have indicated, the factors are inclusive, not exclusive. In relation to your question, our advice is that the breadth of relationships that could be registered under state law means that they may be

relationships that would not otherwise be regarded as a de facto relationship, and therefore our power does not extend that far. What the Commonwealth has done, in its view, is to extend to registered relationships a recognition, to the extent that it can, firstly, by making that a factor, as we have discussed this morning. Secondly, as you are probably aware, there are effectively two hurdles for someone to get through before they get an order from the court. One is that they have a de facto relationship. The second is that they have either a de facto of two years, there are children of the marriage or unjust hardship, or there is a registered relationship. That is conclusive. Once you have got through the 'de facto definition', then a registered relationship is enough. Our advice is that the Commonwealth does not have the power to make a registered relationship determinative of there being a de facto relationship.

Senator HANSON-YOUNG—Just so that I am absolutely clear, a registered relationship in a state or territory, regardless of sexuality or anything else, would not be able to be used as conclusive proof as opposed to going under the definition for AA2G?

Mr Duggan—Yes, that is our advice.

Senator FEENEY—Can you give me an example of a relationship that might be registered but not fit the descriptor of a de facto relationship?

Mr Duggan—Indeed. Generally speaking, a definition of a 'de facto relationship' would usually relate to a relationship of some longevity. There is a question about how long it might be. If you look at the definition, for example, of a 'significant relationship' in Tasmania, it is possible that that could be a relatively short relationship that is then registered, and that is indeed the intention of the legislation, as I understand it. There would be a real question as to whether that relationship would necessarily satisfy, at the time it is registered, the definition. If, of course, it later does satisfy, then they are caught by the provisions, because they would go through the definition of 'de facto relationship' separately.

Senator FEENEY—So the efflux of time is more important than the registration?

Mr Duggan—In terms of what has been referred to the Commonwealth, that is right. For the referral of power in relation to this issue, that is another matter for government to consider.

Senator BARNETT—Does the same apply to caring relationships, say, in Tasmania?

Mr Duggan—That is right. We do not have power in relation to interdependent relationships.

Senator BARNETT—I would like to put this on notice for this afternoon when you come back.

CHAIR—Do you mean with the A-G's department?

Senator BARNETT—Yes, when the Attorney-General's department comes back. In comparing definitions, we have talked about the two bills, the evidence and the de facto bill. I wanted to draw your attention to the Parliamentary Contributory Superannuation Act 1948, which is one of those bills amended by the same sex entitlements bill before us and the definition of 'couple relationship' that results from that bill. I draw your attention to clause 4B, because I would like to alert you to the difference in that bill in the definition of a 'couple relationship' as compared with the differences in the two bills that we have been discussing this morning.

CHAIR—I thank you both for your attendance this morning, particularly Mr Duggan. It has been a difficult morning. We appreciate your time and your making yourself available to the committee.

Committee adjourned at 12.28 pm