COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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

THURSDAY, 7 AUGUST 2008

CANBERRA

CONDITIONS OF DISTRIBUTION

This is an uncorrected proof of evidence taken before the committee. It is made available under the condition that it is recognised as such.

BY AUTHORITY OF THE SENATE

[PROOF COPY]

INTERNET

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

The internet address is:

http://www.aph.gov.au/hansard

To search the parliamentary database, go to:
http://parlinfoweb.aph.gov.au

SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Thursday, 7 August 2008

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

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

Senators in attendance: Senators Barnett, Crossin, Farrell, Feeney, Fisher, Hanson-Young, Marshall, and Trood

Terms of reference for the inquiry:

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

WITNESSES

ARNAUDO, Mr Peter, Assistant Secretary, Human Rights Branch, Attorney-General's Department **16**

CHALLIS, Dr John Robert, Gay Rights Adviser, Superannuated Commonwealth Officers Association **1**

LINKSON, Ms Marita Joy, Federal Secretary, Superannuated Commonwealth Officers Association **1**

SHELTON, Mr Lyle Gavin, Chief of Staff, Australian Christian Lobby **7**

THOMSON, Mr Peter, Principal Legal Officer, Age and Sex Discrimination Section, Human Rights Branch, Attorney-General's Department **16**

WALLACE, Mr Jim, Managing Director, Australian Christian Lobby **7**

Committee met at 1.33 pm

CHALLIS, Dr John Robert, Gay Rights Adviser, Superannuated Commonwealth Officers Association

LINKSON, Ms Marita Joy, Federal Secretary, Superannuated Commonwealth Officers Association

CHAIR (Senator Crossin)—We will reconvene this hearing of the Senate Legal and Constitutional Affairs Committee into the Same-Sex Relationship (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008. I welcome representatives from the Superannuated Commonwealth Officers Association. We have a submission numbered 27 from SCOA, and I am not sure of the number of the other submission.

Dr Challis—Mine is 25.

CHAIR—Firstly, are there any amendments or changes that you wish to make to those submissions?

Dr Challis—There was one mistake in the original; one name was wrong. I put Joel Fitzgibbon in as the shadow Attorney-General and it should have been Joe Ludwig. I did correct that in a subsequent addition, so I just hope that correction has gone through. With the committee's agreement we would like to make a supplementary submission. It is a brief, one-page submission. With your agreement we would like to make that submission at the end of our presentation, because it logically flows from the presentation.

CHAIR—We will take that from you when the time is right. If you start with a brief opening statement, we will go to questions at the end of that.

Ms Linkson—The Superannuated Commonwealth Officers' Association, or SCOA as we are more commonly known, is a national non-profit member organisation representing the interests of Commonwealth and territory pensioners and their dependants. We focus on improving and safeguarding the superannuation and other retirement benefits and conditions. On behalf of SCOA, its members and constituents I would like to thank the committee for the opportunity to make our submission to the inquiry and also to give evidence here today.

We estimate that around 7,000 current recipients of defined benefit pensions and their dependants are affected by this legislation, as well as many more deferred benefit members of the Commonwealth schemes and contributing members. We have made this submission because we believe in equality. None of us want to die in the knowledge that our loved ones will face financial hardship. Same-sex couples, couples who support each other often through many years of life, can suffer considerable angst knowing that upon their death that the surviving partner will be denied the benefits provided to heterosexual couples, and also that their partner may face the prospect of a diminished retirement income. We know that for many Commonwealth superannuation pensioners the pension is the main source of income for a couple. In relation to superannuation benefits SCOA fully supports full equality of same-sex and heterosexual couples. Our members, many of them elderly, have anticipated reform in this area for a number of years and they eagerly anticipate an end to the discrimination with the passing of this bill.

SCOA relies on the work of a number of volunteers, one of whom is Dr John Challis, who is here with me today. John has an active interest in equal rights for same-sex couples and he of course contributed significantly to our submission. He is a regular contributor to our quarterly national newsletter to our members on the topic of same sex, and he can speak in more detail in relation to this inquiry.

CHAIR—Dr Challis, before you start with your opening statement, the supplementary submission you were talking about has already been circulated to all of us.

Dr Challis—Thank you. I also thank the committee for the opportunity of presenting evidence. I would like to congratulate and thank the committee for the very expeditious way in which they are dealing with this bill and with this inquiry. We are hoping that you will be able to have your report finalised very quickly and that the bill can be dealt with in the next session of the Senate. I have an eightieth birthday coming up at the beginning of September and it would be a lovely birthday present if the bill went through.

CHAIR—Happy birthday from this committee to you.

Dr Challis—It is not here yet. The SCOA submission and the submission from the Comsuper Action Committee are very similar. One is really just an extension of the other. The extra material in the Comsuper Action Committee submission is some personal details about myself and my partner, who is here with me today, and the way in which this discrimination affects us in our daily life, particularly in our financial planning. You can read all about that in the submission.

Secondly, I have included some material on the origin of the interdependency proposal, where it came from and how it has developed. It came from Senator Coonan, of course, in 2004 in connection with the superannuation choice legislation. I have also attached three quite important letters relating to the submission and a collection of press cuttings from 2006, 2007 and 2008, which you will find very useful reading in terms of the context and coverage of this. Unfortunately my computer skills are not good enough to have enabled me to email the press cuttings, but I did send them with the hard copy and I hope they have been passed on to you.

The structure of both submissions is very simple. We took the three reasons Dr Nelson gave in his second reading speech for requesting this inquiry, and I have commented on each of those reasons Dr Nelson gave. The first reason, of course, relates to the centrality of marriage. The second reason is the question of preservation of the rights of children. The third reason is the question of interdependency. I will comment on each of those.

We would like to say in connection with the question of centrality of marriage, and the claim that this bill in some way undermines the centrality and the place of marriage in the community, that we feel this really has been exaggerated and that there is not any evidence for this. We ask you to note that shadow cabinet minister Malcolm Turnbull and Christopher Pyne, in their speeches, commended the bill. They gave unqualified support to the bill and expressed no concern on these grounds. Mr Petro Georgiou was quite explicit in his rejection of this reason for delaying the bill and he stated, ‘With respect to any concerns that this bill devalues marriage, I have to say frankly these are concerns are unfounded.’

With regard to the rights of children and how children are affected by the bill, this is really not a matter that I am in any position to make a positive contribution except to say that SCOA and Comsuper believe it is very important that proper provision is made for the dependent children of same-sex couples and that they be given the same treatment as the children of heterosexual de facto couples. I would ask you to take note again of the statistics CPSU put before you on Monday indicating the financial disability affecting children of same-sex couples.

It seems to me the main question that the committee has to deal with in relation to this bill is whether same-sex couples are given the status and the entitlements of de facto heterosexual couples or whether they are treated under this other heading of interdependent relationships. We firmly believe that same-sex couples should be treated as de facto couples and that the de facto model is the way to go. This is what the HREOC report recommends because it says this is the only way to give equal treatment to same-sex couples as to heterosexual de facto couples. We would also note that this was the election policy of the Labor Party. It was the promise that they made during the election, and we are very grateful to them for having fulfilled this promise so quickly.

On the question of interdependency, we have two problems with the interdependency formula. One is a philosophical problem. We agree with HREOC that it does not treat homosexual couples equally with other couples, if you follow that interdependency model. It makes more onerous the criteria for recognising same-sex couples and also, more importantly, there is a philosophical reason why we are concerned about it, and that is that it mischaracterises same-sex couples. It transforms them into some kind of sanitised asexual relationship. They are sort of whitewashed in a sense and made more respectable by calling them interdependent relationships instead of same-sex relationships. I would also suggest to you that it is really economically somewhat irresponsible for the opposition to be trying to impose upon the government a proposal that they themselves when in government found they had to abandon and were unable to implement.

I refer you to the letter that the Comsuper Action Committee wrote to Dr Nelson on 12 December in which we placed on record a conversation we had with Mr Turnbull, our member for Wentworth, relating to discussions that had taken place at 21 August cabinet meeting when the cabinet was trying to decide upon its response to HREOC. This is what Mr Turnbull advised us:

> Mr Turnbull advised that in its response to the HREOC Report, (discussed at the August 21st Cabinet meeting), the government had changed its position and moved away from the ‘interdependent relationship model’ for delivering same-sex entitlements, in favour of giving same-sex couples equal status with heterosexual de facto couples, as recommended in the HREOC Report. Malcolm explained that the reasons for this change were that it was impossible to calculate the additional number of interdependent relationships, other than same sex couples, and therefore to calculate the costs. This was already evident at the May 2007 Senate estimates hearings when Senator Minchin revealed that the estimate for the additional unfunded liability for the reform was $2 billion, split 50/50 between same sex couples and other interdependent relationships.

In other words, what the previous government found was that it was just impossible to make this work. I am reminded that Professor Parkinson said to the committee on Monday, 'Don't touch it. It will lead to a nightmare for the Treasurer, Wayne Swan.'

We would like to put to you another argument, and that is from the practice of the public service. I have been campaigning for this reform for 20 years now. In 1999 I conducted a survey of the public service practice in relation to recognising same-sex couples. A typical response, this one received from the Department of Foreign Affairs and Trade, stated:

> Consistent with Australian Public Service practice, the definition of 'spouse' includes de facto relationships, including same-sex partners. Recognition of, and thus entitlements for, a spouse are automatic and the spouse normally resides with the officer.

I myself took out a statutory declaration of the ABC saying that I lived in a de facto relationship with Arthur Cheeseman, and that was recognised for travel allowances and so on. Our argument is that in its administrative practice the government for 20 years has been recognising same-sex couples as a de facto relationship, and yet in its lawmaking the government has been discriminating and refusing to recognise same-sex couples as de facto couples. There has been this blatant inconsistency between the Commonwealth's administrative practice and its lawmaking, and this bill will put an end to that.

The other point we would like to put to you is the possibility of backdating this bill at least to 1 July, when the government previously intended it to apply. I would draw to your attention the fact that, in his second reading speech, Malcolm Turnbull devoted most of his time to the argument that it should be backdated. Mr Turnbull, slightly facetiously I think, suggested that it should be backdated to 9 November 2007, which was the date on which he announced the government's election policy to recognise same-sex couples. Equally facetiously, we have suggested that it should be put back to 22 June 2004, which was the date when the Howard government originally promised us this reform. This could be important if there are further delays to the bill possibly through redrafting.

I turn now to the supplementary submission. It states that, as an advocate for the recognition of same-sex couples for reversionary death benefits in Commonwealth defined benefit superannuation funds, I have been for a long time concerned about the opposition of the Australian Christian Lobby, ACL, and other conservative Christian groups to this reform. The typical expression of this opposition appeared in the *Australian* on Wednesday, 29 August 2007 with the headline 'Christians out to stop gay rights'. The report by respected political journalist, Patricia Karvelas, stated:

> The Australian Christian Lobby will campaign to stop the Howard Government and the Labor Opposition from granting same-sex couples full de facto relationship status. Mr Wallace said that he did not wish to see the definition of de facto marriage to be extended to include same-sex couples.

It was therefore with some trepidation that I read this week the submission of the Australian Christian Lobby to this inquiry. Imagine my surprise and delight when I discovered that the ACL was supporting the intention of the same-sex relations bill to remove unjust discrimination against same-sex couples and their children, and amongst its recommendations was the following:

> Non-marital relationships, whether heterosexual or homosexual, should be termed 'de facto' relationships as the government currently proposes in its Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008.

The ACL, it appears to me, is offering this concession in return for the restoration of the terminology of husband, wife and spouse when the bill refers to 'legal marriage'. What is the response of the Comsuper Action Committee and of SCOA to this proposal? Firstly, we do not agree with the reasoning behind this recommendation, namely, that the terminology of the bill undermines marriage and needs to be replaced for that reason. We continue to fully support the terminology of the bill as a simple, logical and clear way of achieving the intention of the bill, namely, the recognition of same-sex couples as fully equal to heterosexual de facto couples. That being said, I personally, the Comsuper Action Committee, and I am confident the federal executives of SCOA, whom I have not had time to consult, would have no difficulty in accepting ACL's proposal if it is a means of assuaging the anxiety and insecurity of religious conservatives about marriage. I notice that the representatives of the New South Wales Gay and Lesbian Rights Lobby, giving evidence on Monday, also indicated that they would not be opposed to this compromise. In fact, this is the model of legislation that we were expecting.

The senators will remember that this is the kind of amendment which that great advocate same-sex couples Democrat Senator Andrew Murray was continually placing before the Senate every time a piece of

superannuation legislation came up. As you will recall, his last mammoth effort in the final week of the former parliament was the Judges' Pensions Amendment Bill, often referred to as the Kirby amendment. It contained a comprehensive new definition of 'de facto relationship' that included the words that 'a de facto relationship may be between two people of the same gender' and simply said, 'After marital relationships wherever occurring insert "de facto relationships".' We fully supported this amendment. We urged the Howard government to pass it, and as soon as the Rudd government got down to work after Christmas I wrote to the Attorney-General and urged him to reintroduce Senator Murray's amendment as soon as the parliament met so as to carry out Labor's election promise without delay. It is fully consistent with our position to support such an amendment, if the committee decides to go that way. Our aim is simply to get this reform through parliament without any delay. I place on record our appreciation and thanks to the Australian Christian Lobby for their magnanimity in revising their position and supporting the removal of this unjust discrimination against same-sex couples and their dependent children, and I look forward to hearing their presentation.

CHAIR—With respect to the backdating of the death benefit, what is the impact on people of a backdating to, say, 1 July?

Dr Challis—The backdating would take away a lot of anxiety. I am 80 years old. I might get pneumonia on the train going back to Sydney and die before this bill becomes law. It would just assure same-sex couples that if something unexpected happens between now and the time that the bill is passed they will be covered. In fact, I can tell you a very real case. One of the members of the Comsuper Action Committee, Wing Commander Murray, who accompanied me on our discussions with Mr Turnbull, has just been diagnosed with a very serious heart condition and he is in a quite precarious state. He is very concerned that he will not survive to see this bill passed. It would very painful and very embarrassing if things like that were to happen. It is a real issue. I understand from the Attorney-General's Department that they think it is a very difficult thing to do. I really cannot understand that. After all, if you can backdate the taxing of luxury cars to 1 July, I cannot see why it is not an easy matter to revive a pension entitlement after the person has died.

CHAIR—I would like to ask you about your comments in relation to the Australian Christian Lobby's submission to us. You are suggesting that, if we picked up the toing and froing here about the compromise, you say, in their accepting the bill with terminology, instead of using the words 'couple relationship' we actually specify the different sorts of relationships?

Dr Challis—I am suggesting that you do something similar to what Andrew Murray proposed. You have a husband and wife/spouse, or a marital relationship, and de facto relationships including same-sex couples.

Senator HANSON-YOUNG—Ms Linkson, can you give me some examples of any requests or queries from any of your members who are having trouble accessing super entitlements and who perhaps fit into more traditional interdependent relationships, for example, spinster sisters? Have you had any inquiries about that from your members and is that something that you have felt pressured to advocate for?

Ms Linkson—I am not personally aware of those inquiries. I have only been with the organisation for the last 18 months. But having said that, I am sure there are members out there who are in that situation.

Senator HANSON-YOUNG—There has been toing and froing all week and different witnesses have put to us that we need to be incorporating the interdependent relationship into this bill somehow to cater for people in those situations, but unfortunately we have not heard from anyone in that situation. As the organisation that is really representing these members, has no-one put it directly to you that this is something that they feel disadvantaged by at the moment?

Ms Linkson—Not directly to me. Our position is that that should be dealt with in a different place.

Senator HANSON-YOUNG—Could you let me know how you feel about the definition of the product of the relationship in relation to the definition of 'children' in the bill? There have been different ideas about that as well. Is that something that you can shed light on in terms of your opinion? I understand your submission is recommending that it be passed the way it is. The need for expediency is accepted. And you have advocated for the backdating. But there have been other suggestions in terms of how we frame that definition. How do you feel about that?

Dr Challis—I was present on Monday at the hearings in Sydney for most of the morning. I did hear the concerns expressed and I do understand them. Perhaps 'product' is not a very elegant word. What was suggested and what the ACL is suggesting is that the question of dependency should be the criterion. That if there are dependent children in some form, that should be what is expressed.

Senator HANSON-YOUNG—Obviously I understand that you represent the public sector superannuation members, but we have had concerns raised by a number of witnesses that there is no mandate in the current legislation before us to ensure that those who receive entitlements in private super funds, which we know is almost 90 per cent of the Australian population, would not be guaranteed to have the same rights under this bill as those who have their super in the public funds. Would you be able to respond to that as well?

Dr Challis—I have great sympathy for those people, because the way the superannuation choice bill was left in 2004 was that it was optional for the funds to recognise this. We are talking about the Commonwealth's defined benefit fund. It will be law and it will not be left up to the fund itself to recognise who is in a de facto relationship or not. I would certainly support the government tidying up the previous legislation covering private funds.

CHAIR—I wanted to go into the issue of interdependent relationships and draw out your opinion. I understand, if I read you correctly, that you do not support the law covering interdependent relationships?

Dr Challis—There are two questions. It is not clear from Dr Nelson's second reading speech just what the opposition really intends. In addition to de facto relationships receiving the entitlements, if you want to add another category that says that people in these kinds of interdependent relationships also should have entitlements, we would have no problem with that.

ACTING CHAIR (Senator Barnett)—You would have no problems with that?

Dr Challis—No, if you wanted to add that. Except that I would say to you that you will have difficulties administering this, because there is no way of knowing how many of these people there are. It is unfair to impose on the government, as I said before, a requirement that the coalition when it was in power was not able to introduce for those reasons.

Senator BARNETT—At a conceptual and in-principle level you do not have a problem with covering them in the same way?

Dr Challis—As long as they are covered in a separate category from homosexual and heterosexual de facto relationships.

Senator BARNETT—Why a separate category? Some people would say that is discriminatory.

Dr Challis—No, it is not discriminatory because they are a completely different kind of relationship. They are not a relationship that involves a sexual relationship. Let me quote from Danna Vale's second reading speech. She made what seemed to me to be quite a remarkable statement, saying:

> Why should relationships depend on a definition that describes the sexual nature of the relationship? At this juncture one can honestly ask what has sex got to do with it?

The answer quite simply is that sex has got everything to do with it. Marital relationships are about sexual relationships. De facto heterosexual relationships are about sex. Homosexual relationships are about sex. These other kinds of interdependent relationships do not have a sexual character to them, and so it is completely misdescribing homosexual relationships to put them in this basket.

Senator BARNETT—Can I draw you out there. You have described the differences between the three types of relationships. I seek your understanding that there clearly is a difference between a marriage relationship, a de facto relationship and a homosexual relationship; do you concur with that or do you lump them all together in one?

Dr Challis—I would basically lump them all together in one as a couple relationship, which is what the bill suggests. Then there is another kind of relationship, these other interdependent relationships.

Senator BARNETT—You do not accept the proposition put by many witnesses to this committee that marriage is a distinctly different unique relationship to, firstly, a de facto relationship and, secondly, a homosexual relationship?

Dr Challis—It differs in some ways.

Senator BARNETT—In what ways?

Dr Challis—What is the difference between a marriage relationship and a de facto relationship? I think the difference is that one has been publicly declared and publicly registered and it comes within a certain legal category, but in actual day-to-day living of the relationship there is really no difference. Our friends, I am sure, simply look upon us as a de facto couple like any other de facto couple.

Senator BARNETT—I am not going to go into it at great length, but there would be a broad view across the country that the marriage relationship has legal differences, as you have described just then. It has social, moral and other attributes that are different from de facto and other types of relationships. That is the point that I am getting to, that there is a distinction between the types of relationships. The point that you are making is that interdependent relationships are distinct again?

Dr Challis—Yes, very distinct.

Senator BARNETT—Indeed.

Dr Challis—They are more distinct than the distinction between de facto relationships and married relationships.

Senator BARNETT—Let me go to this question now. As I understand it, you are satisfied, you would support or would be happy with removing the definition 'couple relationship' and replacing it with a 'marriage' or 'de facto relationship'?

Dr Challis—Yes, I would be quite happy with that.

Senator BARNETT—I draw to your attention and the attention of the committee that we have received a supplementary submission from Professor Parkinson. Has that been tabled as a public document?

CHAIR—Yes.

Senator BARNETT—I draw that to your attention, and I think in many respects he has a similar view. He does not support the use of the word 'couple relationship' replacing the word 'marital relationship'. He has expressed views along those lines, if I am not misinterpreting his understanding.

Dr Challis—Just let me clear that I support the term 'couple relationship', but I have no problem with replacing it.

Senator BARNETT—That is fine. Do you have any concerns about the use of the words 'children' being defined as a 'product' of a couple relationship?

Dr Challis—As I said before, I really have no expertise in this area. It is not a very happy word, it would seem to me.

Senator BARNETT—It has been described as an ugly word.

Dr Challis—Well, fair enough. Perhaps some work does need to be done on polishing up that particular section.

Senator BARNETT—Thank you for your contribution.

CHAIR—Dr Challis and Ms Linkson, I thank you for your appearance today before the committee, and your efforts with your submission are very helpful.

Dr Challis—Thank you very much for hearing us and I look forward to my birthday present.

[2.15 pm]

SHELTON, Mr Lyle Gavin, Chief of Staff, Australian Christian Lobby

WALLACE, Mr Jim, Managing Director, Australian Christian Lobby

CHAIR—I welcome representatives from the Australian Christian Lobby. We have your submission, which for our purposes we have numbered 11. Before I invite you to make a short opening statement, do you have any amendments or changes that you want to make to that submission?

Mr Wallace—No.

CHAIR—I will invite you to make a short opening statement. Once you are finished, we will go to questioning.

Mr Wallace—I would like to make a very short statement and then hand over to Mr Shelton, who has spent most of the time on this. Firstly, Australian Christian Lobby does not oppose the removal of unjust discrimination from anybody, and certainly from homosexual people. We are particularly concerned with regard to the effect that that might have on children who are in these relationships as well, as a dependant of a homosexual couple. But we are concerned that in removing any unjust discrimination that we do not set up a situation where we remove the terminology of marriage. We feel that this parliament in particular, being responsible constitutionally for marriage and overseeing marriage through the Marriage Act, should be about also protecting the terminology of marriage and making sure that that language is retained in legislation, which we are sure will help retain the language and the concept of marriage, and reinforce the concept of marriage in society generally. Having said that, I will ask Mr Shelton to address the main points of our submission.

Mr Shelton—As Mr Wallace said, ACL accepts that same-sex couples and the children they are responsible for should be able to benefit from each other’s superannuation. We have previously stated our in-principle support for removing unjustified discrimination against same-sex couples. However, equal access for married, de facto and same-sex couples to benefits and entitlements can be achieved without eliminating marriage from Commonwealth law. Children can also benefit from the superannuation entitlements of those responsible for them without redefining biological reality.

We have three principal concerns with the bill and our note from the previous discussions is that these have been the subject of your deliberations over the last couple of days. The first one is the use of the term ‘couple relationship’. We are suggesting an amendment to the bill that would insert instead of ‘couple relationship’ the phrase ‘marital and de facto’, which I note was discussed previously, and that de facto, heterosexual and same-sex relationships be defined as de facto using the current definition that is used for couple relationships in the bill, but you would keep marital quite separate.

The second principal concern is in relation to children. We are appealing to the committee to avoid writing a biological impossibility into Commonwealth law by defining children as the product of couple relationships, thereby defining them as products of a same-sex relationship. We believe, again, that the objects of the bill can be achieved without this terminology but instead by applying a dependency test.

The third principal concern is to do with interdependency. We believe that, if the goal is to remove unfair discrimination, that should also be removed against those in other types of interdependent relationships and they should have the ability to opt in to access one or the other’s superannuation should they wish.

The reason we are concerned about these things is that the government has foreshadowed further legislation and said that this was a first tranche, and that a second tranche is on the way looking at removing unjust discrimination in a whole range of Commonwealth laws through a foreshadowed omnibus bill. We think it is important not to unwittingly undermine the intent of the Marriage Act by creating a presumption that all relationships are the same, and we would be concerned if some of this terminology was carried through to the further reform that is proposed.

In conclusion, we believe it is completely unnecessary to redefine ‘marriage’, ‘spouse’ or ‘child’ to achieve the government’s aim of eliminating unjustified discrimination against same-sex couples and children in their care. If radical redefinitions to millennia-old social institutions, terminology and natural law are desired, legislation addressing financial discrimination is not an appropriate or sufficiently transparent forum by which to achieve these aims.

Finally, we note that shortly before our arriving here the Attorney-General Department's submission was not available on your website, and we would have been keen to have seen that as that could have also informed our evidence here this afternoon. We just make that point.

Senator BARNETT—I do not think they have made a submission, have they?

CHAIR—The Attorney-General's Department have not made formal submissions to the first two hearings today. They have to this bill and it was circulated to committee members last Friday. We have had quite a large number of submissions about this and perhaps our processes are a bit more ahead of your expectations.

Mr Shelton—I just note that in the program that is on the website for today there is reference made to the Attorney-General Department's submission 38, and the submissions ended at about 36 or something like that.

CHAIR—We have had many more submissions than 38 come in, and they are being processed gradually. As well as that we have had three days of hearings so we could finalise our report and expedite it very quickly, that is, for the first sittings of parliament essentially, when we go back in three weeks.

Mr Shelton—The only reason I make that point is that we anticipate that perhaps the government or the department might see some insurmountable difficulties in the type of approach that ourselves and others who have made submissions to this committee are proposing, and it would have been good if we could have seen that submission and perhaps addressed it this afternoon.

CHAIR—I am not sure whether it is there. I am looking at it now. We have your submission and we will go to questioning now. We will take on board what you have said and we may well include your recommendations in our report, to which we would expect them to then respond. Obviously, the wording of the suggestion of 'product of a relationship' is causing people some angst. Some do not mind it. They are not too worried about the use of the terminology. Would its replacement with wording 'child of the relationship' satisfy your concerns in that area?

Mr Shelton—I do not think so. It is probably better to apply some sort of dependency test. Biologically it is not possible to have a child of a same-sex relationship and that goes to the heart of our concern. In trying to achieve the aims of the bill, which as we have said we support, it seems like we are going to unnecessary lengths to perhaps reengineer what is normally accepted as part of natural law, and certainly the way the bill is written it does write into Commonwealth law a biological impossibility. We would prefer a dependency test rather than the approach that you suggested.

CHAIR—Let me just clarify this for our purposes. The Australian Christian Lobby's position is that they are not objecting to or against the rights of the child being able to access this entitlement, despite the kind of relationship they would find the people in which they live and are dependent on?

Mr Shelton—That is correct.

CHAIR—Are you saying that we need to find a better way to achieve that?

Mr Shelton—That is correct.

CHAIR—Did you want to finish your response to me?

Mr Shelton—No, that is fine.

CHAIR—Senator Brandis?

Senator BRANDIS—I wanted to pursue the dependency test issue with you. I do not know whether you have seen Professor Parkinson's evidence or the additional submission that he has favoured us with today, but that is pretty much his position too. Can I draw you out a bit on how would express the dependency test in particular. Should it be that the child is dependent on an individual member of the couple or should the dependency test be that the child is a dependant of the relationship?

Mr Shelton—Others who are more legally qualified could answer that. There is a dependency test, as we understand it, is applied in the Judges' Pensions Act 1968, and something along those lines could well suffice.

Senator BRANDIS—Just on a different issue—and I agree with you, by the way, about the dependency—I have been pursued by Professor Parkinson and others, including yourself, that that is the way to handle this. On the main issue, you certainly do not need to pursue me, and I dare say other coalition senators, that the expression 'marital relationship' should not be removed from any of these statutes. But am I right in understanding that your position is that you think that de facto homosexual relationships should be treated equivalently to de facto heterosexual relationships as a separate tier of relationships below marriage in effect?

Mr Shelton—Yes, that is correct.

Senator BRANDIS—There has been discussion, a lot of it initiated, I dare say, by me, about the inclusion of other co-dependent or interdependent relationships. What is your view about that?

Mr Shelton—As I said in my opening remarks, that would be our preference. If the aim is to remove discrimination, why should discrimination not be removed from people in other dependent relationships who choose to opt in to accessing each other's superannuation?

Senator BRANDIS—So, you would have an opt-in provision?

Mr Shelton—Yes.

Senator BRANDIS—I agree with you on that, too, but what about the question of the assimilation of co-dependent relationships and de facto, heterosexual and homosexual relationships, to the same category? Do you say that we should do that or do you say, as Mr Irlam did from the Coalition for Equality, that if we recognise dependency relationships they should be a different category? So, we have marital relationships, de facto relationships, both heterosexual and homosexual with no difference between the two of them in terms of consequences or treatment, and we have other co-dependent relationships, again with no differences between them in the consequences of the treatment for people who opt in, but that they should be put in their own basket, as it were, and not lumped in with the de facto relationship category? Do you have a view about that?

Mr Shelton—The way you have described it would be my preference. Again, I am not a lawyer and I guess you would have to work out how you legally approach that.

Senator BRANDIS—You do not have to be a lawyer. I am asking you that conceptually.

Mr Shelton—Conceptually we would have no problem with that.

Senator BRANDIS—We have marriages.

Mr Shelton—That is correct.

Senator BRANDIS—We have de facto relationships and we have interdependency relationships.

Mr Shelton—Yes.

Senator BRANDIS—The consequences of each are the same, but the legislative classification of the three is separate; is that your preference?

Mr Wallace—What we are saying is that the treatment of each, we believe, should be the same. How you categorise those as the mechanism that is required within the legislation to best implement that, I think we would be prepared to live with the solution that might have the three. I do disagree, conceptually, to the idea that de facto relationship is defined by sexual relationship. I may be wrong in this. I am not a lawyer. But my understanding is that there are a number of criteria, some 10 I believe, that are considered in deciding whether someone is in a de facto relationship.

Senator BRANDIS—It all depends whether you are looking at the uniform evidence legislation, the Family Law Act or this act.

Senator BARNETT—We had a debate about that this morning at some length. There are some nine criteria under one bill and seven criteria under another bill, and they are inconsistent.

CHAIR—The bills also had different outcomes as well.

Senator BRANDIS—You have a sexual relationship under the Family Law Act but you do not have a sexual relationship under the Evidence Act, because people interested in the rules of evidence are much more prosaic.

Mr Wallace—I am glad to see that the law is as confused as we are.

Senator BRANDIS—You seem to be saying something just a little different from Mr Shelton. I have an open mind about this. Given that we all seem to agree that marriage should be in a category of its own, do you have a view as to whether de facto and other co-dependent relationships should each be in their own categories or they should be assimilated into a single category?

Mr Wallace—If the issue is to provide for equal treatment of them, then I do not see why they should not be in the same category. As I have said, if our aim is to get equal treatment, if you ended up with three categories—for some reason there may be one that is necessary to apply the act—I would be prepared to accept that, as Mr Shelton has indicated.

CHAIR—Are you familiar with ASFA's submission to us and the evidence we took from it on Tuesday in Sydney?

Mr Wallace—No, but Mr Shelton may be.

Mr Shelton—No, I am not. We have not had the benefit of reading the transcripts as yet.

CHAIR—Its submission also suggests that including interdependent in this legislation would not be desirable because the majority of trustees that superannuation funds operate under have a much more limited and restrictive set of criteria for interdependent, that is, they must satisfy all four criteria and not just one. We have had no submissions from people who might classify themselves as being interdependent, and so I am wondering whether your issue is really that you want the word 'marriage' retained rather than broadening the definition to include interdependent?

Mr Shelton—Obviously marriage is paramount, but we make the observation that, if the issue is about discrimination, there are other people in domestic co-dependent relationships. If they are in a caring relationship, why should they not be entitled to also share in the benefits of each other's superannuation?

Senator BRANDIS—In other words, why should they be discriminated against?

Mr Shelton—That is correct.

CHAIR—ASFA and quite a number of other people who have put submissions to us and are saying that there is no evidence to suggest that people in interdependent relationships are seeking that or have sought that, and superannuation funds treat them very differently from either marital or de facto relationships.

Mr Shelton—It is a matter of the principle, and there may not be a great call on this from people in co-dependent relationships. But if our concern as a society and the government's concern is to address issues of discrimination, that should be applied equally across-the-board.

Mr Wallace—I visited the Attorney-General's office in Tasmania to inquire as to the rationale for relationship registers down there when they were originally established. The example given to me to justify the need for relationship registers—while it did not apply to superannuation I think the principle applies equally here—was that of two aged sisters living together, one of whom owned the house and the other did not. The one who, let us say, is older or may be ill dies and she leaves the house to the other sister, wanting her to retain the benefit of the house, particularly as a place to live. Of course—parochial Tasmania—if there were three other siblings living on the mainland who had never been near these two sisters but who suddenly put up their hands and challenged that, because they had an equal relationship and it was not somehow defined by, for instance, a relationships register, the other siblings would be able to share in the house. As I said, I am not a lawyer but I imagine the same principle would apply when you are talking about the benefit of superannuation.

Senator BRANDIS—But that would be governed by the state laws concerning testator's family maintenance. There is such a thing as freedom of testamentary disposition in this country, which is only interfered with according to the various tests of moral claim and need that the courts apply in the testator's family maintenance legislation. I do not think this legislation would interfere with the operation of those principles.

Mr Wallace—This legislation would not interfere?

Senator BRANDIS—It would not interfere with freedom of testamentary disposition.

Mr Wallace—I am only quoting the discussion I had with the Attorney-General's office in Tasmania as an example of why they saw a need for a relationships register. They saw that there was a need to give people security for where their property or estate went. I am assuming that superannuation is part of that estate. Therefore, we are assuming that the requirement here is to give people security of the passage of that superannuation in the same way.

Senator BRANDIS—It arises in relation to that species of property where there are reversionary benefits, which is not all property of course.

Senator HANSON-YOUNG—In your submission you support the bill and you are concerned about the terminologies. I can understand that and I can hear that. I just want to get some clarification. You call, in particular, for the terminology of 'partner' and 'couple relationship' to be replaced, and the categories that you have proposed are spouse and non-marital, which is regardless of sexuality, I assume. Could you outline whether you see interdependency within that. I have just heard two conflicting arguments or suggestions. Correct me if I am wrong. Do you include interdependency within that non-marital category?

Mr Shelton—As we have just discussed with the senators on my right, we believe that interdependents should be given consideration as part of this for those reasons of discrimination. How you categorise that, as both Mr Wallace and I have said, is a matter for the drafters.

Senator HANSON-YOUNG—We just spoke before about three different categories. There was marriage, de facto and interdependency. Where do you see same-sex couples fitting into those three categories?

Mr Shelton—Clearly, as we have said in our submission, under the category of de facto. You would have marital and de facto relationships. The term 'marriage' is retained in the legislation, which we think is consistent with both the government and the opposition's view to the Marriage Act and to that clear definition, which was given such strong bipartisan support back in 2004.

Senator HANSON-YOUNG—There was a comment from Mr Wallace about the need for equal treatment for equal categories.

Mr Shelton—That is right.

Senator HANSON-YOUNG—That to me would suggest that we would have one big umbrella definition of which would fit marriage, de facto and interdependency; is that what you are suggesting?

Mr Shelton—The bill is suggesting that we have an umbrella category called 'couple relationship' that includes marriage, heterosexual, de facto and same-sex de facto. We are saying we should have marriage separated out and then have another category that is de facto, that includes same-sex de facto and opposite-sex de facto, and we are saying that interdependent relationships should be included in terms of the provision of the benefits. How you categorise them is open for discussion.

Senator HANSON-YOUNG—Mr Wallace, you might want to qualify this, because it was your statement. Equal category for equal rights and equal treatment does not actually deal with that issue?

Mr Wallace—No, I said that the object of the bill is clearly to provide for an equal treatment. We do not oppose that.

Senator HANSON-YOUNG—I understand that.

Mr Wallace—What we believe is that you should retain a distinction in the language and in the terminology that is used there that reflects the distinction that we have for marriage in legislation. We are asking that the amendments be made to retain that distinctiveness.

Senator HANSON-YOUNG—That clarifies that; it did seem a bit funny when I heard it.

Mr Shelton—I don't think so.

Senator HANSON-YOUNG—That goes back to the statement on page 5 of your submission that it is hard to say removing references to marriage does not undermine marriage. Could you identify for me the legal ramifications of removing the reference to marriage, understanding that we are not talking about the Marriage Act here? We are not talking about removing marriage from Australian law. We are simply talking about these particular bills in front of us.

Mr Shelton—The law has an educative role as well, and marriage as defined in the Marriage Act, is between a man and a woman, an exclusive union voluntarily entered into for life. If you start to say through reforms such as this that marriage no longer exists, that is a huge social change. By writing that out of Commonwealth legislation you are writing out a millennium of social understanding and of course the understanding that we in Australia have of marriage. We think it is very important that we retain that important concept. Marriage, as we know, provides benefits to society that other relationships simply cannot do and do not do. Therefore, we think marriage should be upheld as an ideal and should not in any way be diminished through the erosion of language through reforms such as this.

Senator HANSON-YOUNG—Can you identify for me any legal ramifications for changing and amending the terminology to 'couple relationships'?

Mr Shelton—This bill should not be about trying to erode marriage. It is about trying to give equal benefits to couples.

Senator HANSON-YOUNG—I would agree with you.

Mr Shelton—As we have said, we do not have a problem with that. If there is another agenda in this bill to somehow create a diminution of marriage in our society, that should be transparent and should not be taken through reforms to financial discrimination in legislation.

Senator HANSON-YOUNG—Are you suggesting that that is what you think the agenda is in the current bill?

Mr Shelton—I raise the question because, as I have said, it is possible—and we have legal advice, and I think other witnesses have given evidence to this committee—that you can achieve what the government wants to achieve without in any way having to undermine terminology that is important to us as a society and that has certain meaning in our society. We are saying that, unless there are some other reasons, then perhaps those putting this forward should make that clear; otherwise let us get on and introduce the reform so that people can get the benefits of this reform without having to tamper with definitions that are well understood, well accepted and important to us as a society.

Senator HANSON-YOUNG—In terms of the terminology, I do take issue with the point that you are making about a hidden agenda. I would assume of both the government and the opposition, when they were looking at this months ago, that that was never the purpose or that there was a hidden agenda. The agenda is to give people equal rights, as you say, which is really important. If you are concerned about including interdependent relationships to give them equal entitlements as well, how would you ideally like to see that reflected in the terminology? My understanding from what you have said is that you acknowledge that interdependent couples are not the same as de facto. Is that correct?

Mr Shelton—That is right. Two sisters living in a relationship are obviously different.

Senator HANSON-YOUNG—Or a brother and a sister.

Mr Shelton—That is correct. That is right. There are many different constructs.

Senator HANSON-YOUNG—Absolutely.

Mr Shelton—We are highlighting a principle. We are not drafters of legislation or people with legal training, but we are just going to the principle of the issue. If the issue is about discrimination, let us look at other people who are affected by discrimination as well.

Senator HANSON-YOUNG—Would you accept marriage, de facto and interdependent couple as three different categories as listed in the bill, acknowledging that same-sex couples are the same as opposite-sex couples for the purpose of the word 'de facto'?

Mr Shelton—Yes, I think we have already indicated that.

Senator FARRELL—You referred to going to Tasmania to look at its legislation. Can you tell us, if you do know, how many people have sought registration under the Tasmanian scheme?

Mr Wallace—I do not know the exact number to date. I do know that about two years ago—and this is not a definitive and I do not know exactly—it was in the order of 70 to 80, and so it was very small.

Senator BRANDIS—The size of the numbers should not matter. It is unjust that people should be discriminated against. Even if it is only one couple, the law should include all appropriate categories of people.

Mr Wallace—That is our point and that is why we are not opposed to this. What I would say, though, is that we do not make law for exceptions. I do not think we legislate for the exception.

Senator BRANDIS—As to what you said in response to Senator Hanson-Young's questions a moment ago about whether there is a hidden agenda, the fact of the matter is that the use of the expression 'couple relationship' in this bill is entirely unnecessary. It is entirely redundant. All the legislative draftsman would have to say to meet the occasion would be to say, 'This bill applies to the following categories of relationships: (a) marriages, as defined by the Marriage Act; (b) de facto relationships, as determined by the following criteria; (c) co-dependent relationships, as determined by the following criteria.' You do not need to in fact have the overarching category.

Mr Shelton—That is correct. I guess that goes to our concern. In some way it surprises us as to why it would seemingly be contentious even around the table.

Mr Wallace—I would also say that our understanding is that the family law amendment actually preserves marriage and de facto separately, so if it is good enough there our question is why is it not good enough here.

Senator BRANDIS—That is a question that would be very difficult to answer.

Mr Wallace—I would imagine so.

CHAIR—Senator Hanson-Young, did you want to follow up?

Senator HANSON-YOUNG—Could you clarify whether you would be prepared to submit an additional submission that outlined that you would be happy to have the three different categories, acknowledging that same-sex and opposite-sex couples would be reflected under the definition of 'de facto'? That is not what your submission today says.

Mr Wallace—What we are prepared to support is equal treatment of the categories. It is a matter for drafters to decide whether that needs to be—

Senator HANSON-YOUNG—I understand that, but you have put forward your preferred terminology and that is not what we have heard today that you are supporting now after the conversations with Senator Brandis and me.

Mr Wallace—That would still be our preferred terminology. I think the issue of 'de facto' is the degree of co-dependency. I know there is a dispute because of the different treatment under different laws, but my understanding is that de facto couples are determined by the degree of interdependency, of their shared life, largely through shared financial aspects of their life.

Senator HANSON-YOUNG—Now I really am confused. Earlier in his response to my question about whether interdependent couples were included in your original non-marital category, the category that you are using for de facto couples, and whether you would be including them in the same category, Mr Shelton said, no, it was about having two aside from marriage and therefore three different categories. Are you saying that your preferred terminology of 'spouse' instead of 'partner' and 'non-marital' instead of 'couple relationship' includes interdependent couples?

Mr Shelton—What we said before is that it is the principle of interdependency that is important. How you categorise that and how you draft that into the legislation is a matter for the drafters.

Senator HANSON-YOUNG—What is the similarity between an interdependent couple and a de facto couple?

Mr Shelton—As Mr Wallace explained, it is to do with people who are in a relationship where they are sharing their resources. They have a dependency on one another, they live together, and why should they not be allowed to benefit from their superannuation entitlements? That is the principle. How you draft that into the legislation is for others to decide.

Senator HANSON-YOUNG—The Australian Christian Lobby believes that two spinster sisters or a brother and a sister living together is the same as a heterosexual or same-sex de facto couple?

Mr Shelton—You keep saying it is the same. We believe that a married couple is not the same as a de facto couple and it is not the same as an interdependent couple.

Senator HANSON-YOUNG—No, that was not my question.

Mr Shelton—What we are saying is that this legislation, as we understand it, is about the treatment of those relationships, and we believe that they are entitled to equal treatment. As has been made clear throughout everything we have said, we believe that you have a responsibility to retain the uniqueness of marriage by the terminology that you use. We believe that beyond that it is really a matter for drafters as to how they express that in the legislation.

Senator HANSON-YOUNG—You do acknowledge there is a difference between the spinster sisters and a de facto homosexual couple?

Mr Shelton—There will be differences, but as to whether that means they should be discriminated against in terms of treatment, we would believe not, that they should not be.

Senator HANSON-YOUNG—What you are concerned about is, as you put before, the writing out of the historical terminology of marriage and the stature that word carries with it; that is your main concern with this bill?

Mr Wallace—That is right, and also, as was pointed out, the introduction of the term 'product of a relationship', which is a biological impossibility. You would agree that the terminology in legislation ends up being reflected in regulations and all sorts of things that flow from that legislation. We want to make sure that in the regulations and any other material that flows from this legislation the distinctiveness of marriage is retained.

Senator HANSON-YOUNG—Despite the fact that you have not been able to identify any legal ramifications of replacing the current terminology with 'couple relationships', you still think there are serious ramifications that you cannot identify legally but that you think are there, correct?

Mr Wallace—I think you are putting words in our mouth that we did not say.

Senator HANSON-YOUNG—That is why I am asking you the question.

Mr Wallace—I will say again that we believe the legislation is about how people are treated. Our objection to this is that this bill, as it is proposed, would write out terminology already in Commonwealth legislation, particularly the Marriage Act, and which we believe the parliament has a responsibility to preserve. The terminology of marriage, the distinctiveness of marriage, we believe needs to be preserved in the way that the act or the bill is expressed. That is our concern and that is what we have asked for.

Senator HANSON-YOUNG—You do acknowledge that there are no legal ramifications in doing so?

Mr Wallace—Not that we are aware of, but that is for other people to decide.

Mr Shelton—The law goes well beyond just the black letter of the law. There are social and cultural implications to this as well. As I said in our opening remarks, we are talking about millennia-old social institutions, terminology and natural law. If we are going to have a debate about these wider aspects of our culture, then a bill to address financial discrimination is not the appropriate place to do so. That is a wider cultural debate, which would more responsibly be held perhaps more openly and putting up for grabs this terminology. If we, as a society, want to obliterate 'marriage', 'wife' and 'husband' from our lexicon, then that is a debate for another day.

Senator HANSON-YOUNG—I have not heard one witness this week suggest that that is what we do, and it is definitely not my position.

Mr Shelton—I am not suggesting that witnesses would say that, but that is the effect of the bill that is before parliament at the moment.

Senator HANSON-YOUNG—That was why I asked you to identify the legal ramifications. I am not interested in having a social debate here. We are talking about black and white legislation.

Senator BARNETT—In terms of the terminology and the potential hidden agenda, I just wanted to respond to that and alert you to evidence given by Associate Professor Miranda Stewart, who is from the University of Sydney and an expert in the area. She gave advice—and I hope I am not misreading it—along the lines that, to her knowledge, it was the first time she had ever heard of this terminology, 'couple relationship' and defining a child as a 'product' of a 'couple relationship'. She was talking about the intricacies of the bill, but this was her advice. With respect, you have every reason to be concerned about any potential agenda that may be flowing through as a result of this new terminology that has been introduced into this bill. Would you concur with that analysis?

Mr Shelton—Yes, absolutely. If there is no other agenda behind this, then it should be uncontroversial to make the amendments that we are suggesting.

Senator BARNETT—Indeed. I draw your attention to Professor Parkinson's supplementary submission. Have you had a chance to read it?

Mr Shelton—No.

Senator BARNETT—I will just draw it to your attention. It is on the public record. He makes basically those points in terms of improving the terminology and removing 'couple relationship' and replacing it with 'marriage' and de facto relationship. Also, he touches on a child being defined as a product of a couple relationship and redefining that. If you had a view, and if you can take it on notice that you supported such a position, certainly the committee would be very interested in your feedback. We certainly have the gist of where you are coming from. I wanted to draw your attention also to a view put to us yesterday by Mr Egan of Family Voice Australia. He was referring again to this definition of a 'couple relationship'. He was very concerned and upset that being married did not automatically, in his view, allow the courts to interpret that relationship as a couple relationship. It had to meet a number of criteria and it was not automatic. Do you have a view as to whether if you are married you are defined as such and deemed as such under the law?

Mr Wallace—The important thing to me is that marriage is a decision. You do not fall into it after cohabitating for three years or whatever. It is a commitment by two people one to the other, and I would

expect the law to acknowledge and recognise that in keeping that distinct from other forms of relationship. That is the point that you are making there, from my point of view?

Senator BARNETT—Yes. I would draw to your attention that his views are set out on pages 4 and 5 of his submission and he does express strong concern. He is not concerned only about terminology; this witness is very concerned about the fact that the legislation is actually undermining the institution of marriage by not automatically recognising it as such under this bill.

Mr Wallace—We clearly agree with that position. We certainly understand that Professor Parkinson has made it clear—and remembering his level of expertise—that he sees no difficulty at all with retaining the terminology that we are suggesting, the distinctiveness of marriage and the categories there in a drafting sense. While people put forward that drafting becomes more difficult, he certainly—and he is an expert as, we understand it—has said that he does not see that there should be a difficulty in this.

Senator BRANDIS—He is absolutely right. You would have to be stupid to think that you need to use the expression 'couple relationship' to delimit categories.

Senator BARNETT—Before you arrived, Comsuper Action Committee expressed views and referred to your submission. It was the second dot point in your recommendation. I just wanted to alert you to that and ask you whether you had anything further in response. It has obviously happened at the last minute, as it were. Or do you want to just note it and leave it at that?

Mr Wallace—I would simply note it and say we are very happy that the Comsuper Action Committee would agree with our proposal for retaining the terminology that we have asked be retained and for a re-establishment of at least two categories. We are very gratified to see that that is the case.

CHAIR—Thank you very much for your time this afternoon and making yourself available to appear before the committee.

Mr Wallace—Thank you very much for giving us the opportunity and thank you for giving us your ear. We appreciate it.

CHAIR—Thank you very much.

Proceedings suspended from 2.58 pm to 3.11 pm

ARNAUDO, Mr Peter, Assistant Secretary, Human Rights Branch, Attorney-General's Department

THOMSON, Mr Peter, Principal Legal Officer, Age and Sex Discrimination Section, Human Rights Branch, Attorney-General's Department

CHAIR—Welcome to the representatives from the Attorney-General's Department. We have your submission. It was lodged with us last Friday. Do you need to make any amendments or alterations to that?

Mr Arnaudo—No, we do not, thank you.

CHAIR—Do you have a short opening statement that you wanted to make?

Mr Arnaudo—No, I do not, other than I think earlier this morning one of my colleagues took a question on notice about whether the Acts Interpretation Act defines 'couple'. I can confirm it does not. 'Couple' would have its ordinary meaning that applies in the interpretation of that term as applied by the courts. The only other issue would be that my branch is responsible for the Same-Sex Relationships (Equal Treatment in Commonwealth Law—Superannuation) Bill 2008 which is the bill that is trying to remove discrimination against same-sex couples and children in a range of Commonwealth pensions and superannuation schemes. But that is all I have to say.

Senator BARNETT—What was your second point?

Mr Arnaudo—Earlier this morning I think there was a question on notice taken by one of my colleagues, either Ms Williams or Ms Fitch, about whether the Acts Interpretation Act defined the term 'couple' and we confirmed it does not, so its ordinary meaning would apply were the court to interpret it and they would look at the objects of the act and where it sits in the act as well.

Senator BARNETT—That was only part of the question. The other part related to the definition of 'de facto' and we were looking at the Family Law Act before the committee and the Evidence Act and the difference between the two. Are you going to address those issues?

Mr Arnaudo—I am not responsible for the evidence bill or the de facto family law bill. I understand that my colleague from the family law branch, Mr Duggan, is still here in the room and might be able to assist if we need to go to that area. As I said before, the legislation that I am looking after is very much the superannuation equal treatment bill.

Senator BARNETT—The question asked this morning was that we have got two different definitions for the same term 'de facto partner' and then the question was: what about other Commonwealth legislation. We are still waiting for the answer from the department on that question.

Mr Arnaudo—We did do some searches. In Commonwealth law there is a variety of terminology that is used in various acts such as the tax act and the social security act which have a completely different approach to defining and using terms such as 'de facto partner'. This is from my own general knowledge and my experience in looking at these sorts of provisions. There is a variety of provisions. Some provisions just talk about 'de facto spouse'. They do not go further to define it and require it to just have its ordinary meaning and a court would use that. The interpretation we apply to the term 'de facto spouse' is that it would not take account of a same-sex couple relationship, because a same-sex couple relationship cannot marry because the definition of marriage is quite clear. It has to be between a man and a woman. There is a variety of definitions out there. Often they have criteria that are similar but slightly different. Some do not have any criteria at all. This legislation that you have before you today, the Same-Sex Relationships (Equal Treatment in Commonwealth Law—Superannuation) Bill, does not have a term 'de facto couple' or 'de facto partner'.

Senator BARNETT—No, but it has a couple relationship.

Mr Arnaudo—It has. Our aim here is to remove the discrimination against same-sex couples and children whose parents might be in a same-sex relationship. What we have had to do is go through these pieces of legislation that deal with superannuation and make sure that terms that define relationships define them in a way that does not discriminate against a same-sex couple but also any children that are associated with that relationship. For example, the Parliamentary Contribution Superannuation Act already sets out a definition of marital relationship and a set of criteria as to when a marital relationship is deemed to occur or not for the purposes of that act. Basically, what we try to do with our legislation is to try to make sure we have equal treatment for a person who is in a same-sex relationship and for any children that are associated with that relationship as well.

Senator BARNETT—This morning we put a question on notice so that we could get some clarity here. We have got one definition with, I think it is, seven criteria in the evidence bill; then we have got another definition of de facto with nine criteria in the de facto bill, and you have just confirmed for us that there is a whole range of different definitions in different laws applying to the term 'de facto spouse'.

Mr Arnaudo—That is correct.

Senator BARNETT—You can take it on notice but we will need—

Mr Arnaudo—I would like to take that on notice.

Senator BARNETT—You can take in on notice if you like.

Mr Arnaudo—There is quite a significant number of references of 'de facto spouse' in Commonwealth legislation. I would not be able to give you a number off the top of my head but from my quick look I know there are some in the Income Tax Assessment Act; social security has references to member of a couple, but that is a slightly different concept.

Senator BARNETT—Can you give us an example of what definition the Income Tax Assessment Act uses?

Mr Arnaudo—I am not sure if I have got all the provisions but, for example, section 995-1 of the Income Tax Assessment Act 1997 says:

In this act, unless the contrary intention appears:

'spouse' of a person includes a person who, although not legally married to the person, lives with the person on a genuine domestic basis as the person's husband or wife.

There are references like that in other pieces of legislation. In other pieces of legislation it just talks to a spouse—

Senator BARNETT—That refers to a spouse but we are interested here in a de facto relationship—

Mr Arnaudo—That definition would include someone who effectively is a de facto partner, a person who lives with another person on a genuine domestic basis as if they were husband or wife.

Senator BARNETT—Would it include homosexual partnerships?

Mr Arnaudo—That provision would not right now. I suspect that is one of the provisions that the Human Rights and Equal Opportunities Commission identified as discriminatory. Because of the reference there to 'husband or wife' a same-sex couple cannot be a husband or wife, so effectively at law that definition would exclude a same-sex relationship. I am not sure what that definition is used for in the Income Tax Assessment Act, but if a person were to be treated as a spouse at the moment that definition only includes people who are legally married and also people who are in an opposite-sex de facto relationship as if they were husband or wife but they are not legally married.

Senator BARNETT—You would be aware from the evidence given this morning that that definition is quite different to the definition under the evidence bill that is before the committee today?

Mr Arnaudo—It is. I suspect that it is very much due as the evidence was given by the other Attorney-General's Department officers this morning that there are very clear policy reasons why in the Evidence Act and the Family Law Act there is a need to take different factors into account.

Senator BARNETT—We are not all that clear. If you think there are clear policy reasons, we would be very interested to know what they are and you could perhaps outline them for us.

Mr Arnaudo—My responsibility is for the human rights branch, not for the evidence bill or for the family law bill. I think those issues were explored earlier today in terms of what those differences are. For example, in the family law de facto bill, the reference of powers; in the Evidence Act, the need to conform to the state and territory model laws as well. It is really not my area. I was asked to provide an answer to part of a question on notice which was: is 'couple' defined in the Acts Interpretation Act? And I can confirm, no, it is not; it has its ordinary meaning that you would find in a dictionary, for example. If we find some further information that we can provide to you on notice in response to the question we took earlier today, we will definitely do that.

Senator BARNETT—One of the reasons we ask is that there is considerable concern regarding the definition of a 'couple relationship' which seems to be a new terminology that is being introduced here for the first time. Whether or not that is the case, it is a concern to a great many witnesses. One proposition is that we remove that altogether and we simply use the words 'marital relationship' or 'de facto relationship'. If we go

down that track, which some of us are disposed to do, then we need to know the definition for 'de facto relationship'. That is one of the reasons we are asking.

Mr Arnaudo—I am not sure I can point you to one common definition across all of the Commonwealth or even in the states and territories. There are varying definitions of what is a de facto relationship. I think there is some common ground. For example, the definition in the Income Tax Assessment Act is 'living with a person on a genuine domestic basis as a husband or wife'. The courts in themselves have developed case law around those sorts of factors and how to interpret them. In looking at the definitions that we have at the Commonwealth level as well, in my experience in some cases those factors have been brought up but the approach is generally in the direction of where the Family Law Act and the evidence bill are going to.

Senator BARNETT—They are going in different directions. We have been alerted to that today.

Mr Arnaudo—I appreciate that point. One of the other issues in terms of what are the implications of going along the line of a marital or de facto relationship, which was something that we were very keen to address and I think we have done that in our submission to the committee, is that it increases the risk that you draw a distinction between categories of relationships. In terms of pension entitlements, if you draw a distinction for no legal purpose—I understand there might be a social purpose, perhaps—then a court might say that there is a different test that applies to a married couple compared to a couple, regardless of their sex, that is, not married. We wanted to minimise that risk because our approach is to try to ensure that the entitlements that people currently are able to receive under these acts continue as well without increasing the risk that a court might say that there is a different test that applies to a married couple compared to an unmarried couple, whether they are opposite sex or same sex. That is basically our approach there, to try to make sure that we minimise that. We minimise that risk by treating all of those categories of relationships as a couple relationship.

Senator BARNETT—Regarding this couple relationship definition, you have referred to the Parliamentary Contributory Superannuation Act 1948, and I think I raised it earlier to alert you to the concerns expressed by at least one witness before our committee and that is that a married couple are not automatically considered a couple relationship under this legislation. That was the view that was put by a particular witness from Family Voice Australia and it is on page 5 of their submission. I am seeking your views as to whether that is correct and, if so, why?

Mr Arnaudo—I am not responsible for that act but let me take you through section 4(B) which currently defines 'marital relationship' at the moment. It basically says that for the purposes of that act a person had a marital relationship with another person at a particular time if they ordinarily lived together with that other person as the person's husband or wife on a permanent and bona fide basis at that time. So, it basically says: you have a marital relationship if you are living together with someone else as a husband or wife on a permanent, bona fide domestic basis—

Senator BARNETT—A couple relationship?

Mr Arnaudo—No, at the moment it says 'marital relationship as a husband or wife'. We are proposing to change it to say 'couple relationship as the person's partner'. As to how the legislation operates at the moment, you then have to look at subsection 2 which says:

> For the purposes of subsection 1—

and this is what the act says right now—

> a person is to be regarded as ordinarily living with another person as that other person's husband or wife on a permanent and bona fide basis at a particular time only if (a) the person had been living with that other person as the person's husband or wife for a continuous period of three years.

If you have been living with that person as their husband or wife for three years you are taken to be in a marital relationship. And in the case of (b) it is if you have been living for less than three years then in this case the trust having regard to relevant evidence has to become of the opinion that the person ordinarily lived with that other person as that other person's husband or wife whether or not the person was legally married. Then subsection 4 sets out the relevant evidence that you take into account in determining whether a couple who have lived together for less than three years are in a marital relationship and in there you look at, for example, dependency, whether they are legally married to each other—

Senator BARNETT—Does that automatically say they are in a couple relationship, if they are married?

Mr Arnaudo—From my reading of an act that I am not responsible for, if they have been married for more than three years they would be treated as being in a marital relationship. If it were less than three years, the trust has to be satisfied that they are living together on a permanent, bona fide domestic basis and to have

account of this relevant evidence which then subsection 4 sets out and looks at this range of factors, like ownership—

Senator BARNETT—But is only a factor. It is not ipso facto—

Mr Arnaudo—That is what the law is today in terms of the Parliamentary Contributory Superannuation Act. Our bill does not propose to change that at all other than to add registered relationships as an additional factor to take account of in determining whether relevant evidence is sufficient. We are not proposing to change that at all. Our approach is very minimalist with this. We just want to remove the discrimination against same-sex couples and—

Senator BARNETT—In summary, I can see that it is minimalist from your perspective but in terms of its impact our concern is in three main areas, and they are: one, the couple relationship terminology rather than marriage or de facto relationship; two, the definition of a child being a product of a couple relationship and; three, not covering interdependent relationships.

Senator HANSON-YOUNG—I have a question about a definition as well. How did you come up with the definition for the product of the relationship, because there have been a number of queries about that over the last two days? Would the department be able to enlighten us as to how you came up with that because no-one seems to be able to point to any precedent for it anywhere?

Mr Arnaudo—Our written submission sets this out in a bit more detail as well, so I can refer you to that because there is a page and a bit on that. Our aim is to try to remove discrimination against same-sex couples and their children. We are in an environment where at a state and territory level there are inconsistent parenting presumptions and there is inconsistent approach to surrogacy legislation and the recognition of parents as well, so we had to find a way of making sure that we were taking into account these children who would otherwise not be included in the relevant definitions in the act. We also had to make sure that we dealt with the ordinary definition of ‘child’ that the common law would apply and that courts would interpret. The definition is taken to be inclusive. We are trying to ensure that we do not take any other children out but add these other children in who at the moment are not recognised for the purposes of, for example, the Parliamentary Contributory Superannuation Act or the Judges Pension Scheme. The term ‘product of a relationship’ is trying to capture the children who at the moment are not included.

Senator HANSON-YOUNG—One of the issues that was raised was, perhaps, does this then leave a stepchild out who is perhaps part of another relationship—

Mr Arnaudo—I come back to the main aim of the legislation. If step-children are not dealt with at the moment under superannuation laws or under the Judges Pension Scheme then it will not be our bill that will change that. We are trying to remove discrimination between a child whose parents are in an opposite-sex relationship and a child whose parents are in a same-sex relationship. If they happen to be a stepchild, a stepchild is often defined to include someone in a marital context, which is why it is often defined in legislation in a way to make sure that children whose parents are not married are picked up as well. If the step-children were picked up in this legislation we would try to make sure that step-children of a same-sex relationship were also picked up as well. But my understanding is at the moment step-children are not covered by the various pension schemes. It is not as if we can do something special for same-sex children where children of an opposite-sex couple are not covered.

Senator HANSON-YOUNG—There has been a lot of debate this week about the interdependent terminology to try to encapsulate marriage, de facto and, perhaps, co-partners in terms of the non-heterosexual, non same-sex de facto couples, traditionally speaking; the spinster sisters, if you will. If the committee were to decide to include an interdependent relationship or registered relationship such as we see in Tasmania what, if any, issues do you think the Commonwealth would face if that were the recommendation the committee made?

Mr Arnaudo—From the context of removing same-sex discrimination, interdependency has been a category that was considered by the Human Rights and Equal Opportunities Commission and it thought that was not the way of removing same-sex discrimination. I think the government and the Attorney in the debate in the House of Representatives made it clear that this legislation is not trying to deal with interdependency relationships. By the term ‘interdependency’ you clearly expand the class of people that will be caught by a definition and that might have some resource implications that would need to be considered because, clearly, more people may be eligible to claim a pension, a benefit, a reversionary benefit or whatever it is within the scheme that people are generally able to claim.

I think the other issues that would need careful consideration would be how do you define an interdependent relationship? It can be quite a challenge. There are only a few examples I am aware of at a Commonwealth level, for example the Migration Act and in a superannuation context, of course, as well. The migration approach is very narrow and quite specific. In the superannuation context it is a bit broader. This harks back to the debate we are having about how to use these definitions; it reflects the nature of the legislation which that definition is operating in. In a migration context, clearly, a more narrow definition fits. In a superannuation context, being able to give your superannuation to a wider range of people is seen as a good policy outcome and so that is where the legislation has gone to. In answer to your question, it is resources and, I suppose, how you would actually define an interdependent relationship that would be some of the challenges that would need to be taken into account.

Senator HANSON-YOUNG—I would imagine if we are having difficulty trying to come up with a general definition of 'de facto', coming up with a consistent definition for an interdependent couple would be even more difficult?

Mr Arnaudo—There are some examples of definitions of 'de facto' around at the state and territory level. Of course, we have discussed the ones in relation to the Evidence Act and the Family Law Act. There is a range of other definitions. As I said before, there are two definitions that I am aware of in relation to interdependency; there may be some other definitions at a state and territory level. The issue is also being considered by the House of Representatives committee in terms of the role of carers and the support that carers are entitled to receive through things like superannuation and pension schemes. I would say, in one sense, it is an issue that needs to be addressed. It is just that in this bill here we are not seeking to address it at this time.

Senator HANSON-YOUNG—One of the other concerns in relation to the definition around a couple relationship that a number of submissions raised concerns about is the undermining of marriage, replacing the terms 'marriage' and 'de facto' perhaps with 'couple relationship'. Can you point to any legal ramifications for removing the words 'marriage' and 'de facto' and using 'couple relationship' instead?

Mr Arnaudo—In regard to legal ramifications, I think that when changing definitions in terms of entitlements to pensions and things like that you always have to be careful that you do not inadvertently remove someone's existing right to a pension or entitlement. I suppose it is an area that you would tread cautiously in at any time in any change of definition. But the approach we have undertaken to the bill—and we have reiterated this in our written submissions—has been very much to try to minimise the risk that a court would draw a distinction between someone who is married and someone who is not married whether they are in a same-sex or opposite-sex relationship. We have tried to do that by using the term 'couple relationship'. I think as a debate in the House of Representatives it was also discussed, otherwise the alternative is very much to define 'marital relationship' to include relationships that technically would not be marriage.

Senator HANSON-YOUNG—In relation to the super industry supervision; correct me if that is wrong.

Mr Arnaudo—The Superannuation Industry (Supervision) Act.

Senator HANSON-YOUNG—The fact that there is no mandatory clause in there using the definition of 'couple relationship' is obviously great for the public super funds. And we go through act by act to amend that to include giving same-sex couples the same rights as opposite-sex couples, but my understanding is that there is no way that we currently in these bills are mandating the private superannuation funds. I understand a lot of them do refer directly to the SIS Act but a number of concerns have been raised in the last week that that is perhaps not sufficient if our goal is to try to eliminate any distinction between opposite-sex and same-sex couples in accessing their entitlements?

Mr Arnaudo—I am not a superannuation expert. My understanding at the moment is that at the moment it is very much discretionary for all types of relationships in terms of superannuation. That is my understanding of it. As I said, it is really the departments of finance and Treasury that are the experts in how private sector superannuation funds would operate. Our aim, again, is just to remove discrimination so that there is no unfair discriminatory treatment against a same-sex couple compared to an opposite-sex couple. If an opposite-sex couple cannot mandate that their superannuation fund would go to this other person, or whatever they wish, we are trying to equalise it so that that can happen. My understanding is that there is no compulsion on superannuation funds generally to treat a person one way or the other.

Senator HANSON-YOUNG—Is there some way we can do that, because it seems to me that if we are talking about trying to ensure that people are not discriminated against when 90 per cent of Australians have

their super tied up in private funds it would be good to be able to guarantee that they are entitled to the same rights regardless of their sexual orientation?

Mr Arnaudo—In one sense, that is really not an issue that is a discrimination issue because it is a superannuation issue generally. If that is the superannuation policy then that really is a matter for the Minister for Finance and Deregulation or the minister for superannuation, who would be the relevant area of the government to approach that issue. Our approach has always been in terms of equalising the discriminatory treatment between same-sex couples and opposite-sex couples on the basis of their sexuality. If an opposite-sex couple was able to direct a superannuation fund to pay an amount of money in this way, they could do that. It was not then.

Senator HANSON-YOUNG—Most of the witnesses agreed over the last week that if we were happy to do this for some, then we should be happy to do it for all. If the committee wanted to recommend that, how would you suggest that we go about it?

Mr Arnaudo—That is ultimately a matter for the committee. This bill is trying to deal with public sector pensions and superannuation schemes. It is not trying to deal with private sector superannuation schemes. That is properly for another day—

Senator HANSON-YOUNG—Although we are amending the SI(S) Act; that is my point.

Mr Arnaudo—That is correct. But I think that is only in relation to how it interacts with public sector superannuation schemes.

Mr Thomson—My understanding is that in a sense the public sector superannuation schemes, because they are going to recognise same-sex relationships, we had to adapt the framework legislation to facilitate that. It was done in order to set up the amendments that we are doing for the Commonwealth public sector schemes. It does operate in private sector superannuation schemes and they will be enabled to change their schemes if they wish to do so. We are also aware that there has been some concern that if you were to prescribe that private sector defined benefits schemes had to recognise same-sex relationships that there could be increased costs for employers. But that is a question that would need to be best directed to the Department of Treasury, which looks after the SIS scheme.

Senator BRANDIS—Who drafted this bill? Was it the Office of Parliamentary Counsel or was it some other—

Mr Arnaudo—Yes.

Senator BRANDIS—Presumably, drafting instructions were prepared?

Mr Arnaudo—Yes.

Senator BRANDIS—Who wrote the drafting instructions?

Mr Arnaudo—The human rights branch in consultation with the relevant departments that are responsible for the different acts that are being amended.

Senator BRANDIS—Who wrote that section of the drafting instructions concerning the definitions?

Mr Arnaudo—I cannot recall exactly who signed it but I suspect it would be the person who was in my job a couple of months ago.

Senator BRANDIS—Who was that?

Mr Arnaudo—He has moved on to another job at the moment. It is basically the human rights branch.

Senator BRANDIS—I just want to know the name of the officer.

Mr Arnaudo—It is Mr Hall, Mat Hall.

Senator BRANDIS—The drafting instructions were presumably a document? They were reduced to written form?

Mr Arnaudo—Yes, I expect they would be.

Senator BRANDIS—May we be provided with a copy of the drafting instructions?

Mr Arnaudo—I would have to take that on notice and ask the Attorney-General.

Senator BRANDIS—Of course. Are you familiar with the drafting instructions?

Mr Arnaudo—Yes, to a certain extent.

Senator BRANDIS—In the drafting instructions was an instruction given to the draftsman not to adopt the use of the term 'marital relationship'?

Senator MARSHALL—The question of whether you can have the drafting terms has been taken on notice. I am not sure it is appropriate for you to go and ask for the details of those terms. That question has been taken on notice.

Senator BRANDIS—No. The question that has been taken on notice is whether a copy of the document can be supplied to the committee.

Senator MARSHALL—I think it is the same issue.

Senator BRANDIS—I am going to persist. Was an instruction given to the draftsman that the term 'marital relationship' was not to be used?

Mr Arnaudo—I might have to take that on notice because in one sense I would be revealing the contents of those drafting instructions. But I can say in a general sense—

Senator BRANDIS—But you are a servant of the Rudd government that has promised a culture of disclosure, so I want this disclosed.

CHAIR—Perhaps if you let Mr Arnaudo finish his sentences you might find if that is going to be the case.

Senator BRANDIS—Let us hope.

Mr Arnaudo—I am happy to take the question on notice about the disclosure of the drafting instructions. I will take that to the Attorney-General and see if I can get a response in a timely manner. As I said earlier, the general approach with this legislation, which I expect would be reflected in the drafting structures because that is the bill that has been tabled in the parliament, was to try to eliminate discrimination against same-sex couples and their children.

Senator BRANDIS—We know that is the purpose of the bill, but I am interested in a narrower question just for the moment. Are you personally familiar with that part of the drafting instructions that dealt with the definition of couple relationships?

Mr Arnaudo—I do not have them in front of me at the moment—

Senator BRANDIS—I know. I did not ask you that. I asked you whether you were familiar—

Mr Arnaudo—I have not seen them recently.

Senator BRANDIS—Do you know the answer to my question?

Mr Arnaudo—I would have to confirm it by reading the drafting instructions, but I am happy to take that on notice.

Senator BRANDIS—I am asking you whether you know the answer to the question—

Mr Arnaudo—No, I do not.

Senator BRANDIS—You have taken the question on notice, which is—

Mr Arnaudo—I do not know the answer to that question.

Senator BRANDIS—Do you know whether or not the drafting instructions included instructions in relation to the avoidance of the use of the term 'marital relationships'? I am not asking you to confirm, by the way, that they did or not, I am merely asking you whether you know the answer to the question.

Mr Arnaudo—I do not know the answer to that question.

Senator BRANDIS—You do not. I take it that you yourself were not one of the draftsmen of the bill; is that right?

Mr Arnaudo—As I said before, the drafting is undertaken by the Office of Parliamentary Counsel in discussions with instructions from the Attorney-General's Department and also the other relevant departments that are responsible for the legislation that is before the parliament.

Senator BRANDIS—It seems to me that the adoption of an umbrella expression such as 'couple relationship' in this bill is entirely unnecessary. Let us leave to one side this question of interdependency relationships, which is something that we in the opposition have put on the table. Let us just limit ourselves to what was in the mind of government at the time the bill was drafted. May I suggest to you that exactly the same effect of removing discrimination could have been achieved by the very simple device of saying: 'This bill shall apply to the following relationships: (a) marriages as defined by the Marriage Act; (b) de facto

relationships as determined by the following criteria,' and as a subparagraph under (b) making it perfectly clear, as the evidence bill does and as the family law bill does, that de facto relationships would apply irrespective of gender to opposite-sex and same-sex de facto couples. Why couldn't that have been done without eliminating the language of marriage from this statute?

Mr Arnaudo—As I highlighted earlier, the main two reasons were that by doing so there is a slightly higher risk that a court would say that there are slightly different tests for those two categories—

Senator BRANDIS—There is no risk at all. That is nonsense.

Mr Arnaudo—That is the view the government and—

Senator BRANDIS—I practised in the courts for 14 years. I am very familiar with these matters and I can assure you that that is not a risk at all. If you were concerned about it all you would have had to have done was put in a subsection at the foot of the definition to say words to the effect that, 'For the avoidance of doubt, the parliament declares that the two categories are to be applied without differentiation.' If you were concerned about that, why was that not done?

Mr Arnaudo—It is really not the minimalist approach that we adopted. I suspect also that the other concern was that we also needed to deal with the issue of what happens if someone starts off in a de facto relationship and subsequently gets married. At the moment the Parliamentary Contributory Superannuation Act, for example, draws a distinction between people who have been married for less than three years or in a de facto relationship for less than three years and people who have been in a marriage or de facto relationship for more than three years. We would have to make sure we could find a way of managing those sorts of things. I am not saying it is insurmountable but it would be a lot more complicated than the approach that the bill takes at the moment.

Senator BRANDIS—It seems to me, taking you at your word, that the decision either by your branch or by the Office of Parliamentary Counsel, or mutually arrived at between the two of you, to adopt a minimalist style to this drafting was essentially a stylistic decision at the expense of causing enormous offence to all of those people in the community for whom the retention of acknowledgement of 'marital relationships' in Commonwealth law is important but serving no legal or logical function in the legislation itself.

Mr Arnaudo—As I highlighted before, I think there is a legal function in that it minimises the risk—

Senator BRANDIS—You have said that and you are wrong—

Mr Arnaudo—That is the purpose that we have taken—

Senator BRANDIS—You are wrong. By the way, do you have counsel's advice that that was necessary to do that?

Mr Arnaudo—We have sought legal advice throughout this process. That is part of the general process that we follow in terms of developing legislation.

Senator BRANDIS—I take it that the answer to my question is no, then.

Mr Arnaudo—We have sought advice on these issues—

Senator BRANDIS—Do you have counsel's advice that it was necessary to eliminate the statutory language of 'marital relationship' from this bill in order to avoid or eliminate the risk you have suggested?

Mr Arnaudo—You would appreciate I am not at liberty to go into the content of any legal advice on whether we received it or not—

Senator BRANDIS—Excuse me, that is not right. You are not at liberty to go into the content of advice. You are obliged to respond to questions affirming whether or not advice has been received.

Senator MARSHALL—Yes, but your question was specifically about: have you received advice which said this. And that certainly goes to the content of the advice.

Senator BRANDIS—Let me rephrase it then.

Senator MARSHALL—You should, too.

CHAIR—Senator Brandis—

Senator BRANDIS—Let me rephrase it in deference to your deep learning on these matters. Have you taken counsel's advice that bears on this question?

CHAIR—Perhaps if we could just have one senator at a time. Mr Arnaudo, for your purposes we have established during the course of this year that we would and can require officers to tell us if you have sought advice and when you got it. You are not required to tell us the content of that advice, or you may choose to refer that to the minister. In some respects Senator Brandis is right and Senator Marshall is right, that is that you may well be obliged to tell us if you sought the advice; you are not obliged to tell us if you sought advice in relation to X and reveal the details of that.

Mr Arnaudo—We did seek advice in the development of the legislation and I am happy to take on notice the substance of that advice.

Senator BRANDIS—I am going to press you further than that. You have heard the chair's ruling. I am not, for the moment, going to ask you about the content of the advice or the conclusions stated in the advice. I want to know whether you took advice which bears directly upon the question of whether the elimination of the use of the statutory language 'marital relationship' was necessary or desirable. Without telling us what the conclusion was; yes or no? Did you take advice that bore upon that specific issue?

Mr Arnaudo—That would have been one of the issues that was considered—

Senator BRANDIS—That does not answer the question I asked you. Did you take advice that bore upon that specific issue, yes or no?

Mr Arnaudo—Yes.

Senator BRANDIS—May it be produced, please.

Mr Arnaudo—I have to take that on notice.

Senator BRANDIS—I understand that. Turning to another matter, have you seen Professor Parkinson's supplementary written submission to this committee that was tabled in this committee room during the course of the day?

Mr Arnaudo—No, I have only seen it briefly.

Senator BRANDIS—You have not had a chance to consider it?

Mr Arnaudo—I saw his original submission. That was a couple of days ago. I have had a brief reading of the supplementary submission which I think he gave to the committee yesterday evening.

Senator BRANDIS—I do not want to be unfair to you if you have not had a chance to consider it properly, but can I invite you to address the issue to the extent to which you are able? It is Professor Parkinson's view that this rather complex, almost baroque definition of 'children' in this legislation is entirely unnecessary, that all you have to do to make sure that children with a relevant interest are caught is to say that these provisions apply to dependent children, either dependent children of a deceased person in the case of a reversionary interest, or dependent children of a relationship in those circumstances where no reversionary interest is perhaps involved. Do you have a view about that? Is that not a feasible and simpler way of dealing with the interests of relevant children?

CHAIR—Just before you answer, can I say to you that I think that the supplementary submission that Senator Brandis is referring to from Mr Parkinson we have received today. It has been distributed amongst committee members so you will not have seen it because it has not yet been made publicly available.

Senator BRANDIS—But that is the substance of what Professor Parkinson has to say. Can I invite you to speak to that, please?

Mr Arnaudo—Yes, dependency is one way in which children can be defined back to their parents. Just off the top of my head, I would say that one risk with that is what happens if a child is not financially dependent. In 99 per cent of circumstances it is very likely that the child would be dependent on the parent but in some situations, maybe because of separated parents or because a child has got their own job if they are 16 or 17-years-old and they might not be as dependent on that parent as they otherwise would be. I think that is an issue to bear in mind, particularly in terms of superannuation contribution schemes where some children might receive a benefit because of a biological link that they have with a parent and other children would have to rely on dependency. There is a slightly different treatment there, and where there is different treatment there is a risk of discrimination. Dependency is one way in which you could define a child. The acts at the moment refer to it as one of the factors you take into account. It is not the only factor, partly because—

Senator BRANDIS—You would agree with me, wouldn't you, that in almost all circumstances it is going to be the most important factor?

Mr Arnaudo—Perhaps, but it might not be that in every circumstance a child is dependent on their parents and there would be situations—

Senator BRANDIS—You have made that point.

Mr Arnaudo—where maybe a child would then be excluded from the definition of 'child' because they were not seen to be substantially or financially dependent on that particular parent and whether—

Senator BRANDIS—And it may well be, of course, in that very unlikely circumstance the moral case of the child is much weaker than in the ordinary case of a child who is dependent.

Mr Arnaudo—That could be the case but it really would then depend on how do you treat other children in those situations? And if there are children who are getting a benefit because of a biological link and do not have to demonstrate dependency, then that is going to be a different treatment and puts at risk a small group of children; very small I am sure, perhaps, because the vast majority of children are usually dependent on their parents. Again, off the top of my head here I do not want to give you a whole list of examples but you could have a 16 or 17-year-old child, as defined by the legislation, who might not be financially dependent on a parent. There is a risk there, I suppose. One way of minimising that risk is to take a different approach and that is what we tried to do with this definition of 'product of a relationship' example.

Senator BRANDIS—I understand your point, although I must say that I think in the case of a 16 or 17-year-old child not financially dependent upon a particular relationship, the moral claim of that child I think most people as a matter of commonsense would consider to be significantly inferior to a child in the ordinary case who was a financial dependent.

Mr Arnaudo—Sure.

Senator BRANDIS—I think the question you took on notice before, just to avoid any doubt, was a question in which I asked for all of the drafting instructions to be produced to the committee, so that will include drafting instructions in relation to this issue as well, of course.

Mr Arnaudo—In relation to this bill?

Senator BRANDIS—Yes, that is right, which includes the question of the definition of 'child'. May we take it that the drafting instructions did include instructions concerning the appropriate definition of 'child' or was this issue of a generic category of dependency versus the adumbrated categories we see in the bill a decision taken within the Office of Parliamentary Counsel?

Mr Arnaudo—Sorry, I do not have the instructions in front of me to refresh my memory as to exactly how they dealt with these. I just do not have a memory on those issues—

Senator BRANDIS—You are not in a position to tell me?

Mr Arnaudo—Not at this stage, no.

Senator BRANDIS—That is fine.

Mr Arnaudo—I will take it on notice and ask the Attorney-General whether he would be happy to disclose those draft instructions or not.

Senator BRANDIS—We have this culture of disclosure with the Rudd government, so I am sure he would be.

Mr Arnaudo—If I could slightly correct an issue? Before I might have given the impression that no step-children were recognised for the purpose of superannuation law but my colleague, Mr Thomson, has just pointed me to the definition of 'child' in the Superannuation Act 1976 and that definition says:

In relation to a person who has died, means a child (including an adopted child, an ex-nuptial child, a foster child, a step child or a ward) of the person or of a spouse of the person.

So, in some circumstances step-children are recognised. But I think in some other parts of the legislation they are not recognised.

Mr Thomson—I thought I could perhaps assist the committee in terms of the adequacy of dependency as a model. The CSS superannuation act 1976, for example—and I think this is a common feature of some of the Commonwealth defined benefits superannuation schemes—requires that for a child to be eligible they have to be a child of the member or the spouse. That is where the definition of 'child' as a product of a relationship makes the child who is being raised in a same-sex family a child for the purposes of superannuation benefits. The second test is that the child has to be an eligible child, which looks at things such as dependency. The way

the legislation is set up currently, one first of all has to be a child and the problem that the bill is trying to address is that the relationship between, say, a child and her mother's female partner is not being recognised and so the child would not be able to claim a benefit if the female partner died. First of all, you have to fill in that gap so that the child is a child, and then the child has to be a dependent child. I cannot quite see on the current definition and approach taken in the CSS superannuation act how trying to use the concept of dependency would suit because, first of all, the child has to be a child for the purposes of the definition. So there are two tests.

Mr Arnaudo—That is currently in the Superannuation Act 1976. The dependency element comes in at very much the second stage. I am not sure, perhaps Professor Parkinson's approach might be to sort of say: we will just treat you as dependent, full stop. That might achieve it but at the moment that would require more significant changes than would be required to actually remove the discrimination.

Senator BRANDIS—That may be so but Professor Parkinson, whilst I do not want to over-simplify his position, it seems to me is saying that you look at the substantial issue. Rather than being overly concerned with categories, you look at the substantial factual issue: is the child a dependent? If it is, it is fine. If it is not, then it is out.

CHAIR—In relation to 'product of the relationship', is just simply saying 'child of the relationship' a too narrow definition in your view; is that correct?

Mr Arnaudo—Yes, basically. There is a risk there that we will not capture those children and make sure that they are treated as a child for the purposes of the definition of the various acts.

Mr Thomson—The problem is made more severe because the definition of 'child product of a relationship' applies to mixed-sex couples as well, so it is perfectly feasible that—it gets very technical—there may be a link to both parents and so the court might say the 'child of the relationship' is just the normal concept of child, and that is not what is intended. We are trying to extend the concept of child just far enough to recognise children in same-sex families.

Senator BRANDIS—Let's cut to the chase here. Is your purpose to protect the interests of the children or is your purpose to ensure that on every logically conceivable basis in which a child may be a child in relation to or of a same-sex couple, the same-sex couple is treated identically to a heterosexual couple with children? In other words, is this for the child or is this for the parties to the relationship?

Mr Arnaudo—This is very much for the child.

Senator BRANDIS—Is it the principal purpose?

Mr Arnaudo—It is, because obviously the legislation is structured that it is a child of a person who is entitled to give this benefit to them. If the normal definition of 'child' does not include this child because the person is not a parent of that child then they are missed out by the definition, they are not included in those things and they do not get the benefits that come through these other acts as well. As I was saying before, dependency is one way of defining 'child'. You could define it as a person who is under the age of 18 and who is dependent, but there might be situations where a child technically is not as dependent but we still feel that had there been a biological link they would have been dependent. It really comes down to the nature of each piece of legislation and scheme that we are trying to look at. In some circumstances, superannuation ones will be very detailed; in other circumstances you might have a broader definition and be able to tell the differences that way. That also applies with the definition of 'de facto couple', 'de factor partner' in one sense, looking very much at the nature of the act and the scheme that you are trying to administer.

Senator HANSON-YOUNG—Have you seen the definition put forward by the New South Wales gay and lesbian rights group? They highlighted some concerns with it?

Mr Arnaudo—That was earlier this week, I think, wasn't it?

Senator HANSON-YOUNG—Yes.

Mr Arnaudo—Perhaps I have it in front of me but with some other submissions here as well. Off the top of my head, I am not really clear, but it might be that that approach is very much based on relying on surrogacy laws or parenting presumptions in the states and territories. Is that so? I am not sure if I am correctly summarising it.

Senator HANSON-YOUNG—They had four main criteria which you would assume would be able to capture most children. And then the last two were there to make sure we were able to cover those who perhaps

did not fit somewhere else. But having the four categories in the beginning meant that there was not this onus to have to prove all the time, for everybody, why you are a product.

Mr Arnaudo—From my recollection that approach does capture most children, which is fine, but there will always be some children who will not be caught because they will not satisfy those definitions—

Senator HANSON-YOUNG—Which is why they had this—without having the submission in front of me I do not have the—

Mr Arnaudo—Perhaps operating without seeing it in front of us may make it difficult.

Senator HANSON-YOUNG—Yes. Would you be able to take that on notice and respond in terms of whether you think that would be an appropriate approach?

Mr Arnaudo—I would be happy to take that on notice and look at it. Just so that I can have the exact submission, it was the New South Wales—

Senator HANSON-YOUNG—It was the New South Wales Gay and Lesbian Rights Lobby.

Mr Arnaudo—I will have a look at that and see.

Senator HANSON-YOUNG—They were concerned about the use of the definition as well. This was their way around it, so we will just see how you go.

CHAIR—Thank you very much for your time this afternoon and for making yourself available. Can I thank all the witnesses who have given evidence before this committee today. I declare this meeting of the Legal and Constitutional Affairs Committee adjourned.

Committee adjourned at 4.05 pm