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Proof Committee Hansard

SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL
AFFAIRS

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

TUESDAY, 5 AUGUST 2008

SYDNEY

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**SENATE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS**

Tuesday, 5 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 Brandis, Crossin, Feeney, Fisher, Hanson-Young, Marshall, Payne, 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

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Committee met at 9.08 am

CHAIR (Senator Crossin)—Thank you everybody and welcome. I declare open this meeting of the Senate Standing Committee on Legal and Constitutional Affairs. The committee is inquiring into 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. The submissions that are being considered today have been authorised for publication and are available on the committee’s 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. The committee prefers 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. I remind witnesses that if they object to answering a question they 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.

Before we start, I do want to officially welcome Senator Hanson-Young, Senator Pratt and Senator Feeney, not only to the Senate but also to their first meeting of the Senate’s legal and constitutional affairs committee. It is nice to have the three of you here. I just want to explain how the program will run today, for the benefit of both witnesses and senators. The first three sets of witnesses today are giving evidence in relation to both of the bills we are considering. At the end of the hearings, it is our intention for Hansard to produce a separate transcript in relation to each bill, so they need to be able to unravel exactly what we are saying today. So when we start I wanted to ask if you could speak briefly in relation to one bill and then we will have questions; and then, after that, we will go to the next bill. Of course, we need do that within the 45 minutes that we have.

Evidence was then taken on the Family Law Amendment (De Facto Same-Sex Relationship (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008—

[9.33 am]

GRAY, Ms Emily, Co-convenor, New South Wales Gay and Lesbian Rights Lobby

KASSISIEH, Mr Ghassan, Policy and Development Coordinator, New South Wales Gay and Lesbian Rights Lobby

CHAIR—Welcome. We will now take evidence on the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008. I invite you to make an opening statement.

Ms Gray—I would like to reiterate and thank the Senate Legal and Constitutional Affairs Committee for the opportunity to give an oral submission to the inquiry. For brevity we will refer to the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008 as the ‘super bill’. In our written submission we articulated in some depth our support for the bill. Briefly, we support the inclusion of same-sex couples as equal to de facto heterosexual couples. We support the current terminology used in the bill and express our strong reservations about recognising same-sex couples as interdependent couples, as was the practice in the 2004 superannuation reforms.

I will outline a few key points. In part 2 we outline our concern with the definition of ‘child’ as the product of a relationship. We feel that this concept is not sufficiently legally clear and may be both overinclusive and too restrictive for some families in our community. We recommend a model definition of child which reflects leading drafting practice in existence and involving parent-child definitions under existing law.

I am going to outline some key points in relation to this bill before we go to questions. The super bill replaces the term ‘marital relationship’ with ‘couple relationship’ and the terms ‘husband’ and ‘wife’ with ‘partner’. We fully support this legislative drafting, for the following reasons. The new terminology is clear and unambiguous. We would argue that the term ‘marital relationship’ is a misnomer as it actually includes unmarried heterosexual de facto couples. The term ‘couple relationship’ accurately reflects the class of relationship that the bill is trying to address, and that is de facto couples. Another reason relates to evidence of marriage. For example, a marriage certificate was simply one of the factors to consider in whether a relationship was a marital relationship. So even marriage, I suppose, was not legally conclusive in this case. The new terminology of ‘couple relationship’ is inclusive of all partners. Avoiding terms such as ‘marital’, ‘husband’ and ‘wife’ removes the possibility for discriminatory common-law interpretations to include same-sex partners.

We would also argue that the new terminology does not devalue any relationship, including marital relationships. The status of a relationship is not a legal issue but a social one on which reasonable minds differ. The aim of the drafting should be the clear and certain delineation of legal rights and not social judgement, approval or disapproval. Even if the law should condone a particular attitude towards some types of relationships, reasonable opinions differ on the social status of different types of relationships in Australia. Therefore, it is improper for the parliament to ignore the diversity of views held by the Australian people. It was clear from the last Australian census that 15 per cent of the population live in de facto relationships and that 71 per cent of Australians believe that same-sex couples should be afforded equivalent entitlements to those of heterosexual de facto couples.

We would argue there is also precedent in minimalist drafting. It ensures that past common law otherwise prevails for the interpretation of the provision, notwithstanding the minimal change to the potential for some same-gender partners. This ensures certainty for all Australians and not just same-sex partnered ones.

One of the key points that we would like to emphasise in this submission is in relation to interdependency. We do not believe, as is reflected in the *Same-sex: same entitlements* report by the Human Rights and Equal Opportunity Commission, that interdependency is at all a suitable model for recognising same-sex couples. There are a number of reasons for this. It is not about wanting special rights; it is about equal rights, about recognising our relationships as being the same as those of heterosexual de facto couples. Here we are not asking for marriage rights; we simply want to change the definitions of ‘de facto’ to make them gender neutral so that all relationships in the de facto category are recognised.

Some of the arguments that we would put forward to argue that interdependency is not appropriate, as are also reflected in the HREOC report, are as follows. Interdependency can place a much more onerous burden on couples to acquire rights, such as the demonstration of financial interdependency. Interdependency can mischaracterise a genuine same-sex couple as different or inferior to opposite-sex couples. We believe that it is not really appropriate to group loving, committed long-term relationships with, say, spinster sisters

relationships or carer relationships. We believe there are many instances in this country where the living situation of sister or carer relationships do need to be recognised and protected, but we think that is a whole other area of law that would need a whole separate inquiry. We do not think that we should be thrown in with that group of people and we do not think they would necessarily want to be thrown in with us either. Interdependency has uncertain legal boundaries and meanings. It may capture people who do not want to be recognised. It is also inconsistent with state and territory definitions of *de facto*. There has been quite a long history of *de facto* legislation in the various states and territories recognising same-sex couples, and we believe that it would be inefficient, costly and time consuming to introduce a whole other category of relationships for same-sex couples.

Mr Kassisieh—I will raise some key points as to our concerns over the definition of the product of a relationship as it relates to the definition of a child. Whilst we support the intention of the provision, which is to recognise the diversity of the families that children live in, we also highlight our concerns as to some of the clarity around the legal terminology. It is very new terminology. It is not existing in any other state or territory definitions or in federal definitions. In our submission we have highlighted our model definition of a child, which classifies easy cases first in separate tiers and uses existing leading practice for drafting in terms of children who are born through assisted reproductive technology and surrogacy. We also recommend that where appropriate there be a catch-all category based on existing definitions such as *in loco parentis*, in the place of a parent, or a child of the household. Where that is used will depend on the legislation itself. I suppose it is better to now open this up to questions. We are happy to elaborate.

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

Senator FISHER—I hear your arguments about interdependency in terms of couples themselves. I am interested in your recommendations about the definition of ‘child’. You have referred to the tiers that you have set out in your submission. I refer to the second last dot point on page 3 of your submission. You referred to this just then, Mr Kassisieh. It is the *in loco parentis* reference. Do you or do you not see consistency between your suggestion—that there should be inclusion of children who have a relationship, if you like, as being part of *in loco parentis*—and your recommendation in that respect and your recommendation about interdependency of couples themselves? I must say I see a potential inconsistency, so I want you to suggest that there is in fact consistency.

Mr Kassisieh—Absolutely. Take interdependency. If I can use an analogy, you do not delete marital and *de facto* relationships and lump them all into interdependency to capture the hard categories. In the same way you do not lump all the hard cases with all the easy to define cases. Why we have outlined *in loco parentis* as the last catch-all category is not to capture the cases that we can define, such as children born through assisted reproductive technology and through surrogacy, children that are adopted or children that are conceived through intercourse. What we put is that *in loco parentis* should be used where there is no other category to recognise that parent-child relationship and only in certain laws. So same-sex couples and their families will most likely fit under the first four categories that we recognise, so adoption where a legal adoption has been allowed; assisted reproductive technology through parentage presumptions; and surrogacy orders automatically being reflected on the basis of state and territory definitions. *In loco parentis* might apply, for example, in sick leave provisions guaranteeing the right for any person who cares for a child to take sick leave. But we also make a distinction between parents that are intended to be parents from birth, co-parents and step-parents and other people in the place of a parent who can be recognised functionally in various legislation where appropriate. But our definition uses separate tiers—

Senator FISHER—Thank you, but I interrupt there in the interests of time because I want to take you to a final point on the same issue. Listening to what you have said, however, I do not hear you discount the concerns that you have expressed in your submission about the inappropriateness of recognising couples through interdependency. For example, you list three dot points. You say interdependency can create a more onerous burden on couples to prove their relationship. Well, is it not arguable that it is the same in respect of children who are the subject of arguably an *in loco parentis* relationship? Your second concern is that interdependency has uncertain boundaries. Would it not be the case in respect of *in loco parentis*? There is interdependency creating ‘inconsistency’ with definitions—arguably the same in respect of that concern.

Ms Gray—I suppose the reason that we decided to put a submission in on the definition of ‘child’ as the product of a relationship was precisely because of that. We spoke to a number of academics, trying to make the definition less vague and make the boundaries a little clearer than ‘the product of a relationship’. By outlining a number of different categories, we believe that does achieve that. Certainly, when it comes to the definition

of a child, I do not think you are ever going to get something that has absolutely clear boundaries. Obviously, case law is going to have a lot to do with that but we believe that our various categories go a lot further than 'product of relationship' to make the boundaries clearer.

Mr Kassisieh—Can I also suggest the difference is that the catch-all category of *in loco parentis* is for those difficult cases. We do not think that same-sex couples are difficult cases because in many ways they are akin to heterosexual *de facto* couples. Why use a different terminology to define what we already know? They are partners—interdependent financial partners in some cases—they are also sexual partners and they live together in residence. All the same factors of a *de facto* relationship apply to same-sex couples as they do to heterosexual *de facto* couples. So they are more properly grouped with *de facto* heterosexual couples. We are not objecting to an interdependency category for other carer type relationships, but that would be the third tier and could apply to those similarly hard cases—the ones that you cannot define as easily, such as *in loco parentis*.

Senator PRATT—In relation to the discussion we have just had, could you highlight for us, in particular, the difference between how state laws are evolving with some consistent definitions that I suppose are parallel to the way heterosexual couples currently operate and issues that might have a broader, much more vague federal definition.

Ms Gray—Certainly in the majority of states and territories that have now recognised co-mothers, simply what has occurred has been the definition of *de facto* has become gender neutral. So, instead of saying a married or male *de facto* partner, that legislation now says a *de facto* partner which includes same sex and opposite sex. We believe that is the simplest way to reflect the nature of our relationships and also it is in the best interests of the child. If you have inconsistent definitions at state and federal level I think there is the potential for a lot more litigation.

Mr Kassisieh—It is slightly different at the federal level because there are very many *de facto* definitions across the laws as opposed to states and territories which tend to have one *de facto* definition which is cross-referenced in various acts. Either it is centrally located or, as in New South Wales, it is in one act and cross-referenced in other definitions to that one definition. The importance is that *de facto* has had a well-established legislative history and it has changed minimally in terms of the definition. It has changed initially from a man and a woman who lived together on a genuine domestic basis to simply two people who live together in a relationship as a couple. There is considerable common law now that has developed around that definition. We know exactly what it means to be in a *de facto* relationship as opposed to interdependency where we do not quite know what that means. What we had with, say, the private superannuation 'interdependency' definition were more onerous obligations so that you could sift through the variety of relationships. Of course that had government budgetary implications as well as who was and who was not entitled. So you had to go through more onerous obligations to, firstly, satisfy financial interdependency, personal interdependency and all these other factors which are not required in a *de facto* definition in the same way because we know what a couple looks like and they just have to satisfy that they are *de facto*—a slightly higher standard than that of just an ordinary couple.

Senator BRANDIS—I want to come back to this issue of interdependency relationships, but before I do let me get this clear: it is not part of your submission, is it, that we should fail to recognise the unique status of marriage? Your submission starts at the equivalency between a same-sex and a heterosexual *de facto* relationship.

Ms Gray—That is correct.

Senator BRANDIS—Okay, I just wanted to get that straight. With respect, it seems to me that when you say, as you do in the second dot point on page 7, that interdependency mischaracterises a genuine same-sex couple as different or inferior to a genuine opposite sex *de facto* or domestic relationship, it seems to me that that only follows if it is you who are saying that an interdependent relationship is an inferior category of relationship to a *de facto* either heterosexual or homosexual relationship. I challenge why that should necessarily be so. Let me give you an example, and invite you to respond. Let us say, for example, that you had a relationship between two lesbians—a *de facto* homosexual relationship which had the typical characteristics that answer the definition of a *de facto* relationship—and it went for several years and then it came to an end. And, by comparison, let us say you have the classic example of the two spinster sisters who are obviously not in a sexual relationship but nevertheless might live together as a household on a domestic basis and in a committed and loving family relationship for all of their lives. Why would you say that the second example I have given you is an inferior category of relationship to the first example I gave you?

Ms Gray—Certainly we are not trying to devalue the wonderful relationships between sisters, but we believe that a loving, romantic, committed relationship between two partners is different to that of two sisters.

Senator BRANDIS—Love means different things to different people, doesn't it.

Ms Gray—Sure, but we could provide the analogy of a man and a woman who have been living together for 30 years in the same house—they met each other in high school; they have been high school sweethearts. The relationship between the man and his female partner is very different to the relationship between the man and his brother, for example. It is a different kind of love, and we believe that the law and society should encourage long-term, stable relationships rather than trying to ignore the romantic and the unique, loving nature of two people who are in love.

Mr Kassisieh—I would add, to be fair to our submission, that we do say that we have no objection with recognising other important relationships—

Senator BRANDIS—Yes, you do; that is fair.

Mr Kassisieh—and that maybe there is a place for that. What we do have an objection to is saying de facto heterosexual couples are different to same-sex de facto couples and putting the latter in a carer category as opposed to where they probably belong, which is akin to heterosexual de facto couples.

Senator BRANDIS—What if they were bundled together in the same category—de facto heterosexual relationships, same-sex relationships and interdependency relationships of other kinds? Do you have an objection if all three of those subcategories were bundled together for the purposes of this legislation of equivalency?

Mr Kassisieh—On that basis, I would point you to our argument about the definition of a child. You do not put a vague, catch-all category to recognise people that you can define—

Senator BRANDIS—Yes, but that is a drafting issue. You could deal with that in the drafting, couldn't you? What is the in principle answer to my question?

Mr Kassisieh—Under the New South Wales legislation, for example, you have a domestic relationships category and under this domestic relationships category you have de facto relationships, which are defined, and close personal relationships, which also, in some parts of the legislation, you have recognition for.

Senator BRANDIS—And not prioritised.

Mr Kassisieh—In some cases, you do have a prioritisation only for de facto relationships. It is important to note that, where close personal or carer relationships have been recognised, they are in specific limited areas because—

Senator BRANDIS—Sure, I understand.

Mr Kassisieh—couples have not only rights but also responsibilities to one another. Our simple submission is that, where it comes to recognising same sex couples, it should be equally done with de facto couples across all laws, which implies obligations as well as rights. But close personal relationships need to be further investigated for the potential negative implications for these people as well. If you are going to recognise them, there is no problem with having separate tiers—which recognises each—and one umbrella term to recognise all those relationships but then also the ability to define, say, in social security that we only recognise de facto couples but not close personal relationships because that imposes negative financial obligations on a caring partner, for example. It is about getting the specificity of who we are talking about. You can use an umbrella term.

Senator BRANDIS—Let us put issues of definition to one side, because it is not beyond the wit of a good draftsman to do with these definitional and boundary line issues, and come back to the principle. I have a lot of sympathy for your point of view that a same-sex relationship should be treated on the same basis as an opposite sex de facto relationship. I do not have any difficulty with that. But what I am struggling to understand is why you seem to be resisting the notion that other types of permanent loving domestic relationships should not be treated with equivalency to both.

Ms Gray—I do not think anyone, including Graeme Innes, who is the Human Rights Commissioner, would advocate—

Senator BRANDIS—That is his opinion.

Ms Gray—that the nature of two sisters' relationship or two brothers' relationship is akin to the relationship between a de facto heterosexual couple or a de facto same-sex couple. The other issue, I suppose, is that—

Senator BRANDIS—But that is merely to say that the relationship has different features. That is all that says.

Mr Kassisieh—I highlight a report that we did in 1992, which led to the New South Wales reforms, where we were one of the first organisations to say we should recognise close personal relationships for the purposes of property division. In our situation, we had a lot of people who were caring for people who were very ill with HIV-AIDS. Families had deserted them at this stage. We were saying: ‘Why don’t you recognise these close personal relationships as well?’ We did get that recognition in New South Wales but that was for specific areas; it was not a catch-all. We do not say that these relationships are not important; we say that there may be good reasons to recognise them. But that needs a further inquiry into the implications for those people, both positive and negative. Where it has been done—say, in New South Wales—there have been a variety of acts where we have recognised a broader range of relationships and some where we have just recognised de facto and marital relationships because of the specific circumstances that come with those relationships. Generally, it is more likely that children will be looked after in those relationships as well. It is about the specificity of where you recognise them.

Senator BRANDIS—Thank you.

Ms Gray—Given the depth and breadth of the law that has developed in New South Wales and other states in recognising heterosexual de facto couples at a federal level, it would be a lot easier for the federal government to simply change the definitions of de facto relationships, rather than trying to bundle them all in together with this new catch-all term of ‘interdependency’. That would be another one of our arguments.

Senator HANSON-YOUNG—I understand your concerns and your objections about the use of the terminology of interdependency. My understanding of your concerns includes the onus of proving that and the difficulties of going through that, particularly if there is a conflict at the time. My response to Senator Brandis’s question would have been in relation to the difficulties of a catch-all system in proving that. Having said that, I assume that your concerns about the terminology would also follow through to privately funded superannuation as well. Could you just quickly elaborate a little bit on that? I know we are short of time.

Mr Kassisieh—The recommendation in our super bill submission is that, once these changes go through with our proposed definition of a child, that should be reflected in the legislation regulating private superannuation funds, which was reformed in 2004. As to whether or not you remove interdependency, we do not really have a position on that. It is something that needs its own inquiry. But same-sex couples should be included as spouses under the legislation as de facto partners.

Ms Gray—Given that both parties have now committed to removing financial and legal discrimination against same-sex couples, I suppose our final argument against interdependency would be that we do not want to introduce yet another two-tier system of relationship recognition and enshrine another category of discrimination under the law where we have one means by which to recognise same-sex couples and one means by which to recognise heterosexual couples. Given that, finally, we are at a stage in society where 71 per cent of the population do want to remove discrimination, we believe that we should remove it once and for all, rather than introduce yet another system of discrimination with this new category for one group of people.

Mr Kassisieh—I have read some of the submissions on the website, and one of the big issues seemed to be the replacement of the word ‘marital’ with the word ‘couple’. Various jurisdictions have taken different approaches to that in their drafting. We do not have a particular view on using the terms ‘marital’ or ‘couple’ relationship, or ‘marital’ or ‘de facto’ relationship, as long as same-sex couples are grouped with de facto heterosexuals. That might be of concern to a great number of people, but we have no real argument against using the word ‘marital’ or ‘couple’.

CHAIR—The states and territories seem to have evolved in recent times and are giving de facto couples the same rights as married couples, irrespective of the gender of those couples. Is that the kind of direction you think federal laws should take?

Ms Gray—Yes, absolutely. That is what we have consistently been advocating throughout our lobbying efforts at both state and federal levels.

Mr Kassisieh—That is the case at the federal level, except it is only for heterosexual de facto couples of parliamentary members with a life gold pass. That is about it.

Senator TROOD—I want to deal with the problem of the definition of a child—the product. You and other submitters—including Professor Parkinson, I noticed—have a similar view that this definition is not only inelegant; it is positively unhelpful. I am not clear on your solution to the problem, and I wonder whether you

could outline that. I notice you have a reference on page 10 of your submission. Is your solution alluded to in 2.3.1?

Mr Kassisieh—Yes, 2.3 as a whole outlines our solution. So 2.3.1 is one category of children: children born through sexual intercourse and adopted children. Basically, the definition of a child is in categories, with the ‘easy’ cases listed first: a child born to the couple and a child adopted by the couple is a child of that couple. Then you go on to the more difficult cases; but, nonetheless, they are cases of which we have previous examples in the law. If you did amend section 60H, for example, and you had a parented presumption which included a co-mother as well as a co-father in an assisted reproductive technology context, you would have a child that is recognised under that presumption.

Currently in the ACT, you can have a surrogacy parental order given to a parent who is intended to be a parent. This transfers the rights of the surrogate mother to the intended parents. We are saying that where that has happened, we recognise that that order also defines what a child is. The child who has an order issued on that basis is a child of that couple. The ACT is the only jurisdiction that currently has those schemes. Western Australia is, I believe, in the process of putting in a similar scheme. I note that the other states and territories are moving towards those schemes. In the interim, we also recognise the need to have a solution, and a parenting order for a child that has been born through surrogacy would then also bring them within the capsule of category (d) and category (e), which we highlight there. Surrogacy is covered under category (d) and (e).

Finally, in those special circumstances where you do need to recognise a whole range of other people who may be in the position of parents, then you have the catch-all category. But that may not be useful in some areas, say tax law, which has a much more specific definition of ‘child’. But it may be that a child of the household would be recognised under tax law, for example, as a child of that couple. It is about knowing what the purpose of the recognition is for and then adding those tiers for each of those definitions in every piece of legislation to reflect who you want to include, whether it is a broad familial model that includes any child in that household, any child in the care of a parent or the much more limited notion of a child—for example, children conceived through intercourse, children who are adopted, children born through assisted reproductive technology and surrogacy.

Ms Gray—We understand that Professor Jenni Millbank will also be appearing before this inquiry. We would defer to her expertise on this issue as well because she has had decades of experience on this issue. We have spoken to her a lot about this, but we would certainly defer to her expertise as to what she would consider an appropriate definition of ‘child’.

CHAIR—We are going to have to leave it there. Thank you very much for your time today and for your two submissions.

[10.06 am]

PARKINSON, Professor Patrick, Private capacity

CHAIR—Welcome. I begin by thanking you for being so accommodating with the arrangements in your appearing before us today. I think we shuffled you around a fair bit.

Prof. Parkinson—Everything worked out.

CHAIR—I do appreciate your cooperation in accommodating the needs of the committee. We have decided to try to produce a *Hansard* for each separate bill, so we will deal with them separately. Is there anything you wish to add about the capacity in which you appear?

Prof. Parkinson—I am a professor of law at the University of Sydney.

CHAIR—We have two submissions from you—submission Nos 6 and 14. Do you have any amendments or changes that you want to make before you begin?

Prof. Parkinson—No.

Evidence was then taken on the Family Law Amendment (De Facto Same-Sex Relationship (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008—

[10.23 am]

CHAIR—We will now move to the Same-Sex Relationship (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008. Professor Parkinson, do you want to make an opening statement or comments on that bill before we go to questions?

Prof. Parkinson—The superannuation bill creates two minefields—minefields which I do not think the government wants to walk through or the parliament wants to walk through. The first one is the definition of ‘couple relationship’. The barrier almost disappears and there becomes just one evidence of this higher-order thing called a ‘couple relationship’. There is no need for the government to go there; there is no need for the parliament to go there. It is perfectly appropriate and sensible to redraft this bill in terms of a ‘marital relationship’, which is marriage, and a ‘de facto relationship’, which is a same-sex or heterosexual relationship, with people living together in an intimate relationship. Those terms are widely understood; they are understood by the courts and they are understood by everybody. I just do not understand why—apart from saving a bit of ink on the statute books, as I said in my submission—we have gone to this definition of ‘couple relationship’, which has already caused such angst and such controversy, in a superannuation bill. The intent of this bill is perfectly appropriate and perfectly clear; it is to give equal rights to same-sex couples—and I support that.

The other minefield is this awful term ‘product of the relationship’, which it seems nobody is keen on. As I have suggested in the submission I have made, if you look at the purposes of this bill—what are we trying to do here?—you will see we are talking about superannuation rights for same-sex couples. You actually do not need to get into the definition of child for most of those purposes. Where the term ‘product of the relationship’ appears, it is just, in most situations, one form of evidence that they are in an intimate relationship. It may be an intimate relationship because they live together, because they share financially, because they are independent and so on. You do not need to define children for the purposes of the superannuation bill.

I looked at the Judges’ Pension Act closely and found that children are entitled to benefit from judges’ pensions whether or not they have a biological connection with the judge and quite rightly so, too. If the child was substantially dependent upon the judge, maybe as a stepchild, then they are within the definition. What I think has happened here is, if I may say so, some rather rushed and lazy drafting where we have just gone through the statute book using the same term ‘product of the relationship’ between them when, if we had thought a bit further about why it is we are trying to define children for the purpose of this bill, we would realise we did not need to do it at all. I cannot say that that is so across every part of superannuation law, but it would take about a week of somebody’s time to fix this bill and to avoid the minefield totally.

CHAIR—You are suggesting in your recommendation that the term ‘couple relationship’ be replaced with ‘marital or de facto relationship’ and that the definition of de facto relationship then include a reference to a same-sex relationship. Is that right?

Prof. Parkinson—Yes.

CHAIR—But in relation to the child being a product of the relationship, are you suggesting that the definition ‘born of the relationship’ should stay?

Prof. Parkinson—Yes, because the definition ‘born of the relationship’ exists in the current version of the legislation in its different forms. Again, it is just another form of evidence that they have lived together, they have a sexual relationship, they have children and so on. So ‘born of the relationship’ just refers to the natural way in which children are conceived. There is no need to change the existing law.

CHAIR—Yes, but are we talking about biologically born or are we talking about a result of a relationship, no matter what form that is?

Prof. Parkinson—Yes, the term ‘born of the relationship’, which must have been inserted into superannuation law many years ago, refers to the biological process by which children are born from a man and a woman having sexual intercourse. It is not meant to apply to and did not apply to artificial reproduction. My point is that in the superannuation bill you do not need to try to broaden that to encompass surrogacy arrangements or other forms of lesbian or gay couples’ children because it is simply not relevant for the purposes of the legislation.

CHAIR—I am not following you there. Why would it not be relevant? Isn’t the change in the definition to actually accommodate now different changes in the way in which children are produced, in terms of reproductive technology and such like?

Prof. Parkinson—I do not think that is so in this bill. There may be another omnibus bill which is being drafted which seeks to engage in that more radical social reform. This is a bill about superannuation.

Senator BRANDIS—We have been waiting a very long time for that omnibus to come down the road.

Prof. Parkinson—And I hope it will not come down hurriedly, because I think it needs a lot more thought, if I may say so. In all seriousness—

Senator BRANDIS—It has been promised for a long time.

CHAIR—It is having engine trouble.

Prof. Parkinson—I think there is this ad hoc approach. This is a superannuation bill in which Justice Michael Kirby’s partner, were he to die first, would, in my view, entirely properly be entitled to receive the pension benefits as if Justice Michael Kirby had been married in a heterosexual relationship. That seems to me entirely proper. We do not need to get into the definition of children in this bill, because children do not inherit pension rights across superannuation law; they do under the Judges’ Pension Act, as it happens, but they do so because they are substantially dependent upon the judge, irrespective of biological connection. In the Superannuation Act, it seems children do not automatically inherit pension rights and so we do not seem to need to go to the definition of children there either. I am urging that we seek to avoid the grand debates and focus a bit more workmanlike on what the bill is before us.

Senator FEENEY—To follow that up: in remaining silent in the superannuation bill, it is not your intention to recognise or endorse or not endorse or not recognise children or how those children came to be. You think that by remaining silent no-one’s rights are impinged or lost or changed.

Prof. Parkinson—Absolutely not. If you want to engage in a big debate about pension rights and children, that is fine. But I think we should look at step children because it is a bit bizarre to be promoting laws which may or may not encompass a co-parent or a lesbian relationship but not to include stepchildren. If we are going to have a big radical change in social policy let us look at the whole picture and not just the interests of one particular lobby group. What this bill will do by trying to include children is create enormous confusion as to what it is encompassing and what it is not, because the definition is poorly drafted.

Senator FEENEY—That is the essence, is it not, of your earlier point regarding couple relationships being better described as marital and de facto relationships. It is not your intent then to distinguish between heterosexual and same-sex de facto relationships.

Prof. Parkinson—Absolutely not. There is no reason in any body of law why you would not treat heterosexual and same-sex de facto relationships entirely the same. I cannot imagine any issue of social policy where you would need to distinguish between them and certainly not in the superannuation bill.

Senator BRANDIS—May I say that I very strongly agree with your observations about the importance of maintaining recognition as an independent category of marital relationships. I, like you, can but wonder why the drafting approach to this bill has been to homogenise marital relationships with de facto relationships, but

be that as it may. I would like to explore with you for a moment this issue of other close personal relationships or interdependent relationships. I think you were here in the room when the previous witnesses were addressing this topic. Can you speak to, and can you identify any difficulties with, introducing into this legislation or similar legislation that applies in other fields, a treatment of interdependent relationships—in the sense that we understand of permanent, domestic, loving and committed relationships which are not of a sexual character between two people like, for example, two spinster sisters—on an equivalent basis with de facto relationships, both heterosexual and homosexual? Is that a good idea and if you think it is not, can you tell me why?

Prof. Parkinson—Again, I think it is a question of looking at why we are wanting to treat them equally. In terms of property division, if you are treating two sisters as married, which would be the effect, and say that they have obligations to pay maintenance to one another you are creating obligations which, I think, bear no relationship to their expectations. There may well be property disputes between sisters but you would not want to use the marriage paradigm to apply to them.

Senator BRANDIS—To adopt your observations earlier in your evidence about respecting people's rights to choose, what if they elected to subject themselves to such a regime, for example, by deciding to register such a relationship so as to make a public declaration as to what their expectations in fact were.

Prof. Parkinson—If that is so, all well and good. But I want people to have an information leaflet that explains it. In terms of superannuation, if we want to broaden the definition of de facto relationships to close personal relationships then I think Mr Swan should be here because there would be all sorts of applications in terms of the budget, pension rights and superannuation rights going to an ever broader circle of people. That is the problem.

Senator BRANDIS—I appreciate that there are costs involved—perhaps very significant costs, and that is an important consideration—but I ask you to focus on the social policy dimensions of the question, please.

Prof. Parkinson—In terms of the social policy, we have to ask ourselves whether respecting people's different family circumstances and lives requires legislation—whether in some way the relationship between sisters or between a daughter and her elderly mother really requires government involvement left, right and centre in the asbestos compensation bill, the superannuation bill or the immigration bill for that matter. People have family relationships which they choose, which they enjoy and which they appreciate without help from the parliament in Canberra. If there are particular reasons why the parliament in Canberra wishes to recognise, endorse or acknowledge a relationship for, for example, family tax benefits, so be it. But I think we need to be very careful before we create a legal status out of relationships which have a different origin and cultural meaning.

Senator BRANDIS—Let me finish on this: with respect, it is not the end of the matter to say, 'Why would parliament recognise this?' Surely the question is: should the law recognise this? There is a body of equitable principle in particular which, in relation to the joint holding of property, already acknowledges that the coexistence of a long-standing domestic relationship between, say—let us use the example people have been throwing around—two spinster sisters, will of itself generate in relation to the holding of the property certain legal consequences. With respect, Professor, I do not think it is enough to say: 'Why should parliament get involved?'; the law already gets involved.

Prof. Parkinson—I absolutely agree, and I am very comfortable with that. On the situation with two spinster sisters, what we have is the law of property. We have a situation where there are legal rights at stake and maybe disputes about the contributions to those, and there are equitable principles resulting from social trust—all of which are entirely valid. What I am arguing against, with respect, is the attempt to create a grand picture of families by legislation which diminishes or washes out all the different contexts in which family life is recognised for different purposes.

Senator BRANDIS—I do not at all disagree with that. In fact, I agree that we should not have a uniform model. But it seems to me that once you accept, as you plainly do and must, that co-dependency relationships might themselves be legally consequential and alter the rights of the participants in a court of equity or a court of common law, it does not seem to me to be such a large step to go on then to say: given that these relationships are already legally consequential then they ought to be regulated by a slightly more transparent mechanism of legislation.

Prof. Parkinson—That may well be so. But what I think is really so important is that we have a comprehensive look at families across Australian life—look at the diversity, the reasons why we treat them the

same, the reasons why we treat them differently. What we have is a rudderless approach to family policy at the moment. It is only by serious work on these issues that I think we can solve the sorts of problems that you identified.

Senator BRANDIS—Thank you.

Senator HANSON-YOUNG—Just to clarify: in your responses to Senator Brandis you are not suggesting that same-sex couples, whether they are recognised or considered to be in de facto relationships, are therefore in the same category or should be in the same category as spinster sisters? You accept that there is a difference?

Prof. Parkinson—I think we have to look at what families mean in Brisbane, in Blacktown and in Bourke. We can be too driven by extreme interest groups on these issues. There is a very clear understanding of marriage in the Australian community, and I think there is a very clear understanding of de facto relationships in the Australian community, and people would accept that that includes same-sex relationships as well. Those are culturally understood meanings that we can enshrine in legislation. When we try to go too broadly we lose track of what the Australian people understand by the word ‘family’.

Senator TROOD—I have a question on this point on the child as a product of a relationship. You make the point in your submission that it is rather ugly, an observation I cannot help but agree with. Does this do harm to the social policy intent of the legislation?

Prof. Parkinson—I think it does do harm because, again, there is no consideration of the social implications of the recognition of children in same-sex relationships. As I pointed out, it is very difficult to recognise the product of a relationship between gay men without recognising surrogacy. If you recognise surrogacy, you are probably recognising commercial surrogacy in many situations. For 20 years, there has been a pretty uniform view across Australia that we do not want to give any endorsement to commercial surrogacy. Yet, once we start putting ‘product of the relationship’ across the legislation, we are normalising and legitimising something which I think needs a great deal more care, thought and discrimination.

Senator TROOD—That is an observation on the social implications of that legislation. I am also interested in whether or not you think it is going to have legal implications, in the sense that it might, for example, be particularly inclined to promote unnecessary litigation around the issue. Is that a concern you have?

Prof. Parkinson—It is a concern I have. I think the term ‘product of the relationship’ is so uncertain and so unclear—I have no idea what it means. I can only guess at it. I think we will find that we spend hundreds of thousands of dollars on legal fees trying to interpret what sorts of conception that applies to and what sorts of conception that does not apply to. It will be a legal quagmire, in my view.

Senator TROOD—That definition could be too narrow and it could be too broad, in your view.

Prof. Parkinson—It could be either.

Senator TROOD—Yes, that is what I am saying. It could be anything.

Prof. Parkinson—Yes.

Senator TROOD—If a definition were required in this legislation—and you raise the point that perhaps it is not—can you point us to a definition that you think might better serve as a foundation for a definition, rather than creating this completely new form of words and phrases?

Prof. Parkinson—Yes. Rather than trying to define ‘child’, I think we need to define ‘partner’ by simply saying—if it is the intention of parliament, and I have no argument with this—that, if a child is born to a lesbian couple where the co-parent has pension rights, the child should in some way benefit from that. If that is the intent then all one needs to define is ‘a partner of somebody who has a child’. We do not need to define ‘child’; we just need to define that partnership relationship, as the superannuation legislation already does. The other possibility, which is a little bit broader, is substantial dependency. In any situation where a child is substantially dependent on somebody, they are a child of the family. That would include stepchildren too. Clearly, that is so in the Judges’ Pension Act, but I would want the advice of those behind these bills to know whether that, as much as social policy, one wants to broaden rights to all of those children.

Senator TROOD—I can see the point you are making about social policy, but the point you are also making, as I understand it, is that we have a relatively clear understanding, as a consequence of common law, what the meaning of substantial dependency is. So, it would not be a difficult task to incorporate that definition into this legislation, if that were the intended social purpose.

Prof. Parkinson—Yes, I think that the first obligation of parliament is to be clear, and those would be clear.

Senator BRANDIS—And does that consideration apply equally to the children of a male homosexual couple—

Prof. Parkinson—Yes, I think it—

Senator BRANDIS—who were brought into the relationship through surrogacy? We need to ensure, it seems to me, in the case of two gay blokes in a permanent domestic relationship who decide, perhaps, as you say, through surrogacy, to raise a child or children, that the rights and interests of those children are protected as well. Does your proposal apply equally to that case?

Prof. Parkinson—Yes, it does, but it is a much broader one. The much more common situation would be that a gay man has had a heterosexual relationship—maybe a marriage—has two children of his own, comes out as gay and forms a gay relationship. The children, one of eight and one of 10, live with him and his new partner and for the next 10 years and they are brought up as children of that gay relationship. Substantial dependence incorporates those as well.

Senator BRANDIS—That is all we need to do?

Prof. Parkinson—I think it is all we need to do, if anything at all.

CHAIR—I have in front of me the Parliamentary Contributory Superannuation Act 1948, for example.

Prof. Parkinson—I am glad you have, Senator.

CHAIR—That has in it and defines ‘child’, which is very limiting. In this day and age, which is the reason for this legislation, that definition will be expanded once this act goes through. Are you saying that all of these pieces of legislation should have the definition of child deleted from them and that we do not need it?

Prof. Parkinson—No. I am saying that in the Judges’ Pensions Act, which I have looked at closely, you do not need it. I took one act to examine closely. You simply do not need it, because it already has children who are substantially dependent on the judge, whether or not there is any biological connection. In the parliamentary act one could simply say ‘any child of a relationship where they are partners.’ My point is that one would not have to redefine ‘child’. The intentions of parliament can be achieved much more clearly without getting into this social morass. I think it would be a wiser course.

Senator PRATT—Reproductive technology, where you have people who need to be recognised as parents because they did not donate the original gametes to create the child, has created the need to recognise parents in different ways. Provided those recognition procedures are applied equally irrespective of the gender of the parents, surely it should be quite easy to have a consistent set of laws that then recognise the child. What would you say to that? Clearly it is done in places like Western Australia already and there should be no reason for that not being reflected properly within federal law. The gender of the parents is substantially irrelevant.

Prof. Parkinson—That is certainly one social view, that it does not matter how children are conceived or what relationships they are born into we treat them all the same. I have a different view—that is, that we need to have a much more sophisticated debate about what forms of artificial reproduction we endorse as a society and what we do not. I think it would be shocking to endorse commercial surrogacy. That may have the implication that I am not keen on recognising the children who are the products of the relationships of gay men. It is not because I have anything against gay men; it is because I have something against surrogacy.

Senator PRATT—Probably on that point we agree, provided the recognition is consistent irrespective of the gender of the parents.

Prof. Parkinson—And if we go with a consistent definition we may have the effect of endorsing commercial surrogacy; that is my point. Gay men cannot have children who are a product of their relationship without a surrogate mother to give birth to that child.

Senator PRATT—But there are many heterosexual couples in that situation, probably more heterosexual couples than there are gay men. The gender is irrelevant to the premise of the question.

Senator PAYNE—I want to clarify Senator Pratt’s last point which is that, in the case you are making, Professor, the gender is not relevant. You are suggesting we come at this from a different direction, from the direction of the partner’s perspective not from the definition of the child in the rather clumsy way that you suggested is drafted here.

Prof. Parkinson—Yes.

Senator FEENEY—Or substantial dependency.

Senator PAYNE—That is right.

Prof. Parkinson—Those are two alternatives—

Senator PAYNE—There are two legs available.

Prof. Parkinson—both of which are quite simple. I think it would take about a week's work.

Senator PAYNE—I noted what you said about the potential for litigation in relation to the question of the product of a relationship and how that might go. I think it is an interesting point, and these two legs would provide an alternative approach.

CHAIR—Professor Parkinson, thank you for evidence today and for your two submissions. It is much appreciated.

Proceedings suspended from 10.50 pm to 11.07 pm

Evidence was then taken on the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008—

[11.24 am]

MILLBANK, Professor Jenni, Private capacity

CHAIR—Welcome. Professor, in what capacity are you appearing?

Prof. Millbank—I am a professor of law at the University of Technology Sydney. I am appearing in a private capacity.

CHAIR—You have lodged submissions Nos 5 and 8 with us. Do you need to amend those or make any changes to them?

Prof. Millbank—No.

CHAIR—For the purposes of the *Hansard* and our reporting requirements, we have decided to deal with each bill separately. We will now deal with the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill. Do you have any opening remarks that you want to make in relation to that legislation?

Prof. Millbank—Yes, I do. Again I want to affirm that the general principle of the broad approach is the right one. My concerns are with the detail here. Using this new definition of child as a product of a relationship is a mistake. On the issue of principle in how we define the parent-child relationship and the issue of consistency with state law and particularly with the operation of parentage presumptions through assisted conception we have a mismatch there. I do not think that is a huge problem in the super legislation because it is a big fuzzy definition that fits within an even bigger fuzzy definition. If you look at the definition of child under the super legislation, it is a shopping list. It is meant to be broad, it is meant to have very broad coverage. It is a much bigger problem if that definition is taken elsewhere.

As I have said, I think this reflects the fact that there has not been a real rethink of the parent-child relationship in federal law. If you look at the super legislation that is being amended, you have categories of child there that include ‘ward’ and ‘foster child’. They do not have definitions. I do not think ‘ward’ even has a legal meaning in Australian law anymore. Australian concepts of parentage in family law have developed radically in the last 10 to 15 years. The term now is ‘parental responsibility’. We have a sense in which parentage can be broken down to different components for different reasons, yet we do not find those terms translated across to other legislation.

When I did the audit for HREOC of federal legislation for their research report, I was quite surprised by the range of definitions of de facto relationship, of which I think there were about 10 or 11, and the range of non-definitions of child. ‘Child’ was used willy-nilly across all these pieces of legislation, never with a definition but often with provisos or ‘includes’. So it would be “‘child’ includes ex-nuptial child’ or “‘child’ includes adopted child’. I would say that, in this day and age, legislation that does not say ‘includes ex-nuptial child’ would of course be taken, as a matter of interpretation, to include an ex-nuptial child. There is no way that you would exclude a child now because they were born outside of marriage. But it shows you how long ago most of that legislation was drafted and how, instead of defining a conceptual basis for the parent-child relationship, with different categories, different things have just been tossed in at different times. So ‘child’ includes a dependent child, an ex-nuptial child, a child for whom the person has legal responsibility as a legal guardian, a ward. None of those terms have any meaning anymore.

I think it is worth taking a step back. I am not saying that we should have a 20-year law reform inquiry. I think we could have a very quick and dirty audit of federal legislation and a simple conceptual basis of the parent-child relationship that is put into either the Family Law Act or the Acts Interpretation Act and then mirrored out to all the other acts. So every other act could say that ‘parent’ or ‘child’ means the definition in the Family Law Act or the Acts Interpretation Act. I think it is time we did that. I do not think it is that hard a thing to do. That is what I would like to see come out of some of this process, rather than this kind of ad hoc approach of: ‘Oops, we’ve got this problem. We’ve got some people who are left out. Let’s toss in another thing.’

‘Product of a relationship’ seems to me to be tossing in another thing that has not been conceptually thought through. My difficulties with it are that, while it may work for the situation it is used in, it may not. It seems to me to be a repetition of what we did with ‘interdependency’ 10 or 15 years ago—tossing out a very broad, nebulous category instead of creating a very simple category for the people you mean to cover and then adding on a discretion or adding on a functional definition for households or for other categories that are not covered.

I think the concern here is that the definition is trying to do too many things while pretending it is not doing very much and that the ensuing confusion and uncertainty will deprive the people of their rights rather than grant them rights, because they will come before trustees who will say, 'We don't know what this means,' as they did with the interdependency definition, and also people will not actually know that they are covered, whereas having a uniform, simple definition that is implemented in federal law would mean that people knew that they were a parent in federal law and in state law. Being a parent in six acts and not in 112 probably does not help you.

Senator BRANDIS—Professor, if I may say so, I think there is a lot of wisdom in what you say about needing to reconceptualise the definition of 'child of the relationship'. It seems to me you are really saying that rather than dreaming up and narrowly defining new categories the legislation should aim to be more generic. Is that essentially your approach?

Prof. Millbank—Yes. If I may, I would build on that to say that you can use the principles that exist in the parentage presumptions and work from there. You have a clear, inclusive category of parent that builds on the core unit, which is the birth mother and child. Birth mothers of children are their mothers, whether or not they have a genetic connection, because they have carried that pregnancy and had the child, so we start with her as the primary parent. We add on her partner who has consented to the conception, whether or not they are a genetic parent, because they decided to have a child together, they were part of it, they wanted that child—so it is intention—and then after the child is born they will be the functional family unit. It does not work for absolutely everybody but it works for almost everybody. Then we build on from that core unit.

There is an exception, and that is surrogacy. Here, surrogacy has been tossed in with assisted conception families, when in fact the legal parentage presumptions of surrogacy and assisted conception families go in opposite directions. Under all state and territory law in Australia, the commissioning parents, even if they are both the genetic parents of that child in a surrogacy arrangement, are not the legal parents. The reason is that we prioritise the birth mother. If we have a process to transfer parentage to the commissioning parents—and I think an increasing number of people would say we should, and I think we should—that process of transfer of parentage has to be one that is formal and orderly, that protects the child's best interests and protects the informed consent of the birth mother. The ACT has a process like that. Western Australia, South Australia and Victoria are all contemplating it; they are at different stages in the process. But we do not just reverse the parentage presumptions and say, 'For this purpose you're going to be the parents and you're not,' without making a decision and having safeguards around how we are going to change the parentage of that child.

In legislation like this I would say you would have a clear, inclusive category, a system for the transfer of surrogacy that is anchored in state law and mirrored in federal law. Then, if you are worried about how long it is going to take—because, let's face it, law reform takes a long time, especially when state and federal attorneys-general have to agree—in the meantime you have an additional functional category such as 'child of the household' or 'in loco parentis' or 'child who is economically dependent on the adult' for whatever purpose you need it. Things like workers' compensation and superannuation legislation have always had those kinds of 'child of the household' approaches where it is not just about a narrow definition of parent. But you do not throw away the definition of parent; you add to it. You have a clear, bright, inclusive category, you have an exception for surrogacy with all the safeguards that entails and then you have a 'child of the household' or 'functional family' definition that you use in limited, purposive circumstances where the legislation requires that to happen—and I think this is such a piece of legislation. But at the moment you have a list of 12 different kinds of child.

Senator BRANDIS—I will take up one phrase that you used a couple of times in that very helpful answer. What you are talking about is identifying the sovereign concept here: a child who is a member of a functional family unit.

Prof. Millbank—Yes.

Senator BRANDIS—That is the idea, isn't it? It is essentially the same, if I have understood him correctly, as Professor Parkinson's proposition that a child who is a dependant of a particular relationship is treated as a child of the relationship however and by what means it comes to pass that the child does become a dependent member of that household.

Prof. Millbank—Yes. I am a big advocate of functional family categories but I think they need to be in addition to rather than instead of formal categories that are inclusive. I am concerned that the product of the relationship definition is instead of rather than in addition to.

Senator BRANDIS—But, going back to your earlier answer, if we are looking for more generic categories rather than more narrowly segmented categories, then what is wrong with saying a child is a child for the purposes of this act if it is a child dependent upon the two parties to the relationship?

Prof. Millbank—Because there are real benefits to categories, even when they are narrow and even when they do not work for everyone. We have legal categories because they stand as signifiers that mean that we do not have to prove stuff. Including marriage or de facto relationship means that you do not have to prove that you are economically dependent upon someone that you have lived with for X amount of time.

Senator BRANDIS—I see. So, from a structural point of view, do I understand you to be saying that there should be a generic definition at the time and that should include but not be limited to more specific categories?

Prof. Millbank—I would say ‘and’. If you look at, for instance, family provision legislation in New South Wales, you have spouse, child and then you have dependant. ‘Dependant’ can include blah, blah and blah. The functional category is really important, particularly with this kind of legislation. But it is in addition to rather than instead of formal categories.

Senator BRANDIS—Thank you.

Senator HANSON-YOUNG—Can you clarify where that leaves adoptive children? In particular, I am thinking about same-sex couples who adopt as opposed to going down the surrogacy route.

Prof. Millbank—I would argue that your formal definition of ‘parent’ should definitely include adopted children as one of the categories of child.

Senator PRATT—Just to be clear, what you are outlining is that same-sex parents do not require any special recognition; the way that same-sex parents are recognised is consistent with the way that parents are recognised universally.

Prof. Millbank—Absolutely. If you look at lesbian families having children, fitting them into existing categories of the parenting presumptions that were devised around heterosexual couples works completely, because the same factors are present. It is about intention, consent and giving care to the child as a joint family unit afterwards. HREOC and I have disagreed a little about this. They favour the ‘product of the relationship’ category because they are concerned about the coverage of gay men who have children through surrogacy. I want to make it clear that I do not want to exclude gay men who have children through surrogacy, but there are issues with how they have children. The issues around consent and so on are the very same issues that heterosexual families who have children through surrogacy have, and that should be reformed through the reform of surrogacy law. You are quite right that the issues are very similar and should be dealt with across the board rather than through ad hoc messing with the existing presumptions.

Senator TROOD—Your submission refers to the trends in other jurisdictions. I see that you have an article on that subject, which I sadly have not had the opportunity to read. Is the approach there to have this generic definition that you have referred to—and which I am attracted to as a way of addressing the complexity in all of this legislation—or do these jurisdictions tend to have piecemeal amendments that adopt different kinds of approaches?

Prof. Millbank—The trend to which I am referring is the trend to alter parentage presumptions to specifically cover the female partner of a woman who has a child through assisted conception to make her a legal parent, for all purposes, from birth automatically. It is a formal category and it is of universal application. This is something that has only come about recently. Western Australia was the first jurisdiction to do it in Australia. Internationally, the trend prior to the 1990s and even up to the mid-1990s was for second parent adoptions. Many people argued that that was not the correct process. When a child was born into relationship, it led to uncertainty and lots of families not being covered because they could not afford adoption or did not know that they could do it. It led to the idea of process burdens for particular families. Before Australia, New Zealand pioneered the idea of using the existing parentage regimes for ART children and apply them in a gender neutral way. That is the trend that I am referring to in my submission. The UK passed their amendments to do that just a couple of months ago. In Canada, it has happened through constitutional equality litigation in the various provinces as women have literally sued to be put on the birth register of their children. The same thing has happened in South Africa. New Zealand, Australia and the UK are very similar in the sense that we have done it through legislation, but it has not been piecemeal. It has been going to the absolute core of the issue and making it of universal application.

Senator TROOD—And that is true across all of these jurisdictions?

Prof. Millbank—Yes.

Senator MARSHALL—I was not here for all of your presentation and I apologise for that. I wanted to follow up on what you introduced as consensual conception. I understand the point that you are trying to make. What happens 10 years down the track when what may have been taken as consent at the time is then disputed? How do you establish what is consensual conception?

Prof. Millbank—That is one of the very reasons why you need to have cooperation with the states, because they have birth registers. People are put on the birth register and at that point it is recorded formally. The super legislation at the moment does not have a requirement of consent and nor does it have a point in time for determining whether a child is the produce of a relationship. The state acts all do, and there has been litigation under those various provisions where people have broken up. For example, embryos have been created and then the couple have broken up and the woman has wanted to use them later. There has been a family law case where the couple were fighting and he said, ‘I don’t really think we should go through with this,’ and then she went off to the clinic and conceived with him having said that he did not think it was a good idea. The courts have dealt with those situations and have made rulings about that.

That existing body of law is really helpful and should be built upon. This new definition does not reflect those acts and therefore cannot get the benefit from the fact that courts have grappled with this previously and said, for example, that the point in time for donor insemination is the conception attempt and the point in time for IVF is implantation of the embryo not any earlier point. They have handled that and they have built up rules around what can be used to establish that consent. Likewise, the birth registers have established their rules for consent. With many of the states setting up assisted conception registers of genetic parentage, they will also have a record if there are different genetic parents as well. All of those things have been put in place arduously over the last 20 to 25 years. It would be such a waste not to build on them.

CHAIR—Professor Millbank, we do not have any other questions. Thank you very much for your evidence. It has been most useful. Thank you for your time this morning.

[11.43 am]

POULOS, Reverend Elenie, National Director, Uniting Justice Australia, Uniting Church National Assembly

CHAIR—Reverend Poulos, welcome. Thank you very much for attending our inquiry today and coming before the Senate Standing Committee on Legal and Constitutional Affairs. Unlike with our previous three witnesses, we are just concentrating now on the legislation dealing with the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008. You have lodged submission No. 6 with us. Before I invite you to make an opening statement, do you need to change or alter that submission at all?

Rev. Poulos—No.

CHAIR—Please make a short opening statement and provide us with some comments. Then we will go to questioning. Thank you.

Rev. Poulos—Thank you very much for the opportunity to speak to you today on behalf of Uniting Justice Australia. Uniting Justice Australia is the national justice policy and advocacy agency of the Uniting Church in Australia. Its work is grounded in the church's understanding of the Christian call for peace and justice. We believe that, just as Jesus challenged social and religious systems and structures which excluded, marginalised and oppressed people in his society, so we are called to do the same.

The Uniting Church in Australia has a proud history in this regard. In its first public statement, made on the occasion of its inauguration in 1977, the Uniting Church declared that it would 'oppose all forms of discrimination which infringe basic rights and freedoms'. We believe that every human being is precious before God and that, as individuals and as a society, we have a responsibility to ensure that all people are treated with dignity and respect. Through our services and our advocacy we have worked against disadvantage and discrimination faced by women, Indigenous Australians, migrants, asylum seekers, refugees, those who live with disability and illness, people who are homeless, people who live in poverty and many more people. We are committed to promoting human rights as one important tool for bringing justice to the world.

The Uniting Church is unequivocal in its belief that all people should be treated equally under the law and that Australian legislation should be consistent with our obligations under the international human rights instruments to which we are a party. Consistent with this commitment to supporting all people in being able to access the privileges and responsibilities that come to Australian residents and citizens, Uniting Justice Australia considers it is only just and equitable that same-sex couples should be treated the same as heterosexual couples under the law. This should be the case not only for the purposes of superannuation and related legislation but in all matters. Within the Uniting Church, Uniting Justice Australia has a proud history of standing in solidarity with the gay and lesbian members of the church and it works to bring an end to the discrimination suffered by them within the life of the church, just as it works to end all forms of discrimination within the church. Uniting Justice Australia affirms the direction taken by this bill and looks forward to its passage through the Senate.

CHAIR—Thank you very much. We will go to questions, Reverend Poulos.

Senator HANSON-YOUNG—What do you see as the importance of recognising same-sex couples as equal to heterosexual de facto couples, as opposed to interdependency?

Rev. Poulos—I think the issue of interdependency has been dealt with very well by HREOC in their work. I would defer to the amount of time and effort that they have put into demonstrating why that is not a suitable category for same-sex couples. It is about the couple relationship and the significance of that that we are concerned about in terms of couples having equity under the law in matters of superannuation.

Senator HANSON-YOUNG—So you support their recommendations?

Rev. Poulos—Yes, we do.

Senator BRANDIS—Can I explore that a little further with you, Reverend Poulos. We have not had HREOC before us this morning, but we have had before us this morning the New South Wales Gay and Lesbian Rights Lobby, who have adopted—and in their written submissions set these out in summary form—the principal rationales of the HREOC report for not favouring the inclusion of a broader category of co-dependency or interdependency relationships. The principal assertion seems to be that to do so would devalue the importance of or the dignity of same-sex relationships. My question is this. If de facto heterosexual relationships are to be treated as equivalent, morally and legally, to de facto homosexual relationships, why is

it that the status or the dignity of either of those types of relationships is demeaned by recognising yet another category of permanent, loving, domestic relationships? We can leave all definitional issues to one side, and they are important issues, because I want to approach this from the point of view of the principle. Why do you say that those sorts of relationships are inferior to de facto heterosexual and homosexual relationships so that to equate them is to diminish de facto heterosexual and homosexual relationships?

Rev. Poulos—First of all, I do not believe that relationships are inferior—

Senator BRANDIS—You don't. Okay.

Rev. Poulos—across different categories of relationships.

Senator BRANDIS—You see, that is not what HREOC said. I will take you to what is set out in the extract by the Gay and Lesbian Rights Lobby at page 7 of their submission. They quote from HREOC as saying:

Interdependency mischaracterises a genuine same-sex couple as different or inferior to a genuine opposite-sex de facto or domestic relationship.

Now, if you are going to say that by including them you are going to demean them, you must, it seems to me, logically be saying that they are a lesser category of relationship, and that is the proposition I am challenging.

Rev. Poulos—The issue at stake with this legislation is, I believe, about same-sex couples in a domestic relationship that is similar in all other ways to that of a heterosexual couple, be they married or de facto, except for the gender of the people in the relationship. This legislation is seeking to address the equity for those people in Commonwealth superannuation laws. The issue of interdependent relationships is a totally different issue, I believe.

Senator BRANDIS—Why do you say that?

Rev. Poulos—Because of the nature of the couple relationship. The amendments are about couples who live in a specific kind of relationship. What we are concerned about is that people who live in exactly the same kind of relationship have, up to this point, been excluded from the same privileges by virtue of their gender alone.

Senator BRANDIS—It all depends through which prism you look at this. If you say that we have to treat gay people in a de facto relationship identically to and with the same respect as heterosexual people in a de facto relationship, I do not have a problem with that, but I just do not see why it follows that, by expanding the ambition of this legislation to recognise yet other categories of permanent, loving, domestic relationships between two people, you are demeaning anyone.

Rev. Poulos—I have not said that it demeans anyone. I have difficulty with the concept that inviting all people in the society to enjoy the privileges that society offers demeans other people who already have those privileges—

Senator BRANDIS—Exactly.

Rev. Poulos—so I am not interested in the language of 'demeaning' under those circumstances. If what you are asking is whether the legislation should be expanded to include all types of loving relationships, then do that, but remove the categories and the definitions that refer to married couples and children. Completely redefine family, if that is what you want to do, but—

Senator BRANDIS—That is not what I want to do. I think all of the witnesses we have had here today who have addressed this point have acknowledged that there is a uniqueness about marriage so that marriage is not, as it were, to be homogenised with other permanent, loving, domestic relationships. There are some people who do not share that view, but I do not think we are having that argument here today. Leaving marriage to one side, if you approach this from the point of view of not discriminating against gay people, I can understand that if that is the sort of question you are posing to yourself then that would invite the answer you have given. But, if you approach it from another perspective and ask, 'How does society appropriately recognise all sorts of permanent, loving, domestic relationships between two people?' then wouldn't you accord them the same amount of respect, as long as they met those three criteria, whether they be a de facto heterosexual couple in a sexual relationship, a de facto homosexual couple in a sexual relationship or two people who, otherwise than in a sexual relationship, live as a household and choose to spend their lives together?

Rev. Poulos—I am not a legal expert—

Senator BRANDIS—I am not asking you a legal question.

Rev. Poulos—My understanding is that, under the current legislation, there are all sorts of ways that people can address their superannuation entitlements and benefits. The question that this legislation poses is whether we extend the same privileges of heterosexual couples to those of same-sex couples. As a matter of principle in social justice, Uniting Justice believes that we should do so.

Senator BRANDIS—I think everybody agrees—I do not want to put words into the mouths of other senators, but I, for one, have no problem with that. It seems to me that that proposition is then being used as a barrier to extending the principle still further, and I do not understand why.

Rev. Poulos—I am not convinced that, in the context of this legislation, extending categories to interdependency is relevant. I understand that that is an issue that this committee is exploring. While I have already indicated that we do not believe that doing that is demeaning in any other way, this is not the issue that Uniting Justice have considered in this context. We are concerned at this point in time about the rights of same-sex couples.

Senator BRANDIS—Sure, I understand that. Do I gather from that that, rather than saying, ‘No, we don’t go along with it,’ you are reserving your position because that is not the issue that you have addressed?

Rev. Poulos—That is right.

Senator BRANDIS—Thank you.

Senator FEENEY—I notice on page 4 of your submission you say that the Uniting Church does not support expanding the legal definition of marriage to encompass same-sex unions. Could you give us some remarks on what you say distinguishes marriage, or should distinguish marriage, from either heterosexual or homosexual de facto relationships for the purposes of this legislation and perhaps more generally in principle?

Rev. Poulos—The Uniting Church’s position on this matter is consistent I think with the position of all other churches and denominations in that we do believe that the definition of marriage should not be changed and that marriage should be defined as that between a man and a woman. Why we think that—is that the question you are asking me?

Senator FEENEY—No, forgive me. My question does not go to the religious doctrine of that position. I am interested in, having made that declaration, what legal attributes you think marriage should then enjoy that de facto relationships should not enjoy, if any.

Rev. Poulos—I do not know that I can answer that question for you because I am not well enough informed about the breadth of legislation that relates to couples who are married—the breadth of the Family Law Act and all of that.

Senator FEENEY—Sure.

Rev. Poulos—I really cannot answer that.

Senator FEENEY—But in relation to this legislation—no difference?

Rev. Poulos—In relation to this legislation, we believe that same-sex couples should be entitled to exactly the same rights as heterosexual de facto couples.

Senator FEENEY—Thank you.

Senator HANSON-YOUNG—Following on from that, you have spoken in your submission about giving same-sex couples equal rights and supporting the HREOC recommendations. It is stated very clearly in your submission that you do not believe this undermines marriage. We have had some other submissions that speak against that and say that that is exactly what it does do—undermine marriage. How would you respond to that?

Rev. Poulos—It is the same answer that I gave previously. I do not understand the basis of that question that extending a privilege to people who are excluded undermines the situation for people who already have that privilege. It does not make sense to me. It is like saying that there are some people in our society who are privileged to live with great wealth and to try to work to build up wealth amongst the underprivileged undermines the status of those who already have great wealth. It is not an argument that I believe is reasonable or logical in any way, shape or form.

Senator HANSON-YOUNG—In summary: you do not believe that giving same-sex couples the same rights as heterosexual couples in this legislation undermines the institution of marriage whatsoever?

Rev. Poulos—Uniting Justice does not believe it undermines the institution of marriage at all.

Senator PAYNE—Reverend Poulos, in your submission under the heading ‘The rights of children’ on page 4 you make some observations about the definition of ‘child’ both in this legislation and in existing legislation. A couple of submissions, both from the previous witness and from Professor Parkinson this morning, have raised quite significant concerns with the changing of the definition to ‘product’—a term to which some take issue as well—‘of a relationship’. Have Uniting Justice turned their mind to those concerns that have been raised by other witnesses?

Rev. Poulos—No, we have not, Senator Payne. I have read some of the other submissions and I understand the issues that are at stake. I certainly understand the concerns that some might have in using the term ‘product’. Again, our submission is a very modest one. The intention of it was primarily to demonstrate to the committee and to Australian society that not all Christians and not all parts of the Christian church feel the same way about such pieces of legislation. We are concerned that children are cared for, that they have the same rights as each other regardless of the nature of the adults in the household in which they live. We believe that society has a particular responsibility to make sure that they are cared for, and it is on that basis that we support certainly the intention of this bill.

Senator PAYNE—I appreciate those points that you make and I appreciate the distinction that you draw between your organisation and perhaps some others in the same field, but would you take any issue with the committee’s pursuit of concerns raised by other witnesses in other submissions in relation to this specific area? You have indicated your support for the changes, but there have been some quite serious concerns raised about the impact of those and perhaps unintended consequences in terms of long-term litigious potential.

Rev. Poulos—No, we would not take issue with that, as long as the intention that is apparent in this bill remains for any further changes, although I would say that we are concerned that these changes happen as quickly as possible. There are people who have been struggling with this for a long time in their lives; there are people who have been affected as their partners die. We believe that it needs to happen in a timely fashion.

CHAIR—Reverend Poulos, thank you very much for your submission and for taking the time to make yourself available today. It is much appreciated.

Proceedings suspended from 12.04 pm to 1.04 pm

CLARE, Mr Ross William, Director, Research, and Acting Director, Policy and Industry Practice, Association of Superannuation Funds of Australia

HODGE, Mr Robert, Principal Policy Adviser, Association of Superannuation Funds of Australia

CHAIR—I welcome representatives from the Association of Superannuation Funds of Australia. Thank you very much for joining us earlier than expected; we certainly appreciate that. You have sent us a submission, which is much appreciated, which is lodged in our records as submission No. 28. Do you need to amend or make any changes to that submission?

Mr Clare—There is no requirement for any changes.

CHAIR—I invite you to make a brief opening statement. Following that we will go to questions.

Mr Clare—ASFA, as the peak superannuation industry organisation, has taken a long-running interest in the issue of the treatment of same-sex partners within the superannuation and relevant taxation provisions. One of our policy principles is that ASFA supports superannuation and taxation legislation which does not discriminate against same-sex partners. That has been a longstanding and enunciated position of the association, and that is the starting point for our consideration of the provisions of the bill. Our members also take a great interest in the practicality of legislative provisions and how they will be administered in practice, so we have also examined the provisions of the bill in that context.

The conclusion we have come to is that, within both the superannuation and the taxation legislation, the bill does pursue and will apply equal treatment of same-sex partners. We welcome that. Looking at the proposed provisions and after consulting our members, we are of the view that the provisions will be capable of being administered by funds without undue complication. In some ways they will be simpler for funds to operate.

The tests for interdependency are relatively new and are not entirely clear, so it has been a process of evolution in terms of moving from the definitions for interdependency in the legislation to their application in practice, and it is a definition that is not well suited to the situations of a proportion of, or many, same-sex couples. On the other hand, superannuation funds have had considerable experience with evaluating the indicia relating to de facto couples of opposite gender. In terms of applying that test to same-sex couples, we anticipate it will be an easier process.

One other important issue that I should raise is whether funds should be required to change trust deeds to extend the definition within their trust deeds to the proposed allowable definition within the bill. As you know, many superannuation funds will be making amendments to their trust deeds. In some cases it will happen automatically because the fund trustee will pick up the definition as defined within the SIS legislation. So if amendments are made to the SIS legislation it will automatically flow through. There are some other funds that would have to change their trust deed to have an extended or wider definition than they do at the moment. In most instances funds will be willing—indeed eager—to make such changes. But there will be cases where there are cost implications, particularly with regard to defined benefit funds where a reversionary pension is payable.

The Commonwealth government, in this bill, is proposing to extend the definition of ‘spouse’ within various Commonwealth defined-benefit pension schemes so as to provide reversionary pensions for same-sex couples. The cost, as estimated by the actuarial advisers, is shown in the explanatory material for the bill. For private-sector funds and their employer sponsors, it will be a question of whether such a change is made in consideration of a number of factors, and cost will be one of them. Most private sector defined-benefit schemes, particularly those paying pensions and reversionary pensions, are now closed to new members, and quite a few of their members have already retired. So the cost of such changes is an issue for employers. I understand that, even in these cases, with defined-benefit funds and reversionary pensions, there is active consideration of these issues at the moment, given the introduction of the bill. Those are my broad introductory comments, and my colleague Robert Hodge and I would be pleased to answer any questions you might have.

Senator BRANDIS—On the first page of your submission, in the discussion of the 2004 legislation: given the recognition of close personal relationships by the 2004 legislation, would that not already, for the purposes of superannuation only, extend to same-sex couples?

Mr Clare—My understanding is that many, perhaps most, same-sex couples would be able to qualify under the interdependency provisions, but the interdependency provisions do have criteria which are additional to and different from the proposed definition of ‘couple’ in this bill.

Senator BRANDIS—I understand that, but my question is a simple one. I would have thought that the four criteria you have set out at page one of your submission would comprehend all same-sex de facto partners but would obviously also extend to include other relationships as well. From your point of view, would there be a conceptual problem with this legislation doing what, for the purposes of superannuation, the 2004 legislation did in extending the categories of potential beneficiaries of the legislation to include but go beyond same-sex couples to interdependent partners or relationships as defined in the 2004 legislation? In other words—and perhaps I am being a bit wordy here—there is nothing specific to superannuation in the 2004 definition, is there? It could apply to any area of the treatment of two people for the purposes of any area of policy.

Mr Clare—Certainly interdependency is a notion that could be applied in other areas, but actually it is not. As far as I am aware, it is not a concept that is used in other jurisdictions.

Senator BRANDIS—I understand that—and that is one of the questions before us.

Mr Clare—ASFA considers the interdependency provisions to be both more restrictive and discriminatory.

Senator BRANDIS—Why discriminatory?

Mr Clare—They apply a different test for same-sex couples as compared to couples of opposite gender. As I understand it, for instance, I do not think opposite-sex couples have to establish that one or each of them provides the other with personal care as one of the indicants of a couple relationship. It is a more restrictive test and we see it as discriminatory.

Senator BRANDIS—More restrictive by comparison with de facto heterosexual couples?

Mr Clare—Yes.

Senator BRANDIS—I can understand why you say that but, nevertheless, would it be right to say that in the application of these principles to same-sex couples, they have been found to generally apply to same-sex couples and other relationships as well?

Mr Clare—I do not have information on how many same-sex couples have applied under these provisions and the extent to which applications for establishing interdependency have been rejected. We do not have information on that.

Senator BRANDIS—Do you have that information, Mr Hodge?

Mr Hodge—No, I do not have the information but, anecdotally from questions that we receive from members of the public with the introduction of the interdependency relationship test, one of the key issues was financial support. You can have two people who are financially independent—that is, they both have jobs and they are both able to look after themselves. So they are not actually directly providing financial support, which is one of the key criteria to get into this, which does not apply in other de facto relationships or marital relationships. That was one of the really key issues that these people were having difficulty satisfying under the interdependency relationship test.

Senator BRANDIS—So this definition is in that particular respect too narrow to capture all same-sex de facto relationships?

Mr Hodge—Yes. Because in a lot of circumstances what you have is an emotional relationship rather than a financial one.

Senator BRANDIS—What if the third dot point were not one of the necessary benchmarks? That issue would disappear, would it not?

Mr Clare—We still come back to discriminatory treatment and as a matter of principle ASFA does not support discriminatory provisions. You also come down to the fourth dot point which has its requirements and has not been easy to administer in terms of evidence. Most people do not record instances of providing domestic support and personal care.

Senator BRANDIS—But domestic support could mean anything, couldn't it? Or is domestic support a technical term?

Mr Hodge—It is a bit technical. It is an uncertainty and one of the interesting things is that, in setting up this definition, it had to have a subset in it to cater for those people who were no longer residing together

because one was in hospital or in a nursing home. So you actually broke that nexus away from the emotional support—

Senator BRANDIS—There are always going to be these issues at the boundary line but it seems to me that, ordinarily, any de facto couples—heterosexual or homosexual—are likely to meet the criteria of having a close personal relationship, live together and provide to one another, in that domestic environment, a measure of domestic support. I do not see why that is discriminatory against a homosexual de facto couple if it would be equally apt to describe a heterosexual de facto couple.

Mr Clare—It is that the tests for de facto couples do not use these criteria.

Senator BRANDIS—That is not my point. My point is the obverse in fact. They could. It would be equally applicable.

Mr Clare—If you wanted to further restrict the application of the existing couple de facto spouse provisions and have a subset of heterosexual de facto couples covered by the provisions. Then, of course, if that were a matter of policy, it could be restricted. That would be one way of removing the discrimination but it is not something that ASFA is arguing for. We are saying that the interdependency provisions are more restrictive. I would agree that many same-sex couples could potentially qualify under it. But for our association and for many generally, in conditions of uncertainty and more problematic administration, it does not make it an attractive option, particularly when we are presented with a proposed solution to what we see as discriminatory treatment.

Senator BRANDIS—Can you speak generally to the question of—you might respond in part now and give us further information in writing, if you would be good enough—whether ASFA has found any particular problems with the application of this test? You mentioned before one problem with people who were physically separated because one has gone to a nursing home, for example. Is this test generally reasonably easy to apply and to the extent to which there have been problems in particular cases that have come to your notice could you identify what they are, please?

Mr Clare—My colleague has already identified the financial support question. I have also identified the difficulties in evidentiary burdens and actual meaning of providing domestic support and personal care.

Mr Hodge—We will go back to our members and ask funds for specific instances of the difficulties they have faced in applying the current test.

Senator BRANDIS—I would be very grateful if you did do that. Any set of criteria which apply to an endless variety of difficult relationships are always going to have borderline cases. That does not mean that they do not work successfully; it merely means that in the nature of a healing condition there are always borderline cases and you are trying to find what is in and what is out of a defined relationship.

Mr Clare—I agree, but in terms of the borderline, it is a smaller country; in terms of the interdependency it is a smaller set and the border is more uncertain. So there are the two aspects that have been of concern. The Superannuation Complaints Tribunal does have some cases they have considered. With many of the interdependency cases that have come up, I think the great bulk of people qualifying under this provision are actually parents of adult children still living at home. That is the larger group in the community that has qualified under these provisions. I am yet to come across a reported case of elderly sisters with superannuation living together. Some cases may exist but they probably have tax-free super because they are pre-1988. The incidence of such household arrangements and the incidence of superannuation which has any taxation consequences are pretty negligible. Most of the case law to date in terms of SCT is more about parents of adult children. Unfortunately, all too often with a group of young adults there can be accidents or suicide and significant death benefits due to insurance elements. That gives rise to a certain number of cases for consideration by funds.

Mr Hodge—One of the key things in administration of superannuation law is simplicity of application and operation of the law. To that perspective, I see it makes more sense, rather than to take interdependency and apply that to de facto couples, you would distinguish all of those people who are not married from a simple criteria for those who are married, to extend the definition another way, down the other direction, to take what applies to married couples, extend it to de facto and then extend that to same sex relationships. That is a far simpler test to apply than to go through the process. At the end of the day, as you put increased complexity into the operation of the laws, that is a cost on everyone in the community and it is born by the whole superannuation fund membership, not just by those applying for the benefits.

Senator HANSON-YOUNG—Following on from that can I correctly conclude that, if this legislation were to change the definition of ‘marital relationship’ to ‘couple relationship’—avoiding the interdependency issue, encapsulating the de facto, heterosexual and opposite sex couples as well—making it simpler would reduce the administrative burden on super funds?

Mr Hodge—Any test which is easier to apply reduces administration costs.

Mr Clare—And certainly in any situation where there is greater certainty there will be less likelihood of a review of a decision. We would see that as both simpler initially and also as reducing the incidence of applications to the Superannuation Complaints Tribunal.

Senator HANSON-YOUNG—Perhaps you will not be able to answer this, but would reducing the complexity of the administration also reduce the fees charged to members?

Mr Clare—You are reducing the cost of the overall system, but seeing that flow through to a specific fee—

Senator HANSON-YOUNG—It is a bit difficult.

Mr Clare—is a bit difficult.

Senator HANSON-YOUNG—Can you foresee how that would happen if you are not going through these different investigations to try to figure out if somebody’s relationship is legit or not?

Mr Hodge—Definitely. But in the overall membership of superannuation funds, as the figures that Ross has produced in this report show, we are talking about very small numbers.

Senator HANSON-YOUNG—In taking all of that onboard and assuming that these changes will make things simpler, because it is talking traditionally about Commonwealth super funds, how do you think the private super funds will respond to these changes? What do you think it will mean for individual members?

Mr Clare—A large proportion private sector accumulation funds, which the great bulk of Australians with superannuation are in, will have the new definition automatically adopted by way of the cross-references to the SIS definitions

Senator HANSON-YOUNG—Do we know how many will not have that cross-reference?

Mr Clare—We have no information on that percentage. My anecdotal impression is that it is a large proportion but certainly the bulk of funds would not pick up the definitions automatically. A significant minority would require amendment of trust deeds to pick it up. We have certainly seen indications of a willingness to do that. We now have far fewer funds and trust deeds compared to even three or four years ago. There are a bit over 500 funds now and most of them are the larger funds and they have had attention to their trust deeds in recent times. When we had more corporate superannuation funds I would have been less confident about the percentage of funds with fairly modern trust deeds or the ability and willingness to change them in a relatively short time frame.

Senator HANSON-YOUNG—Taking the principle that we want heterosexual and same-sex couples to be able to access the same super entitlements regardless of whether they access them through the public superannuation schemes or whether they are engaged with a private super fund, how would we do that and ensure that it is universal and that people are not discriminated against—not just because of their sexuality or gender but also because of the industry in which they have worked?

Mr Clare—One of the difficulties, and the one I identified in my opening comments, is that for those relatively few defined benefit private sector funds with reversionary pensions, changes to the definitions have cost implications. If it is a decision of the Commonwealth that this is something that the Commonwealth supports through funding the change, then I am sure that the industry would be very willing to consider that. But in terms of requiring employer sponsors to change the definition and take on possibly quite large burdens for a relatively young reversionary beneficiary, a pension may have a capital value of half a million dollars or more. There may not be too many such cases but for a particular employer sponsor I would anticipate unwillingness to take on such a liability. So if the Commonwealth required all funds to change definitions, I think they would also have to consider funding the costs of such provisions for the small number of funds where there would be a cost.

Senator HANSON-YOUNG—So, based on the principle that you stated earlier—that your organisation has a principle of nondiscrimination—you would like to see nondiscrimination. Obviously that would follow through across all sectors, so is that something you would be advocating to encourage the Commonwealth to

work with super funds to ensure that it does happen in those private sectors—because, at the end of the day, it is the principle of not discriminating based on sexual orientation and gender?

Mr Hodge—There are a couple of ways this can be addressed. One of the key things to remember is that—unlike the situation, say, when the superannuation guarantee came in—the vast majority of Australian superannuation fund members are in accumulation funds, and the vast majority of those have choice of fund. So, effectively, the marketplace will provide a solution. Where some funds decide not to go down that path, those who have choice will exercise choice, because there are a group of people who fall into this category and those people are very interested in their rights and entitlements and in what will happen with their benefits when they are paid out. So those people will actively seek a solution which may very well be choice of fund. From the defined benefit fund perspective, short of Commonwealth financial support for funds to change in respect of existing members, you may very well find that these funds will change their trust deed in respect of new members going forward so that, as these people join the fund, the actuarial calculations of the funding can be provided to support this new class of membership.

Senator HANSON-YOUNG—What is the position, though, of your organisation? Based on your principle of trying to eliminate discrimination, are you advocating that the Commonwealth help ensure that we have consistency across the board—whatever cost is involved, obviously?

Mr Clare—I would reiterate that our principles support superannuation and taxation legislation which does not discriminate against same-sex partners. The issue of whether we should be making approaches to government to provide funding to private-sector defined benefit schemes with reversionary pension provisions to facilitate changes in definitions has not been a matter that our association has considered. If there were a likelihood of such an approach to government being well received, I would be confident that our association, on consideration of the matter, would put in support for such a measure. But we are commenting on the bill as it stands, and our support is for the bill to be passed as it stands. If the Commonwealth government wishes to introduce further provisions where there is a package of financial assistance for further changes, I expect that the association would also support such a bill.

Senator PRATT—Your submission comments on the definition of a child. You conclude that most claims involving children of married or de facto couples are dealt with by the trustees, but is there a particular piece of legislation that you turn to in defining a child?

Mr Hodge—What a child is is generally defined in the SI(S) Act.

Senator PRATT—What is that act? Are you able to tell us what that act says?

Mr Hodge—The Superannuation Industry (Supervision) Act extends the definition of a child to children of de facto relationships.

Senator PRATT—So, if the definition of a de facto relationship is amended to include same-sex couples, it would automatically include children of those couples?

Mr Clare—They have specific provisions relating to the particular circumstances in which a child can be what is termed the ‘product’ of a same-sex relationship. They run through both some of the reproductive technology that now applies and the social setting.

Senator PRATT—I am not so interested in same-sex couples. I am actually asking about why there needs to be a difference, because if you recognise heterosexual de factos and their children then I am not quite sure where the distinction is required.

Mr Clare—Traditional common law bases its notion of a child of a person on the genetic link. We have the birth mother, and it is generally not disputed, when a child is produced by the birth mother, that they are a child of that person.

Senator PRATT—How do you deal with children of straight couples when the children are produced by reproductive technology, for example?

Mr Clare—It depends on the nature of state legislation dealing with that. If there are—

Senator PRATT—All right, that answers my question: you turn to state legislation to define that parent—

Mr Clare—In those cases where there is not a genetic link between the child and one of the parties to the marriage or the relationship, if there is DNA from somewhere else, then it will generally come down to the state legislation dealing with such situations.

Senator PRATT—So if state legislation universally covered children in same-sex relationships, would ‘child of a couple’ relationship definition be unnecessary to you?

Mr Clare—We have the bill, which I understand the committee is examining, which deals with such issues, as I understand it, although we have not specifically analysed or commented on it. The differences between states and the lack of coverage of such issues in some jurisdictions has been behind the introduction of proposed uniform Commonwealth provisions.

Senator PRATT—For example, there is a lesbian couple in Western Australia where both mothers are on the birth certificate. If the non-biological mother were to die, you would work out whether that child had an entitlement under this act. Do you need this ‘child of a couple’ relationship definition, or is the state recognition enough for you to proceed with processing that claim?

Mr Hodge—In those situations, generally most superannuation funds would drop back to the definition of financial dependant because that is far easier to apply. Where there is some doubt, superannuation funds look for a reason to identify a person as a dependant. When they are looking at paying a death benefit, they seek wide as to who would have a claim. In such situations, probably the simplest way would be to establish financial dependence.

Senator PRATT—But you would have no obligation to do—

Mr Hodge—They could look it either way. If it was easily established that it was a biological child and it came in, they could accept that. If there was some doubt as to the status under relevant legislation, then they would always look at it from the point of view of financial dependency.

Senator PRATT—Okay, but would you differentiate between the lesbian couple’s child created with reproductive technology versus the straight couple’s child created with reproductive technology? Are you applying the same test? Or are you referring to some other national legislation for the straight couple?

Mr Clare—I think we would be best to respond to you in writing on that point. You are really asking for what would be a legal interpretation of SIS provisions as they interrelate with common law and state provisions. To be frank, I do not feel confident about giving an opinion on that. It is not a situation that comes up very commonly within our experience.

Senator PRATT—But it does relate to my next question, which was about stepchildren. How do you define whether a stepchild is currently eligible? That is under the interdependency—

Mr Hodge—If it is a stepchild, once again it generally comes under financial dependency. That is one of the most common routes that they go down. They look at the relationship between the two parents who are looking after the child, whether they are their natural parents or their step-parents, and they look at the degree of support they are giving.

Mr Clare—But the SIS legislation has some specific stepchildren provisions, which are in a separate league again and, given the way they operate, are heterosexual-couple based.

Senator PRATT—Yes, which is why I am concerned about the definition. You have given support to the definition of a ‘child of a couple’ relationship here, but a stepchild is not a child of a couple in a relationship. If you fail to recognise same-sex relationships and heterosexual relationships in the same way, then you may be leaving a stepchild out of access to an asset if they are a stepchild within, say, a lesbian family as opposed to a stepchild in a heterosexual family. Is that a problem that could come up?

Mr Clare—The explanatory memorandum does give examples of children and relationships and who would be covered and who would not. It certainly focuses on extending entitlement to children who are the product of a relationship. The stepchildren provisions, as I understand it, are not being removed from the SIS legislation. The policy thrust seems to be to focus on children who are the product of a relationship in the context of the financial circumstances of that relationship. That is how I understand the legislative proposals to work.

Mr Hodge—Effectively it is including another category of people who do qualify as a dependant for the purposes of paying death benefits. It is not an attempt to change all those things which already exist.

Senator PRATT—I understand that. I just wonder if there are children who are dependent on, say, same-sex couples who will not meet this test because they are not the product of the relationship.

Mr Clare—If they are dependants then they will come in under financial dependency.

Mr Hodge—That is our answer—that this adds a new definition and brings a new class of people in but it does not stop the fund from considering those other people under another provision. That is what has happened quite often with the treatment of same-sex relationships. Before the dependency rule came in, a lot of those cases were, if possible, addressed under financial dependency.

Senator PRATT—Thank you.

CHAIR—In relation to some of the issues that were just raised, this bill also amends the Superannuation Industry (Supervision) Act, the SI(S) Act, and replaces the definition of a child. So that would apply to all schemes—not just defined schemes but schemes right across the board, essentially.

Mr Clare—It comes back to the definitions. Generally, the SI(S) Act sets out to whom benefits can be paid, but funds can and do have more restrictive definitions. So it is enabling but it is not prescriptive. I think in our discussion earlier we explored some elements of that. In terms of the implications of the changes to the definitions, they are enabling for funds and often will be automatically adopted through the cross-referencing in the trust deeds, but that does not mean that it will flow through to every fund necessarily.

Senator TROOD—Gentlemen, on the last page of your submission you allude to the problem of the concept of a child being the product of a relationship, which I know you have been discussing. I just want to clarify your position on this. You say that you do not think this is going to be a problem, essentially, but you also say that some greater clarity would be desirable. Where do you think that clarity is required?

Mr Clare—We need further guidance on what ‘product of a relationship’ means. We have some examples within the explanatory memorandum, but it is a new, and may be an emerging, concept. So it may come down to the regulators, the Australian Prudential Regulation Authority, and the Australian Taxation Office on the taxation aspects. When you look at how many of these cases come up and the likelihood of there being a dispute, in many cases, if there is evidence before the trustees that a child is a product or part of a relationship, within superannuation that is accepted. Superannuation trustees do not spend their time asking for DNA tests to establish parenthood of a child. Generally they rely on statutory declarations or the evidence of the parties in terms of letters and the like. But we do raise the point that this is a new concept and funds like certainty in terms of administration, so getting more certainty is desirable.

As to holding up the bill for refinements on the definition, given that it may not actually be an issue in a given year for any fund or any person, it is our position that we support the passage of the bill as it is and that, if it is possible to give further guidance, that would be desirable. There are mechanisms for doing that through the relevant regulators. Concepts can be more fully explained in that way, not necessarily through more complex legislation or even material in explanatory memoranda.

Senator TROOD—We had some evidence earlier in the day that this was an undesirable new concept—that it was perhaps complicating the law by introducing this concept and that there would be better ways to address the particular issue that it seeks to address.

Mr Clare—I am sure that there are many views on the subject of who could be considered a child within the context of superannuation. The position of our association on a consistent basis is that there should not be discrimination against same-sex couples.

Senator TROOD—I see that.

Mr Clare—This is one aspect of what you could say is discrimination. Others may consider that discrimination is appropriate, and I can understand that they will make that argument, but our consistent position is that we do not support discrimination and we see this provision as an outworking of that general principle.

Senator TROOD—When you say in your submission that ‘in practice this is unlikely to be much of a problem’, you seem to be saying one of two things. One is that there are unlikely to be many people in the category of claimant to whom you would have to address yourself.

Mr Clare—That is certainly one element of that.

Senator TROOD—But that presumably is at the present time. I just wonder whether or not perhaps the absence of a category of claimant is a consequence of the fact that compulsory superannuation has not been around for a great many years and that in future there are going to be a larger number of people who are potentially within this category and that you actually may be faced with a larger number of people going ahead than you would at the moment. I suppose what I am asking is: what are the actuarial indications with regard to that particular problem?

Mr Clare—I based the assessment on a very small number of such cases from the ABS census material. Our submission has some material on the incidence of same-sex de facto relationships identified within that context. The census also collects information on the number of children within households of such relationships and there is some further material on their age. Together with other information published by the Australian Institute of Family Studies you come to the conclusion that you have the incidence of same-sex couples in the community of 0.3 to 0.5 per cent. In the bulk of them there are no children. Of those couple households with children, many of the children are the product of another relationship and not of the same-sex couple relationship. So I just work down through the arithmetic. There are not all that many deaths in a given year of a partner to a same-sex couple with superannuation. Then you come down to the subset of that, where there is a child who could be established to be a product of the relationship. Then you come down to the subset of where there is somebody else who may want to dispute such a finding by the trustees that the child is the product of that relationship. When I do the numbers it comes down to the fact that there may not be any cases in a year or perhaps in a number of years, and I do not think the introduction of these provisions giving rise to the possibility of death benefits to such children will lead to an increased incidence of couples producing such children. It is not much of an incentive, basically.

Senator TROOD—I was not suggesting that it was going to be an incentive; I was thinking about it in the context of a growing proportion of society which will have superannuation entitlements and that that is clearly going to grow over a period of time.

Mr Clare—I would not agree with you there. The compulsory superannuation system means that—

Mr Hodge—It is mature now.

Senator TROOD—I see.

Mr Clare—In terms of coverage, yes.

Mr Hodge—What will grow will be the size of the balances, but we do not think the actual number of balances as a proportion of people in the Australian population will increase. We think the coverage is sufficient that is there now.

Mr Clare—It is not very much. Amongst retirees we may have some increased coverage, because currently there are some retirees who never had super going forward. There will be some marginal differences there, but there will not be much difference in terms of the percentage of people in the population with super, because it is already quite high and quite a stable percentage.

Senator FISHER—I would like to take Senator Trood's line of questioning one step further. You have indicated that the size of super might grow and that the numbers are unlikely to change, Mr Hodge, but I would put to you that the demographics may well change. You have given us a very good presentation, as I understand it, based on your submission and also your answers to Senator Trood, based on the arithmetic and the numbers, as you put it, Mr Clare, from others who have collected data from the past. My questions to you are: firstly, do you consider yourselves expert at predicting the future in this respect; and, secondly, if not, has your organisation done any work to predict the future that would impact, for example, on your prediction that there is unlikely to be a scenario where two older sisters do not already satisfy the definition of 'interdependent' or, for example, where you are unlikely to get the child from a previous relationship that is not already encompassed by the legislation? Has your organisation done any work to predict the future in that respect, as opposed to your saying that, based on the past, you do not think it is likely to be much of a problem?

Mr Clare—We do not hold ourselves out to do general demographic and social forecasting.

Senator FISHER—I would have thought not.

Mr Clare—I think we are one of the few organisations that have actually given you some numbers on incidence at all.

Senator FISHER—Agreed—and that is good.

Mr Clare—One of the things I have learnt from the demographic research that I have done—and I have done a bit of it at ASFA and in previous lives—is that demographic features of the population do not change much and that, if they do change, it takes a very long time for it to happen. Even if you had some unprecedented changes in incidences of increases in two or three times the rate of something, two or three times one or two or 10 or 20 is not very much. I would not want to put forward any projections going forward, but the point I would make is that even if there were large increases—and I have no reason to believe that

there will be; demographics tend not to work that way at all, and certainly not in a hurry and not over a few years—then two or three times a very small number is still a very small number in the scale of 10 million or 12 million Australians with superannuation. You are talking about a handful, less than a score, on the basic arithmetic.

Senator HANSON-YOUNG—Coming back, then, to the principle of not discriminating based on one's personal relationships, whether they be heterosexual or homosexual, it does not really matter how many there are; we should not be discriminating. Correct me if I am wrong, but is that the essence of your submission?

Mr Clare—Yes, and that is a point we have made in other contexts.

Mr Hodge—That is our longstanding policy.

Mr Clare—The fact that there will not be many hard cases means the administration costs will be low, and I was addressing those questions. But I agree that it is principle driven, and most of the principle will relate to a larger number—the 0.3 per cent or 0.5 per cent. Most death benefits currently go to spouses, and it can be more complicated for the children, but it is a small minority.

Senator HANSON-YOUNG—The definition of the 'child' as the product of the relationship, while not desirable, should not be holding up the passage of this legislation.

Mr Clare—I would not even go that far. It is something new; we would not see it as an undesirable thing. All we have highlighted is that we do need some guidance as to this new concept, and if further guidance could be provided that would be helpful. But it certainly is not a reason, in our view, to hold up the passage of the bill.

Mr Hodge—No. The fact that there is a definition in there does bring a little more certainty into what is a complicated area of working out whether in fact a person can be deemed to be a child of a person or of a relationship. So it has actually extended the definition, which has provided more clarity. Our point was that if we had a few more examples or clarification from regulators then it would make that job even easier and provide even more certainty.

CHAIR—Thank you for appearing before us today and also for coming earlier. It is much appreciated.

[1.58 pm]

BUDAVARI, Ms Rosemary, Acting Director, Criminal Law and Human Rights Unit, Law Council of Australia

CHARANEKA, Mr Alexander Scott, Member, Superannuation Lawyers Committee, Law Council of Australia

CHAIR—I welcome representatives from the Law Council of Australia. Thank you for taking the time to appear before us this afternoon and also for making yourselves available a little earlier. We have your submission, which we have numbered 31 for our purposes. Are there any changes or amendments that you wish to make to that submission?

Ms Budavari—No.

CHAIR—Would you like to make an opening statement and then we will go to questions.

Ms Budavari—The Law Council of Australia is the peak national representative body for Australian lawyers, with approximately 50,000 members. The Law Council has a number of specialist sections and within those sections a number of specialist committees. The relevant committee for our purposes today is the superannuation committee of our legal practice section, which consists of expert lawyers in the field of superannuation from around Australia.

In the context of this particular bill, the Law Council has a general and longstanding policy supporting the removal of discrimination against same-sex couples, and the Law Council views that as essential to increase Australia's compliance with international human rights obligations.

The Law Council sees this bill as just the first step in a more substantial legislative reform process. The Law Council agrees with the government view that this bill is time critical for the reasons that have been outlined in the report of the Human Rights and Equal Opportunity Commission in relation to a number of instances where partners and children of same-sex relationships are experiencing discrimination in this particular area, particularly in relation to death benefits, which is quite a sensitive area. The Law Council believes that the policy has been announced to remove same-sex discrimination in this area and therefore there are good reasons for this bill to be passed in a timely fashion.

For these reasons the Law Council did not support the referral of the bill to this committee. But now that that has occurred, the Law Council offers the expertise of its superannuation committee in relation to, particularly, the issues around private superannuation funds and understanding the effects of the changes to the definitions that are being proposed, and also in providing practical guidance which will be needed to interpret the legislation. This is particularly coming from the committee based on its experience with similar changes in 2004 in relation to the concept of interdependency and also some other practical consequences of the legislation which are outlined in the submission. Mr Charaneka will be available to answer questions on those particular aspects. That concludes our opening statement. We are both available to answer any of your questions.

Senator HANSON-YOUNG—You have just touched on the issue of private superannuation. I am not sure whether you were here when I was talking to the association. How, in your view, as a group of superannuation lawyers, do you think the industry will respond to this, given that the legislation before us is not mandating these changes across the board? We are saying that it is good for public funded superannuation but it is optional otherwise.

Mr Charaneka—There were some good points raised before: in a large percentage of cases you will have definitions of a dependant which cross refer directly back into the SI(S) Act section 10 definitions. Any changes that are made to the SI(S) Act will obviously have a flow-on effect immediately into the particular superannuation fund. That will require some understanding of the impact of that change and typically what you will have is a short window of time to allow the trustees to digest that change and to gear up for that change. So there are certain aspects of this paper which highlight what things trustees will need to do in that case.

In the case where there is no cross-referencing back to the SI(S) Act definitions then the trustee will need to consider whether it amends its trust deed under the amendment powers that are typically granted in the trust deed with a view to expanding the definition of dependant or the definition of child to pick up what is here. From what we have seen in past experience, trustees in the private sector are generally minded to expand the

categories of dependant in the accumulation side. That distinction between accumulation funds and defined benefit schemes was highlighted before. So, yes, I think you would have broad support, if I can put it that way.

There are some other flow-on effects which you will need to consider as well in terms of existing instruments that purport to bind trustees in relation to death benefit distributions. There will need to be some discussion around that and some information provided by trustees on that issue. There may well be additional financial planning consequences around it. You need to consider that there might be issues broader than just the super fund trustees here. There could also be financial planning services required as well, conceptually similar to what we had in the interdependency relationship changes.

Senator PRATT—Your submission outlines how the definition of spouse is amended and acknowledges the change to the product of a relationship as in a child. Whilst I appreciate dependent children may well have a place—

Mr Charaneka—As financial dependants.

Senator PRATT—Yes, as financial dependants. I am wondering whether, in relation to, for example, a stepchild, a stepchild will acquire the status of a financial dependant in the same way whether they are the product of parents in a heterosexual marriage or a lesbian couple.

Mr Charaneka—That is a good point. It is worth while pointing out that the definition in SIS is inclusive, so it does not seek to limit, it seeks to expand. What you have there is a proposal that effectively replaces the definition of ‘child’ and includes other elements to it, if you like, but does not take away from the concept. It starts off by being an inclusive definition. In terms of whether someone is a stepchild, we know there is an express provision in SIS that says that child includes stepchild. Typically, there would be an evidential requirement there for someone to assert that they are in fact a stepchild. That would typically be done a number of ways including, potentially, by stat dec from the relevant individual who is claiming to be entitled to a benefit. Similarly, the same sort of evidential issue would be required here. I guess the question is how you assert that someone is a child in that situation. You have a definition here which purports to cover that in some way as being the product of a relationship and then giving further guidance. Having heard the comments before, it would perhaps be beneficial if there were some statement from a regulator giving some understanding as to what ‘product’ means for the purposes of their jurisdiction. That might assist trustees in formulating what they think is the correct way of interpreting it. I do not think that there are going to be any real issues there.

Senator PRATT—I am concerned that ‘product of a relationship’ is meant to relate to the origins of that child, in terms of when it began, and that stepchild status is acquired through marriage. Therefore, a stepchild in a lesbian or gay relationship would not have access to recognition. The stepchild might, by virtue of being a dependant, ultimately gain some recognition, but they would not automatically be recognised under the amendments to this act.

Mr Charaneka—Yes. You obviously have a very clear intention stated in the explanatory memorandum. It is supposed to be expansive in that it covers a broader class of individuals. It is clearly trying to capture a situation where there is a child living in a relationship with two gay parents, basically. How or where that would ever be challenged would perhaps be another thing to ponder. It would be, I guess, a matter for the trustee to determine based on this and in light of what the explanatory memorandum says—that is, whether they were satisfied that someone fell within that broad concept of ‘product’—and understanding what it is that this legislation is designed to achieve. Your concerns in relation to whether someone takes a stricter view, in terms of saying the word ‘product’ in other contexts may be read to mean the strict biological issue of a couple and where there is no biological connection therefore the person falls outside of the concept of child, would seem to be where you are getting to. Is that right?

Senator PRATT—I am not necessarily saying the biological relationship but where the intention was to create the child together as opposed to bringing a child into a relationship.

Mr Charaneka—The problem is that there is also going to be some time until there is a case on this that will provide guidance on what exactly these words will mean. For practical purposes, trustees will be in mind to take advice and the advice will typically draw on what the explanatory memorandum talks about in terms of providing some understanding as to what is behind it. Some types of material may assist in getting to the point where you do not have the automatic exclusion or the result being interpreted in a way that segregates or distinguishes between people in the way that you are talking about. Otherwise it may well take some more acute drafting, perhaps. I am not sure if that is something that you want further comment on.

Senator PRATT—We have had other submitters tell us that we really just need to follow what has been done at a state level, where recognition for same-sex couples has been created for reproductive technologies. They are recognised as parents and then you need your final catch-all, which is children of the household who may be dependant. Would that go some way to clarifying those kinds of problems in your view?

Mr Charaneka—I think that it would. But, again, to come back to the point, it is an inclusive definition here so even though you have gone to some lengths to specify certain categories which you want to make abundantly clear are in, you still fall back on that overall position that it is an inclusive definition.

Senator PRATT—Yes, thank you.

CHAIR—Before I go to other questions, would you clarify something for us? One of the issues you raise in your submission is the inconsistency in the definition of a ‘spouse’. What has been raised with us today is that there are inconsistencies in quite a number of definitions across this legislation. Do you want to make a comment on that?

Mr Charaneka—I did not want to be too pre-emptive here because I understand in the discussions we had that this is something that will be looked at in terms of other amendments to other statutes. The ones we have identified, which are fairly topical, obviously include the Family Law Act and the fact that you have superannuation flagging and splitting arrangements there for persons who are in registered marriages, so there is a query as to whether you can have a splitting arrangement in the same way if someone is in court under the Family Law Act. Social security rules also purport to recognise interests and use a concept of spouse in terms of looking at entitlements to social security benefits as well. I guess the point is that it is highlighting that there are other laws that need to be considered as part of this and if they are not considered or not addressed then what you could have is perhaps the requirement for a couple in this case to obtain fairly involved advice to try to navigate potentially different definitions, or definitions that have different impact depending on the context. That is what we are trying to get to there. Similarly, the tax act as well would need to be looked at in terms of ensuring that the treatment remains uniform. It is not just a matter of changing the SI(S) Act here because so many things relate back to superannuation, be it in the family law context, social security, income tax.

CHAIR—And you will put to us that those definitions need to be consistent?

Mr Charaneka—I think that one would need to ensure that there was a consistent effect. It may be that you can have different definitions, the point being that if you are looking at having a death benefit distribution paid to a dependant for SIS purposes, you need to ensure that the death benefit distribution is obviously tax free if the intention is to keep it consistent with other dependants who receive it. You are also potentially looking at Family Law Act issues where currently persons in a registered marriage have certain rights under the Family Law Act to flag or split their former partner’s interest in a superannuation fund. I am not sure if that is being considered here as part of the rights that you would afford to people in a same-sex relationship in having the sorts of rights to be able to say, ‘Okay, now the relationship has ended, we think that it’s appropriate that there be some sort of property settlement and as part of that there is a need to recognise the superannuation interests of both people in that relationship with a view to giving the same sorts of rights that you have at the moment for others in the community.’

Senator HANSON-YOUNG—We have heard a lot today from a number of different witnesses and also questions from the committee in relation to the definition of interdependency. What is your view in terms of the importance of recognising same-sex couples as equal to those of opposite sex in de facto relationships as opposed to lumping everybody in under this umbrella interdependency?

Mr Charaneka—The answer is that effectively you are potentially excluding persons in a same-sex relationship who are not financially dependent on each other. The concept of an interdependency relationship extends the concept of financial dependency to have the dependency going the other way not just in relation to the person who has deceased but other persons whom the person relied on.

What you have here is the potential for persons in same-sex relationships who are not financially dependent on each other in any way to not be treated as a dependant for superannuation death benefit purposes, and things flow from that. The first thing is that the person I will call the survivor of the deceased would not be able to automatically take a superannuation death benefit from the particular fund in question. That person would not be considered as part of the claims-taking process as interpreted under the trust deed. That would mean that in order to receive a benefit that person would need to receive that via the estate of the deceased member. That then raises issues in terms of timing, contest and whether the entire benefit would be made available to the survivor if, for example, the deceased person had certain debts owing at the time of death that

would be accounted for from that superannuation death benefit distribution. So there are issues there that we can see. If you do not classify everyone in the same way, there are consequences. The timing issue is critical in being able to get administration in place or orders for an executor to be appointed—that sort of thing. It is much longer than would otherwise be the case in terms of the claims taking process and the person being able to receive that benefit directly.

The other issue you have is that the current law allows tax act dependants, not SI(S) Act dependants but tax act dependants, who are recipients of death benefit distributions to receive that benefit tax free. In other words, the benefit comes out whole from the fund. If someone receives a benefit via the estate then they may get less than the actual amount paid out from the fund because there could be debts or there could be challenges, family maintenance types or orders, against the estate at the time.

Senator HANSON-YOUNG—So they could possibly be disadvantaged even in terms of the money they receive, as opposed to the timing issue and the different hurdles they may have to go through to prove why they fit into this particular category.

Mr Charaneka—That is right. It is a different process. You are effectively coming under state based probate laws, under the laws of intestacy and things like that. Your benefit is derived via the estate, not directly from the superannuation fund itself. Whilst it is true to say that the concept of interdependency relationship like financial dependants could potentially capture persons in same-sex relationships, it is potentially not a perfect fit. That is my comment about that.

CHAIR—I thank you both for your time this afternoon and for taking the trouble to put in a submission to our inquiry. It is much appreciated.

Proceedings suspended from 2.18 pm to 2.39 pm

FELTHAM, Mr Peter, Industrial Officer, Community and Public Sector Union

NEWMAN, Ms Lisa, Deputy National President, Community and Public Sector Union

RAHILL, Ms Alison, Parliamentary Liaison Officer, Community and Public Sector Union

CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Mr Feltham—I am a trustee on the ARIA superannuation board, but today I appear in the context of the CPSU only.

CHAIR—We have received your initial letter and your more substantive submission. Do you need to make any changes or amendments to that submission?

Ms Newman—No.

CHAIR—I now invite you to make an opening statement and then we will go to questions.

Ms Newman—The CPSU is a union that represents 200,000 employees—that is, the federal public sector, the ACT public service, the NT public service as well as telecommunications sector employees, employment services and the radio and TV broadcasting industry. We also cover and represent 400,000 employees covered by both the CSS and PSS superannuation schemes. Today we would like to address three areas: recommendations regarding public and private sector employment mechanisms that should prevent discrimination; examples of relevant provisions from certified agreements which illustrate whether or not discriminatory provisions exist; and, recommendations which relate to the current discriminatory provisions within the federal Public Service superannuation schemes.

In our submission we have made a recommendation that the APS Values be expanded to list the ways by which employees might suffer discrimination. The reason for this is that every agency within the APS is subject to the APS Code of Conduct and the APS Values, and those documents play a primary role in how employment arrangements are formed. We think it would be extremely beneficial if the APS Values could be expanded to deal with discrimination more specifically. We also make a recommendation in relation to the AGE bargaining framework, which is the policy of the new government in relation to agreement making in the federal Public Service. We seek a statement in relation to anti-discrimination being included in the bargaining framework very specifically, again because this is a source document which agencies use in relation to their agreement-making processes. We believe that would set a course and direction for agreement making that would affirm the government's commitment on anti-discrimination in all forms. The third recommendation we make is in relation to funding of not only HREOC but other associated organisations to ensure that they are resourced appropriately to allow them to deal with compliance issues that might arise within the Public Service.

I will go to the second area that our submission seeks to address, and that is examples of provisions taken from a sample of agreements that we have looked at. There are a number of examples that are noted in the submission, but the one thing that all of these examples have in common is that they seek to address the potential for discrimination that flows from the definitions of 'spouse' and 'dependant'. That is critical in relation to certified agreements because a number of leave provisions—such as carers leave, adoptive leave, parental leave, maternity leave, bereavement leave and remote localities benefits and allowances—are accessed via eligibility criteria which encompass these definitions.

Centrelink's certified agreement is an example where same-sex partnerships are specifically included in the definition of 'dependant'. We believe that agreement goes a substantial distance in addressing discrimination in relation to access to those provisions. On the other end of the spectrum, you have Telstra. Telstra's employment arrangements are somewhat more complicated and their agreement has to be read in the context of the relevant award. However, in the certified agreement for Telstra there is no, or very little, detail about the eligibility criteria for the forms of leave that I have mentioned. That does not allow us or anyone very much scrutiny to determine whether or not those provisions and that certified agreement could give rise to discriminatory practices.

I would also like to mention that under the previous government there was a significant move to transfer entitlements from legally enforceable certified agreements into policy. This has been an issue of concern to us that we raised in our submission to the HREOC inquiry in 2006, because it limits transparency in employment mechanisms and relationships in a way that limits public scrutiny. AWAs, for example, are an issue in arrangements that are not subject to public scrutiny, in much the same way as policy arrangements from

different agencies are not able to be scrutinised publicly. We have sought in our negotiations with various departments to broaden the definitions of 'spouse' and 'dependant' to deal with this issue where it has not been able to be dealt with in any other way. I will now hand over to Peter to take you through the specific details of the superannuation scheme recommendations that we have made.

Mr Feltham—As I indicated earlier, I have a secondary interest in that I am a trustee on the superannuation board that administers the CSS and the PSS. I appeared before an inquiry that was convened by the minister for superannuation a couple of weeks ago on pension indexation of public sector superannuation. In appearing before that inquiry I was able to get some information from ARIA on the costs of pensions that are currently funded via the CSS and the PSS schemes. The information I was provided, which was as of about 14 July 2008, was that about 14 per cent of CSS and PSS superannuants receive a pension of less than \$10,000 per year, slightly over 40 per cent receive a pension of less than \$20,000 per year, over 65 per cent receive a pension of less than \$30,000 per year and about 85 per cent receive a pension of \$40,000 per annum or less. That is significant in the context of the reversionary pension debate over this issue that has been going since at least the turn of the decade and perhaps the turn of the century. The debate in the past has been about the costs of providing this to superannuant pensioners to provide the reversionary benefit to people in the CSS and the PSS. I believe those numbers put the actual costs of this into some perspective going forward.

Attached to our submission, I understand, were also some examples in a document entitled 'HREOC Examples', which provided a number of examples of the way in which a non-same-sex partner or a de facto partner under the current legislation would be treated in regard to a reversionary pension or a child benefit versus the way that a same-sex partner is treated in exactly the same circumstance. I think those five examples provide some very significant discrepancies and very significant discrimination based on the sexual relationship of the two people involved. From a superannuation perspective, that is all I would like to say. I will hand back to Lisa Newman again.

Ms Newman—In relation to our preparation for the HREOC inquiry of 2006, we sought membership feedback. Another issue that was identified by members was the eligibility criteria for some remote localities provisions in many of our agreements. This issue arises from employers who tied their eligibility criteria to an ATO ruling in relation to the payment of certain allowances. It is our recommendation that this committee determine whether or not rulings affecting eligibility for those allowances are discriminatory against same-sex relationships. I will finish up by saying that it is the strong wish of the CPSU that your work and the report that comes out of your work proceed with haste in order that, beyond the specific recommendations that we have made, your work is concluded as soon as possible so that the bill may go to a vote as soon as possible. Any delays in the process, obviously, to our mind, create the possibility of ongoing disadvantage to our members. I will leave it there.

CHAIR—I want to clarify something in your submission, on page 7, in paragraphs 37 and 38. Are you suggesting that section 10 of the SI(S) Act, the Superannuation Industry (Supervision) Act, is not being amended sufficiently enough to take into account your concerns?

Mr Feltham—The SI(S) Act amendment does take account of this. The problem is that historically the 1976 CSS Act and the 1990 PSS Act have overridden that SIS requirement. So the requirement is to actually amend the CSS and PSS, and this inquiry is looking at a range of other superannuation acts which need to be varied to take account of the community standard which is effectively contained within SIS.

CHAIR—So we would need to make a recommendation that, as well as the SI(S) Act being amended, the CSS and PSS acts need to be amended.

Mr Feltham—My understanding is that the SI(S) Act is operating consistently and the community standard is that same-sex partners are generally acknowledged—there may be some exceptions to that—within superannuation schemes. The reason they are not acknowledged within the public sector schemes and the broad public sector schemes, including the military and the parliamentary schemes, is that, as I think Lisa Newman indicated, the definition of 'spouse' is different from what it is in SIS. We are comfortable with the SIS definition but we have not got that definition in the public sector, the military, the pension and the judges' schemes.

CHAIR—So you are saying that to make it consistent the same definition should apply in those other acts?

Mr Feltham—I believe that is what the HREOC recommendation was as well.

CHAIR—At the moment the SI(S) Act does not override it, does it? It just sets a benchmark, I suppose.

Mr Feltham—No, it does not override it and it cannot override the PSS Act or the CSS Act.

CHAIR—Are you putting to us, then, that that is a flaw—that, in an attempt to provide benefits for same-sex couples who work in the Public Service, the PSS and CSS acts should be amended as well?

Mr Feltham—Yes.

Senator BRANDIS—There has been some talk about the need for this legislation to be passed expeditiously, and I agree with that. I am just asking the secretary to check for me, but, to the best of my recollection, the bill was introduced in the House of Representatives in the early part of June. The report of this committee is due in September. Are you aware of any cases among your members of any same-sex couples who in fact have been, or look likely to be, disadvantaged by the intervention of three to four months of parliamentary scrutiny since the introduction of the bill?

Ms Newman—In the area of eligibility for provisions such as leave and remote localities allowances, those are accessed all the time and access is sought all the time so there is a real possibility.

Senator BRANDIS—There is a possibility of course, but how many same-sex couples are there among your members? Can you give me either a specific figure or a rough estimate?

Ms Newman—It is not something we seek information on from our members specifically, Senator, so I am not in a position to give you even an estimated—

Senator BRANDIS—So you do not know.

Ms Newman—We receive feedback from members on all sorts of issues. This is one on which we have sought feedback.

Senator BRANDIS—The bill was introduced in the House of Representatives, I am told, on 28 May and the report of this committee is due by 30 September, so that it is four months. Given that it was said against those of us—including me, I might say—who thought it was a good idea to have proper scrutiny of this legislation through this committee, that we were delaying it and exposing people to some financial disadvantage, can you think of one instance? Has anyone complained to you that since 28 May there has been an adverse change to their circumstances which would not have happened had the bill passed the Senate without reference to this committee?

Ms Newman—Have we received specific complaints? No, Senator, but our membership is reflective of the diversity of the community at large—

Senator BRANDIS—What is your membership?

Ms Newman—It is approximately 50,000 members in the areas of coverage that we have. So in relation to the possibility of disadvantage from any delay, it is real and it does exist. I am quite certain that.

Senator BRANDIS—As a matter of logic it must be possible, but I am asking a different question: whether in fact there is any evidence that there has been an actual case of disadvantage as a result of the four months between the introduction of the bill in the House of Representatives and report of this committee next month. You cannot point either by way of specific complaint or anecdotal evidence to any particular case?

Ms Newman—I will undertake to put the question directly to our members and come back to you. In relation to that question, I think that it would be very interesting to put it to APS employers who deal with applications for leave and entitlements specifically.

Senator BRANDIS—Let me give you one example of what I mean, because I am not interested in people complaining that they want this passed sooner rather than later. I am interested in specific cases of disadvantage. Let me give you one case that is quite a famous case. Justice Kirby retires next February when he reaches the age of 70. If this bill does not go through before Justice Kirby turns 70 on some day next February, then he will have been materially disadvantaged—but I have every expectation that the bill will have gone through by then so that in fact will not happen. That is what I am looking for—not people who are aggrieved because of impatience with what they say is the delay, but specific cases of actual material disadvantage to individuals.

Ms Newman—I think that your example is an interesting one. In relation to the table and presentation that my colleague gave, anyone who is retiring or anyone who, God forbid, were to die under the current legislation would actually suffer material disadvantage—

Senator BRANDIS—I would like to know if there are any actual cases.

Mr Feltham—There would be. I have done a breakdown of the 400,000 membership of the CSS and PSS and about 129,000 pensioners who may or may not be in a same-sex relationship—

Senator BRANDIS—We could, I think, fairly surmise that most of them would not be.

Mr Feltham—The administrator of the CSS and the PSS is ComSuper. ComSuper would administer the eligibility or otherwise for a pension based on the current CSS and PSS acts.

Senator BRANDIS—In any event, I have made my point—you are not able to point to any specific complaint you have received. I am not saying that it is not possible; there may have been an individual case. If there has been then perhaps you could take that on notice and let us know.

Ms Newman—Certainly.

Senator BRANDIS—The other thing I wanted to briefly touch on arises from some questions that came from the chair. Reading paragraph 42 of your submission, do I understand you to be saying that what you would like to see is the same interdependency relationship provisions applied to your members as exist under the SI(S) Act?

Ms Newman—That is right.

Senator BRANDIS—So that is one thing you are looking to this committee to recommend.

Mr Feltham—Yes, that is right.

Senator HANSON-YOUNG—Can I follow on from that. Obviously the bill in front of us and what we are looking at here is to change the definitions. We are asking for same-sex couples to be recognised in the term ‘de facto’, the same as heterosexual couples. Then the issue of interdependency would be clarified for those people.

Ms Newman—Yes.

Senator HANSON-YOUNG—Is that what you are looking for in the CSS and the PSS as opposed to using this umbrella definition—which we have heard throughout today is not a good fit, to quote one of our previous witness?

Ms Newman—No. We specifically recommend the use of ‘interdependency’ because it cuts through the problematic definitions that have been a catalyst for discrimination in the past.

Senator HANSON-YOUNG—Then what is the reasoning for saying that in the superannuation amendments bill we want to ensure that same-sex couples can be given de facto status and therefore equal standing and equal rights to current heterosexual couples?

Ms Newman—Because to not do so, to leave the situation as it is at the moment, puts not only people subject to pensions but their families and children at a material disadvantage.

Senator HANSON-YOUNG—So you support the HREOC recommendations that call for same-sex couples to be fitted into the same ‘de facto’ definition as heterosexual relationships?

Ms Newman—We do.

Senator PRATT—I just wanted to clarify that, because I am not sure that you actually mean what your submission says. Defining relationships as interdependent was actually about giving same-sex couples the equivalent entitlements to heterosexual de factos, as opposed to recognising those relationships as interdependent. Is that right? Notwithstanding the fact that they are interdependent, ‘interdependence’ has generally been a category of relationship that has fewer entitlements than those of a heterosexual de facto couple. I just wanted to clarify that.

Mr Feltham—We went into the HREOC inquiry in 2006 with a particular recommendation. HREOC might have come out with something slightly different and broader because the HREOC recommendations at the time were to pick up 58 acts of parliament that needed to be varied. I think it evolved from that point into something a bit different. From our viewpoint, we want equity to be established and the de facto arrangement does provide equity. Given what has been indicated in the debates this morning about the differing definitions, I think we might be suffering the same problem here.

Senator PRATT—Further to Senator Brandis’s point, thank you for your advocacy on behalf of your members. I am a former member of the CPSU and have a substantial amount of money in the PSS, which my partner will not be the beneficiary of without the passing of this act. Thank you for your advocacy.

Mr Feltham—You are one of 110,000, Senator, who are either preserved or deferred.

CHAIR—Do we have any other questions? Senator Feeney?

Senator FEENEY—Going back to the question of interdependency, I want to read a quote from a briefing paper and ascertain whether you agree with it or not to further clarify the point. It states:

- Interdependency mischaracterises a genuine same-sex couple as different or inferior to a genuine opposite-sex de facto or domestic relationship. Like opposite-sex couples, partners in same-sex relationships are more likely than other interdependent relationships to be the primary financial and emotional support for each other, and to raise children together.

Is that a statement you are happy to support, or do you have opposition or further remarks?

Ms Newman—No, we are quite happy to support that position. The issue for us in relation to the word ‘interdependency’ was essentially to try and avoid some of the problematic definitions and the linkages—for example, to marriage—that have been used to create red herrings in relation to this type of community dialogue.

Senator FEENEY—I appreciate that. I just wanted to precisely clarify your position.

CHAIR—Senator Brandis?

Senator BRANDIS—Thank you very much for the opportunity to contribute again, Madam Chair. Arising out of that, I have a logical problem with what you are saying, Ms Newman. It seems to me, just as a matter of logic, that you could only regard the classification of same-sex de facto relationships with other co-dependency relationships as demeaning of the same-sex relationship if you assume that the same-sex de facto relationship is superior to, and therefore ought not to be classified with, the interdependency relationships. Why would you say that? Why can we not accept that there is a variety of relationships in society between two people which have the features of being permanent, loving, domestic relationships, including de facto heterosexual relationships, de facto homosexual relationships and other permanent, caring, loving, domestic relationships in which two people constitute a household and which ought to be respected? Why do you privilege two—the sexual relationships—above the other loving relationships?

Ms Newman—I was not aware that we actually had.

Senator BRANDIS—I thought it followed from your answer to Senator Feeney, but I do not want to put words in your mouth. If you agree with me then that is fine. I am not going to ascribe a view to you that you may not adopt—

Ms Newman—Thank you for that courtesy, Senator.

Senator BRANDIS—but I did think that the proposition I put to you did follow from your answer to Senator Feeney, and I think he thought so too.

Senator FEENEY—I think what is at issue is that same-sex de facto relationships and heterosexual de facto relationships are to be treated equally, and those relationships which are not sexual, which do not give rise to children or the caring of children, do not have some of the key attributes of those de facto relationships. So to use terms like seniority or inferiority in looking at those relationships is obviously pejorative and subjective, and none of us are trying to do that.

Senator BRANDIS—No, but that is the language that comes from the HREOC report that you quoted, Senator. That is the point.

Senator FEENEY—Some relationships obviously have different attributes to others—

Senator BRANDIS—Absolutely.

Senator FEENEY—and we obviously should understand that in our legislative purpose.

CHAIR—We are not here to actually debate the bill either.

Senator FEENEY—Sure.

CHAIR—Ms Newman, do you have a response to the point Senator Brandis made?

Ms Newman—I come back to the submission we initially made to HREOC in 2006. We talked about interdependency cutting across the variations of relationships that exist but recognising the economic interdependency that people who share households or key relationships may have. That was the basis of the submission then; and in our position now, notwithstanding the HREOC report, the recommendations of which we are happy to support, that is what we have sought to address.

Senator BRANDIS—I just want to clarify the issue arising between Senator Feeney and me. That language comes not from me but from the words of the HREOC report, which Senator Feeney quoted. Let me read it again:

Interdependency mischaracterises as a genuine same-sex couple as different or inferior to a genuine opposite sex de facto or domestic relationship.

If you leave out the words ‘or inferior’, I do not think we have a problem; but once you include the words ‘or inferior’ what you are doing is not saying the relationships are different but saying that relationships do have an order of inferiority or priority, which is something I cannot accept.

Mr Feltham—The definition of interdependency goes to a same-sex relationship, but it is more historically acknowledged as involving spinster sisters who have a financial dependency. As I understand it, that is where the original terminology came from. It evolved from there into other forms of interdependency.

Senator BRANDIS—That might be right, but I do not think we should limit ourselves because of the provenance of a particular example. I think we all know—I certainly know—of permanent domestic relationships which are not of a sexual character between two people which you would absolutely describe as loving relationships.

Senator FEENEY—And they are less challenging relationships for legislators, because they do not give rise to children or whatever.

Senator BRANDIS—That is indeed the case. Nobody is saying that those relationships might not have different characteristics—the absence of children being an example of a very obvious potential difference. It is not a question of them having a different character; it is a question of their moral status.

Senator HANSON-YOUNG—The second of your key recommendations says that the CPSU fully agrees with the terminology of the bill, which gives same-sex couples the same standing and entitlements as heterosexual de facto couples. I ask you again: is that the terminology you are happy with?

Ms Newman—Absolutely. We support that fully and wholeheartedly, and we wish this bill all speed.

CHAIR—Thank you for your appearance before the committee this afternoon and for your submission.

Committee adjourned at 3.13 pm