The Senate

Standing Committee on Legal and Constitutional Affairs

Evidence Amendment Bill 2008 [Provisions]

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ABBREVIATIONS

ACT	Australian Capital Territory
Acts Interpretation Act	*Acts Interpretation Act 1901*
ALRC	Australian Law Reform Commission
CDPP	Commonwealth Director of Public Prosecutions
Commissions	Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission
Department	Attorney-General's Department
EM	Explanatory Memorandum
Evidence Act	*Evidence Act 1995*
Evidence Bill	Evidence Amendment Bill 2008
Family Law Bill	Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008
GLRL	Gay & Lesbian Rights Lobby (NSW)
HREOC	Human Rights and Equal Opportunity Commission (now Australian Human Rights Commission)
Law Council	Law Council of Australia
NSW	New South Wales
NSWLRC	New South Wales Law Reform Commission
Same-Sex General Law Reform Bill	Same-Sex Relationships (Equal Treatment in Commonwealth Laws–General Law Reform) Bill 2008
Same-Sex Superannuation Bill	Same-Sex Relationships (Equal Treatment in Commonwealth Laws–Superannuation) Bill 2008
SCAG	Standing Committee of Attorneys-General
Uniform Evidence Law Report	Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law: Report*, ALRC Report 102, NSWLRC Report 112, VLRC Final Report, December 2005
VLRC	Victorian Law Reform Commission

CHAPTER 1

INTRODUCTION

Background

1.1 On 18 June 2008, the Senate referred the provisions of the Evidence Amendment Bill 2008 (Evidence Bill) to the Standing Committee on Legal and Constitutional Affairs, for inquiry and report not before 25 September 2008.

1.2 The Evidence Bill amends the *Evidence Act 1995* (Evidence Act) to implement the majority of recommendations made by the Australian Law Reform Commission (ALRC), the New South Wales Law Reform Commission (NSWLRC) and the Victorian Law Reform Commission (VLRC) (collectively, Commissions) as a result of their inquiry into the operation of the uniform Evidence Acts. At present, the Commonwealth, New South Wales (NSW), Tasmania, the Australian Capital Territory (ACT) and Norfolk Island are all part of the uniform Evidence Act regime.

1.3 The report of the Commissions, entitled *Uniform Evidence Law* (Uniform Evidence Law Report), was released on 8 February 2006.[1] The primary objectives of the Commissions' inquiry were to identify and address any defects in the uniform Evidence Acts, and to maintain and further the harmonisation of the laws of evidence throughout Australia.

1.4 The Commissions reported that the uniform Evidence Acts are working well and that there are no major structural problems with the legislation or its underlying policy. While areas of concern were identified and addressed in the Uniform Evidence Law Report, the Commissions concluded that a major overhaul of the uniform Evidence Acts regime was neither warranted nor desirable. However, the Commissions made a range of recommendations to 'fine tune' the uniform Evidence Acts and promote harmonisation between Australian jurisdictions.[2]

1.5 In November 2005, the Standing Committee of Attorneys-General (SCAG) established a working group to advise Ministers on reforms arising from the Uniform Evidence Law Report. The working group considered the Uniform Evidence Law Report's recommendations and developed model evidence provisions with a view to creating greater national uniformity in evidence laws. An expert reference group established by SCAG also commented on the model evidence provisions and recommended modifications and departures from some of the recommendations in the Uniform Evidence Law Report. The model evidence provisions were endorsed by SCAG in July 2007. The Explanatory Memorandum (EM) to the Evidence Bill notes

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1 ALRC, NSWLRC, VLRC, *Uniform Evidence Law: Report*, ALRC Report 102, NSWLRC Report 112, VLRC Final Report, December 2005.

2 Explanatory Memorandum (EM), p. 1.

that, as part of a strategy to promote further harmonisation, the working group is currently considering other possible reforms arising from the Uniform Evidence Law Report and further developments in case law.[3]

1.6 NSW has passed legislation implementing the model evidence provisions. The *Evidence Amendment Act 2007* (NSW) was assented to on 1 November 2007 and will commence by proclamation, not before May 2008. A number of other states are currently preparing legislation to implement the provisions.

1.7 The Evidence Bill implements the majority of the model evidence provisions. However, the Evidence Bill does not include the model evidence provisions relating to a general confidential relationships privilege or the provisions extending client legal privilege and public interest immunity to pre-trial proceedings. The rationale for the exclusion is that the Federal Government is still considering its response to the ALRC's 2007 report entitled, *Privilege in Perspective*,[4] which recommended that separate legislation be created to cover various aspects of the law and procedure governing client privilege claims in federal investigations. That report noted the Uniform Evidence Law Report's approach but did not make broader recommendations about the extension of privilege in other areas. According to the EM, the Federal Government considers that it is appropriate to defer extension of these privileges until its response to the ALRC's 2007 report has been finalised.[5]

1.8 The EM states that the amendments in the Evidence Bill are largely technical and will have most impact on the courts and legal practitioners, their aim being to promote uniform evidence laws in order to increase efficiencies for the courts, legal practitioners and business.[6]

1.9 Schedule 3 of the Bill is unrelated to the Evidence Bill's main purpose.[7] Schedule 3 amends the *Amendments Incorporation Act 1905*, renaming it the *Acts Publication Act 1905*, and provides for certain printed and electronic versions of Acts to be taken as an accurate record of those Acts.

Conduct of the inquiry

1.10 The committee advertised the inquiry in *The Australian* newspaper on 16 July 2008, and invited submissions by 25 July 2008. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to over 50 organisations and individuals.

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3 p. 1.

4 ALRC, *Privilege in Perspective*, Report 107, December 2007.

5 p. 2.

6 p. 2.

7 It is unclear why Schedule 3 is included in a bill relating to evidence law. The EM and the Second Reading Speech do not provide any explanation for this.

1.11 The committee received a large number of form letters, and variations on form letters, from individuals who either expressed support for, or opposition to, the provisions of the Evidence Bill relating to the compellability exception for de facto partners. Most of the submissions received from individuals were categorised as either form letters or variations on form letters.

1.12 Examples of form letters were published on the committee's website but it was not possible to list and publish all individual submissions categorised as form letters or variations on form letters. This was due to the large number of submissions received for this inquiry and other concurrent inquiries being conducted by the committee, and the resources required to publish all those submissions. However, all submissions (apart from confidential submissions) are available to the general public and can be provided by the committee secretariat upon request.

1.13 Those individual submissions that were considered not to fit into the categories of form letters or variations on form letters were listed and published on the committee's website, and are listed at Appendix 1 to this report. The committee received 12 submissions from organisations. These were also published on the website and are listed at Appendix 1.

1.14 The committee received 59 joint submissions in relation to this inquiry and other concurrent inquiries relating to the Same-Sex Relationship (Equal Treatment in Commonwealth Laws–Superannuation) Bill 2008 (Same-Sex Superannuation Bill) and the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Family Law Bill). These are also listed at Appendix 1.

1.15 The committee held a public hearing in Canberra on 7 August 2008. A list of witnesses who appeared at the hearing is at Appendix 2 and copies of the Hansard transcript are available through the Internet at http://www.aph.gov.au/hansard.

1.16 The committee also held hearings in Sydney, Melbourne and Canberra on 5, 6 and 7 August 2008 respectively in relation to both the Same-Sex Superannuation Bill and the Family Law Bill. Due to considerable overlap between certain issues which arose at the hearings into all three bills, this report will refer to evidence relating to the Same-Sex Superannuation Bill and the Family Law Bill, as well as to the bill which is the subject of this inquiry.

Acknowledgement

1.17 The committee thanks the organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.18 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter sets out the main provisions of the Evidence Bill.

Schedule 1 – Uniform evidence amendments

2.2 Schedule 1 of the Evidence Bill implements the model evidence provisions.

2.3 In summary, the key amendments contained in Schedule 1 relate to:

- competence – introduction of a revised test of general competence to give evidence which moves away from the current 'truth and lies' distinction and focuses instead on the ability of a witness to comprehend and communicate;
- hearsay rule – to provide further guidance on the definition of hearsay evidence; and to clarify the operation of the section 60 exception for evidence relevant for a non-hearsay purpose;
- admissibility of expert evidence – so that expert opinion can be used by a court to inform itself about the competence of a witness and to provide a new exception to the credibility rule where a person has specialised knowledge based on the person's training, study or experience;
- admissions in criminal proceedings – to ensure that evidence of admissions in criminal proceedings that is not first-hand is excluded from the ambit of section 60; and that the reliability of an admission made by a defendant is tested where that admission is made to, or in the presence of, an investigating official performing functions in connection with the investigation, or as a result of an act of another person capable of influencing the decision whether to prosecute;
- coincidence evidence – to reduce the threshold for admitting coincidence evidence to require consideration of similarities in events *or* circumstances, rather than the existing threshold that there be similarities in both the events *and* the circumstances;
- credibility of witnesses – to ensure that evidence which is relevant both to credibility and a fact in issue, but not admissible for the latter purpose, is subject to the same rules as other credibility evidence; and to enable evidence to be adduced with the leave of the court to rebut denials and non-admissions in cross-examination;
- compellability provisions – to ensure same-sex couples are treated in the same manner as de facto spouses (which includes replacing the definition of 'de facto spouse' with the gender neutral phrase 'de facto partner');
- hearsay and opinion rules – to create a new exception for evidence/opinion given by a member of an Aboriginal or Torres Strait Islander group about the

existence or non-existence, or the content, of the traditional laws and customs of the group;

- advance rulings on evidentiary issues – to make it clear that the court has the power to make an advance ruling or make an advance finding in relation to any evidentiary issue;
- warnings and directions to the jury – to make it clear that a trial judge is not to give a warning about the reliability of the evidence of a child solely on account of the age of the child; and to clarify the scope of information to be given to the jury about the forensic disadvantage a defendant may have suffered because of the consequences of delay, and the circumstances in which such information is to be given; and
- manner and form of questioning witnesses – to enable a court, on its own motion, to direct that a witness give evidence wholly or partly in narrative form, and to make further provision with respect to the improper questioning of witnesses in cross-examination in civil and criminal proceedings.

Schedule 2 – Other evidence amendments

2.4 Schedule 2 of the Evidence Bill implements amendments that are specific to the Commonwealth. Many of these amendments are consequential to amendments in Schedule 1 and are necessary to ensure consistency. Schedule 2 also updates cross-references to relevant ACT legislation.

Schedule 3 – Printed and electronic publication of Acts

2.5 Schedule 3 of the Evidence Bill amends the *Amendments Incorporation Act 1905* to establish an authorised database of Commonwealth legislation and to allow courts to rely on the electronic versions of Commonwealth legislation.

2.6 Specifically, Schedule 3 implements amendments to provide for certain printed and electronic versions of Acts (including compilations of Acts) to be taken to be an accurate record of those Acts, unless the contrary is proven. Schedule 3 also provides that printed compilations of Acts include amendments by either Acts or legislative instruments. These amendments will be made to the *Amendments Incorporation Act 1905*, which the Evidence Bill will rename as the *Acts Publication Act 1905*. The amendments will mean that there is one central piece of legislation relating to both the printed and electronic publications of Acts. The EM states that these amendments will improve the accessibility of freely available authoritative information about Australia's laws and will allow courts to rely on electronic versions of Commonwealth Acts.[1]

1 p. 3.

Key provisions in Schedule 1

2.7 Some of the key provisions in Schedule 1 are set out in greater detail below.[2]

Amendments to Chapter 2 of the Evidence Act – Adducing evidence

Competence: lack of capacity to give evidence

2.8 Item 3 repeals and replaces current section 13 of the Evidence Act to insert a new test for determining a witness's competence to give sworn and unsworn evidence. The Uniform Evidence Law Report noted that current section 13 – which contains two different tests for giving sworn and unsworn evidence, both of which require a witness to demonstrate an understanding of the difference between truth and lies – are too similar and restrictive.[3]

2.9 New section 13 provides that all witnesses must satisfy the test of general competence in subsection 13(1). The revised test provides that a person is *not competent* to give *sworn or unsworn evidence* about a fact if the person lacks the capacity to understand, or to give an answer that can be understood, to a question about the fact, and that incapacity cannot be overcome.

2.10 Proposed subsection 13(3) provides that a person is not competent to give sworn evidence if he or she does not have the capacity to understand that he or she is under an obligation to give truthful evidence. This restates current subsection 13(1).

2.11 Proposed subsection 13(5) provides that, if a person is not competent to give sworn evidence, he or she may be able to give unsworn evidence, providing the court has told the person:

- that it is important to tell the truth;
- that he or she should inform the court if asked a question to which he or she does not know, or cannot remember, the answer; and
- that he or she should agree to statements believed to be true and should not feel pressured into agreeing with any statements that are believed to be untrue.

2.12 Proposed subsection 13(8) provides that, in informing itself of the competence of a witness, the court may inform itself as it sees fit, including by referring to the opinion of an expert.

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2 Most of the text in Chapter 2 is taken from both the EM to the Evidence Bill and Parliamentary Library, Bills Digest no.140, 2007-08, 'Evidence Amendment Bill 2008'. Chapter 2 will contain only a general overview of the Bill. Further detailed explanation of each of the Evidence Bill's provisions, as well as the Evidence Act as it currently stands, is provided in the EM and the Bills Digest.

3 EM, p. 5.

Compellability: exceptions for 'de facto partners'

2.13 Items 5 to 8 change the definition of 'de facto spouse' in two sections of the Evidence Act which:

- provide for certain exemptions to witnesses who could otherwise be compelled to give evidence (section 18); and
- regulate the commentary that can be made on a decision of such witnesses not to give evidence (section 20).

2.14 Currently, a defendant's spouse or de facto spouse, a parent or a child of the defendant are included in the 'protected witness' category.

2.15 The amendments propose that the Evidence Act's current references to a 'de facto spouse' be broadened to refer to a 'de facto partner'. The term 'de facto partner' is defined in the Dictionary as 'a person who is in a de facto relationship' with a relevant person; a de facto relationship exists 'if the two persons have a relationship as a couple and are not legally married'.[4]

2.16 The EM states that the amendments will ensure 'that the terminology relating to de facto relationships is gender neutral and that the section applies to same-sex couples'.[5] The EM also notes that the definition of 'de facto partner' is 'only intended to cover types of relationships where the two persons have a relationship as a couple'.[6] However, the phrase 'relationship as a couple' is not defined or explained further.

2.17 The definition of 'de facto partner' in proposed subclause 11(3) of Part 2 of the Dictionary (Item 94) specifies the criteria that should be used by the court when determining whether someone qualifies as a de facto partner. In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as are relevant in the circumstances of the particular case:

- the duration of the relationship;
- the nature and extent of their common residence;
- the degree of financial dependence or interdependence, and any other arrangements for financial support, between them;
- the ownership, use and acquisition of their property;
- the degree of mutual commitment to a shared life;
- the care and support of children; and
- the reputation and public aspects of the relationship.

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4 See Items 84 and 94 which insert proposed Clause 11 into Part 2 of the Dictionary.

5 p. 6.

6 p. 6.

2.18 The definition also specifies that whether someone is of the same or opposite sex is irrelevant to the conclusion, as is the question of whether either of the persons concerned is legally married to someone else or is in another de facto relationship. The Bills Digest notes that the 'definition is unusual in that there is no reference to exclusivity, usually a factor in establishing a de facto relationship'.[7] There is also no specific reference in the definition to the existence of a sexual relationship (although presumably this is implied in the reference to having 'a relationship as a couple').

Manner and form of questioning witnesses

2.19 Item 10 repeals and replaces current subsection 29(2). New subsection 29(2) allows the court, on its own motion or on application, to direct that a witness give evidence wholly or partly in narrative form, rather than in question and answer format. The EM states that this will give the court more flexibility to receive the best possible evidence without the need for application by a party, which is presently the case. Witnesses such as children and people with an intellectual disability are likely to be assisted by this increased flexibility.[8]

2.20 Item 13 repeals and replaces current section 41 which permits the court to disallow improper questions put to a witness in cross-examination. New section 41 requires the court to disallow improper questions to seek to give greater protection to vulnerable witnesses. Proposed subsection 41(1) describes the types of questions which must be disallowed. These include questions that are misleading or confusing, unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or put to a witness in a manner or tone that is belittling, insulting or otherwise inappropriate. Proposed subsection 41(1) also expands the type of prohibited questions to those which have no basis other than a stereotype, including stereotypes based on age and mental, intellectual or physical disability.

2.21 Proposed subsection 41(2) lists the factors which may be taken into account in determining whether a question should be disallowed. Factors include the witness's age, education, ethnic and cultural background, gender, language background and skills, level of maturity, and understanding and personality.

2.22 Proposed subsection 41(3) provides that a question is not disallowable merely because it challenges the truthfulness of the witness, or the consistency or accuracy of any statement made by the witness; or the question requires the witness to discuss a subject that could be considered by the witness to be distasteful or private.

2.23 Proposed subsection 41(4) provides that a party may object to a question put to a witness on the ground that it is a disallowable question.

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7 p. 11.

8 p. 7.

2.24 Proposed subsection 41(5) provides that the duty imposed by section 41 on the court applies regardless of whether or not an objection is raised to a particular question.

2.25 Proposed section 41 applies to both civil and criminal proceedings. Proposed subsection 41(6) provides that a failure by the court to disallow a question under section 41 will not affect the admissibility of the witness's answer.

Documents

2.26 Item 14 repeals and replaces existing subsection 50(1) to allow an application to adduce evidence of the contents of two or more documents in question (where the contents are voluminous or complex) to be able to rely on a summary of documents to be made at any time in proceedings: its effect is that applications to rely on summary documents could be made *during* a hearing, rather than *before* a hearing commences (which is currently the case).

Amendments to Chapter 3 of the Evidence Act – Admissibility of evidence

Exclusion of hearsay: section 59

2.27 Section 59 of the Evidence Act provides the general exclusionary hearsay rule:

> Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.

2.28 In the Uniform Evidence Law Report, the Commissions considered the distinction between intended and unintended assertions, and noted the difficulties introduced by the courts in interpreting section 59.

2.29 Items 17 and 18 propose amendments to section 59 so as to clarify the meaning of 'intention' in section 59.

2.30 New subsection 59(1) provides that, in determining whether a person intended to assert the existence of facts contained in a previous representation, the test to be applied should be based on what a person in the position of the maker of the representation can *reasonably be supposed to have intended*. The test proceeds on the basis that intention may be properly inferred from the external and objective manifestations normally taken to signify intention. Although direct evidence of subjective intention can be considered, investigation or proof of the subjective mindset of the person who made the representation is not required.

Exception to the hearsay rule: evidence relevant for a non-hearsay purpose

2.31 Section 60 of the Evidence Act provides that:

> The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

2.32 Item 22 inserts new subsections 60(2) and (3). Proposed subsection 60(2) clarifies that section 60 operates to permit evidence admitted for a non-hearsay purpose to be used to prove the facts asserted in the representation, whether the evidence is first-hand or more remote hearsay (that is, whether or not the person had first-hand knowledge based on something seen, heard or otherwise perceived). Proposed subsection 60(3) inserts a safeguard to ensure that evidence of admissions in criminal proceedings that is not first-hand is excluded from the scope of section 60.

Exception to the hearsay rule: in criminal proceedings if the maker is not available

2.33 Items 28-30 amend section 65. Current section 65 provides an exception to the hearsay rule in certain circumstances when a person is not available to give evidence.

2.34 Item 30 repeals and replaces current paragraph 65(2)(d) and introduces a second limb to the hearsay rule exception relating to previous representations in criminal proceedings when the maker of the representations is not available. Current paragraph 65(2)(d) only contains one limb and provides that the hearsay rule does not apply to a previous representation made against the interests of the maker at the time it was made.

2.35 The EM states that the assumption behind this provision was that, where a statement is against the interests of the person who made it, this provides an assurance of reliability. However, where the person who made the statement is an accomplice or co-accused, this may not be the case.

2.36 Item 30 inserts the requirement that a representation which is made against the interests of the maker should also be made in circumstances that make it likely that the representation is reliable. The provision is not restricted to accomplices and co-accused, as statements against interest may also arise in other situations.

Exception to the hearsay rule: in criminal proceedings where the maker is available

2.37 Current section 66 provides an exception to the hearsay rule where, in a criminal proceeding, a person who made a previous representation is available to give evidence about an asserted fact. Such a person may give evidence where the 'occurrence of the asserted fact was fresh in the memory of the person who made the representation'. The Uniform Evidence Law Report noted that the courts have had difficulty in interpreting the meaning of 'fresh in the memory', as a result of the High Court's decision in *Graham v The Queen*.[9]

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9 (1998) 195 CLR 606.

2.38 New subsection 66(2A) clarifies that the 'freshness' of the memory of a witness in criminal proceedings who has made a previous representation may be determined by a wide range of factors, in addition to the temporal relationship between the occurrence of the asserted fact and the making of the representation. The nature of the event and the age and health of the person are included as examples of considerations which may be relevant to an assessment of 'freshness'.

Exception to the hearsay rule: electronic communications

2.39 Item 33 repeals and replaces current section 71 which provides an exception to the hearsay rule for representations contained in documents recording a message that has been transmitted via telecommunications. New section 71 will allow for a broader and more flexible definition of the technologies which fall within the exception. The definition is not device-specific or method-specific, embraces all modern technologies, and is sufficiently broad to capture future technologies.

New exception to the hearsay rule: Aboriginal and Torres Strait Islander traditional laws and customs

2.40 Item 34 repeals and replaces section 72 with a new exception to the hearsay rule for evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Australian Aboriginal or Torres Strait Islander group.

2.41 The Uniform Evidence Law Report found that the Evidence Act should be amended to make the hearsay rule more responsive to Aboriginal and Torres Strait Islander oral tradition. In particular, the Commissions considered that it is not appropriate for the legal system to treat orally transmitted evidence of traditional law and custom as prima facie inadmissible, when this is the very form by which law and custom are maintained under Indigenous traditions.[10]

2.42 According to the EM, the intention of this new exception is to make it easier for the court to hear evidence of traditional laws and customs, where relevant and appropriate. The exception moves the focus away from whether there is a technical breach of the hearsay rule, to whether the particular evidence is reliable. Factors relevant to reliability or weight will include the source of the representation, the persons to whom it has been transmitted, and the circumstances in which it was transmitted.[11]

2.43 The EM also notes that current requirements of relevance contained in sections 55 and 56 of the Evidence Act may operate to exclude representations which do not have sufficient indications of reliability. Reliability will also be ensured if courts continue to use their powers to control proceedings to create a culturally

10 p. 16.

11 p. 16.

appropriate context for the giving of evidence regarding the existence or content of particular traditional laws and customs. Further safeguards are also provided by the court's powers under sections 135, 136 and 137 to exclude or limit the use of evidence.[12]

New exception to the opinion rule: Aboriginal and Torres Strait Islander traditional laws and customs

2.44 Section 76 of the Evidence Act provides that:

> Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

2.45 Items 35 and 36 introduce an exception to the 'opinion rule' which will allow members of an Aboriginal and Torres Strait Islander group to give opinion evidence about the existence or non-existence, or the content, of the traditional laws and customs of the group.

2.46 The Uniform Evidence Law report found that a member of an Aboriginal or Torres Strait Islander group should not have to prove that he or she has specialised knowledge based on training, study or experience before being able to give opinion evidence about the traditional law and custom of his or her own group.

2.47 People who are not members of the group will have their competence to give such evidence determined under current section 79, on the basis of their specialised knowledge gained through training, study or experience.

Exception to the opinion rule: admissibility of expert evidence

2.48 Section 79 of the Evidence Act provides an exception to the opinion rule where the opinion is based on specialised knowledge. The EM notes that expert opinion evidence on the development and behaviour of children can be relevant to a range of matters in legal proceedings and can be important in assisting the court to assess other evidence or to address misconceived notions about children and their behaviour.[13] However, the Uniform Evidence Law Report found that courts show a continuing reluctance in many cases to admit this type of evidence.

2.49 Item 38 inserts new subsection 79(2) to clarify that the exception covers expert evidence about child development and behaviour, particularly in cases of sexual assault. The changes will allow expert opinion to be used by a court to inform itself about the competence of a witness.

2.50 This amendment will also have an impact on the use of the credibility rule. New section 108C provides a new exception to the credibility rule where a person has

12 p. 16.

13 p. 17.

specialised knowledge based on the person's training, study or experience, mirroring the amendment of proposed section 79(2) relating to the opinion rule.[14]

Admissions in criminal proceedings

2.51 The purpose of current section 85 is to ensure that only reliable evidence is placed before the court, by requiring the prosecution to demonstrate that the particular admission was made in circumstances which make it unlikely that its truth was adversely affected.

2.52 Item 40 amends subsection 85(1) to ensure that evidence of admissions in criminal proceedings that is not first-hand is excluded from the ambit of section 60 (exception to the hearsay rule) by repealing and replacing existing subsection 85(1). The words 'in the course of official questioning' in paragraph 85(1)(a) will be replaced with 'to or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence'. This clarification aims to enhance the reliability of evidence by broadening the period where the questioning might take place. Apart from implementing a recommendation made by the Commissions in the Uniform Evidence Law Report, this proposed amendment would also implement developments in case law.[15]

2.53 The amendment will also require that the reliability of an admission made by a defendant is tested where that admission is made to, or in the presence of, an investigating official performing functions in connection with the investigation, or as a result of an act of another person capable of influencing the decision whether to prosecute.

2.54 The EM states that the amendment goes further than the recommendation made by the Commissions in two respects because of recommendations by the SCAG working group, which were also approved by the SCAG expert reference group, and form part of the model evidence provisions.[16] Following a decision in the Victorian Supreme Court in 2006 that suggested covert operatives may be included in the scope of section 85, the words 'as a result of an act of another person who was, and who the defendant knew or reasonably believed to be capable of influencing the decision to prosecute' have been added to paragraph 85(1)(b). Further, to avoid doubt, the term 'official questioning' has been removed from other parts of the Evidence Act (this has occurred via Items 41, 65, 70 and 89).

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14 New section 108C is explained in further detail below.

15 The amendment addresses the reasons of the majority of the High Court in *Kelly v The Queen* (2004) 218 CLR 216.

16 p. 19.

Coincidence evidence

2.55 Items 43 repeals and replaces current section 98 with a new section 98 which introduces a general test for the coincidence rule. Item 43 will reduce the threshold for admitting coincidence evidence to require *consideration* of similarities in events or circumstances, rather than the existing threshold that there *are* similarities in events or circumstances.

2.56 The Commissions considered that the existing test raises a high threshold and could exclude highly probative evidence from the ambit of the provision. New section 98 will apply where the party adducing the evidence relies on any similarities in the event *or* the circumstances in which they occurred, *or* any similarities in both the events and circumstances in which they occurred.

2.57 The requirement to give reasonable notice in writing to other parties is retained, as is the requirement for the court to be satisfied that the evidence will have significant probative value.

Credibility of witnesses

2.58 Item 45 inserts new Divisions 1 and 2 into the Evidence Act and proposes to amend the credibility rule in order to clarify its interpretation. New subsection 101A will provide a definition of credibility evidence and new section 102 will restate the credibility rule.

2.59 Proposed section 101A defines credibility evidence as evidence that:

(a) is relevant only because it affects the assessment of the credibility of the witness or person; or

(b) is relevant because it affects the assessment of credibility of the witness or person and is relevant, but not admissible, or cannot be used, for some other purpose under Parts 3.2 to 3.6 of the Evidence Act.

2.60 New section 101A addresses the literal interpretation of existing section 102 adopted by the High Court in *Adam v The Queen*.[17] Section 102 currently states that evidence that is relevant only to a witness's credibility is not admissible. Prior to the decision in this case, the provisions in Part 3.7 (Credibility) had been used to control the admissibility of evidence relevant both to credibility and a fact in issue. The consequence of this decision is that the credibility rule will not apply if evidence is relevant both to credibility and a fact in issue, even where the evidence is not admissible for the purpose of proving a fact in issue.

2.61 The decision in the case of *Adam* has led to the situation in which control of evidence relevant for more than one purpose, including credibility, depends entirely upon the exercise of the discretions and exclusionary rules contained in sections 135

17 (2001) 207 CLR 96.

to 137 of the Evidence Act. According to the EM, this has the potential to lead to greater uncertainty, inconsistent outcomes and increased appeals. Evidence relevant to both credibility and a fact in issue, but not admissible for the latter purpose, should be subject to the same rules as other credibility provisions.[18]

2.62 Item 45 also adds a note to section 101A to clarify that section 60 (exception to the hearsay rule) and section 77 (exception to the opinion rule) are not relevant in the determination of admissibility for another purpose under section 101A because they cannot apply to evidence which has not yet been admitted.

2.63 New section 102 is not intended to change the law on credibility evidence, instead restating the credibility rule in simpler terms. It states that credibility evidence about a witness is not admissible.

2.64 Items 48-51 are consequential amendments arising out of the amendments in Item 45.

Exception to the credibility rule: cross examination as to credibility

2.65 Current subsection 103(1) provides that the credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence has substantial probative value. Probative value is defined to mean:

> The extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

2.66 Item 46 amends subsection 103(1) by replacing the words 'has substantial probative value' with 'could substantially affect the assessment of the credibility of the witness'. The rationale for the change is that the proposed wording is more accurate and draws on the construction adopted by the Court of Criminal Appeal in *R v RPS*[19] which has allowed the courts to give meaning to the section.

2.67 Current section 106 provides that the credibility rule does not apply to rebutting a witness's denials by other evidence in specific circumstances (for example, where evidence tends to prove the witness's bias or motive to be untruthful). The Uniform Evidence Law Report noted that these specific circumstances or exceptions may be too limiting and may prevent the admission of important evidence.

2.68 Item 52 implements two key changes by repealing and replacing section 106. First, the court may grant leave to adduce evidence relevant to credibility outside the current categories. Second, evidence relevant to credibility may be led not only where the witness has denied the substance of the evidence in cross-examination, but also where he or she did not admit or agree to it.

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18 p. 21.

19 Unreported, NSW Court of Criminal Appeal, 13 August 1997.

2.69 Items 53-56 make amendments restructuring the provisions in a new Division 3 that relates to credibility of persons who are not witnesses. In particular, Item 54 repeals and replaces subsection 108A(1) to reflect the new definition of credibility and the changes to section 102 in Item 45.

New exception to the credibility rule: admissibility of expert evidence

2.70 Item 56 inserts new section 108C into the Evidence Act. Proposed section 108C creates a new exception to the credibility rule and applies to expert opinion evidence that could substantially affect the assessment of the credibility of a witness. The court must give leave for this evidence to be adduced. The purpose of the amendment is to permit expert opinion evidence in situations where it would be relevant to the fact-finding process (for example, to prevent misinterpretation of behaviour of a witness with an intellectual disability or cognitive impairment or inappropriate inferences from that behaviour). The EM states that this proposed amendment complements the amendments to section 79 contained in Item 38.[20]

Privilege: client legal privilege

2.71 The 'client legal privilege' allows a lawyer's client to refuse giving evidence on the grounds that it is information falling within that client/lawyer relationship.

2.72 Current section 122 provides that client legal privilege is lost by consent, or by knowing and voluntary disclosure of the substance of the evidence. Item 62 amends section 122 to provide that evidence may be adduced where a client or party has acted in a manner inconsistent with the maintenance of the privilege; that is, the operation of the client legal privilege will be restricted where the privilege has already been expressly or impliedly waived. The EM states that this test of inconsistency 'sits well with the underlying rationale of section 122, namely, that the privilege should not extend beyond what is necessary, and that voluntary publication by the client should bring the privilege to an end'.[21]

Privilege: privilege against self-incrimination

2.73 Item 63 replaces the current procedure under section 128 where a witness claims the privilege against self-incrimination.

2.74 The privilege against self-incrimination allows a witness to object to giving evidence if it would go to establishing that they have committed an offence or are liable to a civil penalty. The court must decide whether there are reasonable grounds for the objection and, if so, must tell the witness that they can refrain from giving evidence.

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20 p. 25. New section 79 is discussed in more detail above.

21 p. 26.

2.75 However, the court is able to insist that the witness give the evidence if the 'interests of justice' require it (although only if the evidence does not go to show guilt of an offence or liability for a civil penalty in a foreign country). The court can also offer the witness a choice about whether to give the evidence, and can explain that it can provide a certificate regarding that evidence which would ensure that in further proceedings the certified evidence cannot be used against the witness.

2.76 The proposed changes to the privilege against self-incrimination are largely technical. The changes arise from concerns noted in the Uniform Evidence Law Report that the current certification process is cumbersome and hard to explain to witnesses; comments were also made about the necessity to invoke the process in relation to each question. A preferable approach was that the broader 'subject matter' of the evidence, rather than the 'particular evidence' be protected.[22]

2.77 To address these concerns, new section 128 has been expanded to cover not only 'particular evidence' but also 'evidence on a particular matter' (proposed subsection 128(1)).

2.78 In addition, section 128 has been restructured to simplify the order in which the process of certification is outlined in the section.

2.79 Item 63 also introduces a new section 128A which provides a process to deal with objections on the grounds of self-incrimination made by a person who is subject to a search order (Anton Pillar) or a freezing order (Mareva) in civil proceedings other than under proceeds of crime legislation.

Presumptions relating to electronic communications

2.80 Item 68 repeals and replaces section 161 to facilitate proof of electronic communications.

2.81 Currently, there is no provision in the uniform Evidence Acts that applies presumptions relating to the sending and receiving of electronic communications generally. New section 161 will address this issue by providing presumptions relating to the sending and receipt, as well as the source and destination, of the electronic communication. The term 'electronic communication' is defined in the Dictionary at Item 86 and includes all modern technologies, including telecommunications.

Advance rulings on evidentiary issues

2.82 Item 78 inserts a new section 192A to provide that the court may, if it considers appropriate, give an advance ruling or make an advance finding in relation to the admissibility of evidence and other evidentiary questions, and in relation to the giving of leave, permission or directions under section 192.

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22 EM, p. 27.

2.83 The EM states that this proposed amendment addresses the finding of the High Court in *TKWJ v The Queen*[23] that the uniform Evidence Acts only permit advance rulings to be made in cases where leave, permission or direction is sought under the legislation. The power to give advance rulings carries significant benefits in promoting the efficiency of trials and allows counsel to select witnesses and prepare for trial with greater certainty.

Miscellaneous amendments: the term 'lawyer'

2.84 Items 11, 12, 58, 66, 67, 76 and 77 contain amendments to replace the term 'lawyer' with 'Australian legal practitioner or legal counsel' in various sections of the Evidence Act. 'Lawyer' is defined in the Dictionary as a barrister or solicitor. Items 80 and 88 insert definitions of the terms 'Australian legal practitioner' and 'legal counsel' into the Dictionary. The EM states that it has been unclear whether the term 'lawyer' requires a person to hold a current practising certificate or whether it is sufficient that the person be admitted on the roll of the relevant court.[24] The effect of the proposed amendments is to ensure that the sections will apply to lawyers with a valid practising certificate, as well as 'legal counsel', that is, lawyers who do not have a current practising certificate but are otherwise permitted to practise in that jurisdiction.

2.85 Items 12 and 77 are similar amendments. They replace the term 'lawyer' with 'Australian legal practitioner or legal counsel or prosecutor'. Item 91 incorporates a new definition of 'prosecutor' into the Dictionary.

23 (2002) 212 CLR 124.

24 p. 8.

CHAPTER 3

KEY ISSUES

3.1 As indicated in Chapter 1, the committee received a large number of form letters, and variations on form letters, from individuals who either expressed support for, or opposition to, the provisions of the Evidence Bill relating to the compellability exception for de facto partners. For those who opposed the inclusion of this exception in the Evidence Bill, one of the arguments was that only married persons should be protected from being compelled to give evidence against each other since only marriage (between a man and a woman) is a union which comprises 'sworn obligations and commitments'.[1]

3.2 The committee received 12 substantive submissions; some of these submissions provided comment on other aspects of the Evidence Bill, besides the compellability exception for de facto partners.

3.3 This chapter discusses some of the key issues raised during the committee's inquiry, including:

- general comments on the Evidence Bill;
- departure from some of the recommendations of the Uniform Evidence Law Report;
- the compellability exception for de facto partners.

General comments

3.4 The ALRC expressed its warm support for 'the great bulk' of the amendments contained in the Evidence Bill, and stressed the importance of consistency and uniformity in evidence laws across jurisdictions.[2]

3.5 At the public hearing, Professor Les McCrimmon from the ALRC told the committee that the ALRC is hopeful that the Evidence Bill will prompt other jurisdictions to enact the uniform evidence legislation to ensure 'that we have a truly uniform Evidence Act regime applying across the country' and 'so that we are not in the position that we are in now where state courts are applying one type of evidence law and the federal courts another and jurisdictions differing in the evidence law that is applied'.[3]

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1 See *Submissions f1, f2 and f3*. See also FamilyVoice Australia, *Submission 2*; Australian Family Association, *Submission 5*; Australian Family Association (SA), *Submission 9*.

2 *Submission 7*, p. 1.

3 *Committee Hansard*: *Evidence Bill*, 7 August 2008, p. 2.

3.6 The Law Council of Australia (Law Council) submitted that it does not object to the passage of the Evidence Bill in its current form, despite the fact that some parts of the Evidence Bill do not accord with the position advanced by the Law Council during the ALRC's consultation process.[4] The Law Council noted that 'the Bill is the product of a considered and transparent policy process to which interested stakeholders have had the opportunity to contribute'.[5] Further:

> …the Law Council recognises that the provisions of the model Bill have already been enacted in one jurisdiction and are likely to be introduced in others. Therefore, in the interests of achieving greater uniformity in evidence laws, the Law Council does not wish to urge upon Parliament any departure from the provision[s] of the model Bill.[6]

3.7 The Human Rights and Equal Opportunity Commission (HREOC)[7] specifically welcomed aspects of the Evidence Bill relating to:

- same-sex couples and their children;
- evidence of traditional law and customs of an Aboriginal or Torres Strait Islander group; and
- children.[8]

3.8 The Commonwealth Director of Public Prosecutions (CDPP) informed the committee that it had been invited to provide input on a number of occasions during the drafting of the Evidence Bill, particularly in relation to section 128 which deals with the privilege against self-incrimination in other proceedings.[9] The CDPP noted that subsection 128(10) of the Evidence Bill replicates the current subsection 128(8), in accordance with the CDPP's advice not to amend subsection 128(8) and, instead, to 'rely upon the very clear authority of *Cornwell* [*v The Queen* [2007] HCA 12]'.[10]

Departure from recommendations of Uniform Evidence Law Report

3.9 The ALRC commented that the Evidence Bill departs from the Uniform Evidence Law Report's recommendations in some respects, and expressed concern that 'if these issues are not addressed at the Commonwealth level, then the opportunity to realise a truly uniform evidence regime in Australia may be compromised'.[11]

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4 *Submission 10*, p. 2.

5 *Submission 10*, p. 2.

6 *Submission 10*, p. 2.

7 The committee notes that, on 4 September 2008, the Human Rights and Equal Opportunity Commission changed its name to the Australian Human Rights Commission.

8 *Submission 11*, p. 3.

9 *Submission 6*, p. 1.

10 *Submission 6*, p. 2.

11 *Submission 7*, p. 1.

3.10 In particular, the ALRC noted that the Evidence Bill does not include a professional confidential relationship privilege. In the Uniform Evidence Law Report, the Commissions expressed the view that it is in the interests of consistency and uniformity for the Evidence Act to adopt the NSW confidential professional relationship privilege provisions (with some minor amendments). In the ALRC's view, the enactment of a confidential relationship privilege within the Evidence Act would not be affected by any proposals for reform which would arise from the Federal Government's response to *Privilege in Perspective*.[12]

3.11 The ALRC also noted that the Evidence Bill does not extend the application of the privileges under the Evidence Act to preliminary proceedings of courts, as this is another issue that the Federal Government is considering as part of its response to *Privilege in Perspective*. While the ALRC considered that to be appropriate, it also emphasised the need for a nationally consistent approach to these matters. It noted that the model evidence provisions, the *Evidence Amendment Act 2007* (NSW) and the Evidence Amendment Bill 2008 (Vic) all extend the scope of the privileges to preliminary proceedings of courts, including a summons or subpoena to produce documents or give evidence, pre-trial discovery, non-party discovery, interrogatories, and a notice to produce.[13]

Compellability exception for 'de facto partners'

3.12 The committee heard evidence in relation to the Evidence Bill's provisions relating to the compellability of de facto partners, including the proposed change in terminology from 'de facto spouse' to 'de facto partner'.

3.13 Under paragraph 12(b) of the Evidence Act, a person who is competent to give evidence about a fact is compellable to give that evidence. Section 18 of the Evidence Act, which applies only to criminal proceedings, permits certain categories of witnesses to object to giving evidence against the accused. As explained in Chapter 2, a defendant's spouse or de facto spouse, a parent or a child of the defendant are currently included in the 'protected witness' category. Under section 18, the court has the discretion to excuse a witness from testifying – after balancing the risk of harm to the witness, or to the witness's relationship with the accused, against the importance of the evidence itself.

3.14 As the Commissions explained in the Uniform Evidence Law Report, the discretionary approach to compellability in the uniform Evidence Acts reflects the underlying rationale and competing policy considerations:

> …on the one hand, the desirability, in the public interest, of having all relevant evidence available to the courts and on the other the undesirability in the public interest that:

12 *Submission 7*, p. 4.

13 *Submission 7*, p. 4.

- the procedures for enforcing the criminal law should be allowed to disrupt marital and family relationships to a greater extent than the interests of the community really require, and
- the community should make unduly harsh demands on its members by compelling them, where the general interest does not require it, to give evidence that will bring punishment upon those they love, betray their confidences, or entail economic and social hardships.[14]

In-principle support

3.15 The ALRC commented that the Evidence Bill 'will ensure equality and avoid discrimination by according the same legal privileges in relation to compellability provisions to all those who are couples, irrespective of the sex of the parties involved'.[15] Further, the ALRC noted that the approach taken in the Evidence Bill is consistent with the approach adopted in the *Evidence Amendment Act 2007* (NSW), the Evidence Amendment Bill 2008 (Vic), and under Tasmanian legislation.[16]

3.16 The ALRC also expressed support for the definition of 'de facto partner' in the Evidence Bill:

> …this approach is less prescriptive because it does not require that the parties to a relationship live together. It caters for a range of situations in which a couple may not cohabit but may nonetheless have a relationship with many of the other characteristics indicative of a de facto relationship. For example, circumstances can be envisaged where parties in a relationship choose to maintain separate residences, or live apart while one party is in long-term care outside the home. In such cases, the circumstances of any cohabitation (or lack of it) are just one factor to be taken into account in determining whether a de facto relationship exists.[17]

3.17 HREOC expressed strong support for the proposed amendments in relation to same-sex couples. HREOC noted that the new definition of 'de facto partner' is based upon the definitions of 'de facto spouse' contained in state and territory legislation and is generally consistent with the definition recommended in HREOC's *Same-Sex: Same Entitlements* report.[18]

3.18 The Gay & Lesbian Rights Lobby (NSW) (GLRL) expressed its support for the proposed definition of 'de facto partner', and other related amendments. The GLRL argued that the Bill 'is truly a minimal change to the law' – since the right to object to

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14 ALRC, *Evidence*, ALRC 38, 1987, p. 80 quoted in Uniform Evidence Law Report, p. 116.

15 *Submission 7*, p. 5.

16 *Submission 7*, p. 5.

17 *Submission 7*, p. 5.

18 HREOC, *Same-Sex: Same Entitlements*, Report of the National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits, April 2007, p. 6.

being compelled to give evidence currently extends to married spouses, heterosexual de facto spouses, parents and children – but that the proposed change is 'of enormous significance to same-sex partners who may face appearing as witnesses in some criminal Commonwealth trials'.[19]

3.19 The GLRL submitted that the proposed definition of 'de facto partner' is 'a simple reflection of long-established definitions existing under state and territory laws, which include same-sex couples for (almost) all purposes',[20] and that identical amendments to those proposed in the Bill (including the current definition of 'de facto partner') were passed in NSW in 2007. The GLRL also noted that the different treatment of same-sex couples and opposite-sex de facto couples is discriminatory, and in contradiction of Australia's human rights obligations.[21]

Inconsistencies with other federal legislation

3.20 At the public hearing, the committee pursued the issue of inconsistencies between the Evidence Bill's definition of 'de facto partner' and similar definitions in other bills before the committee and, indeed, with other federal legislation. At the time of the public hearing for the Evidence Bill, the committee was examining two other pieces of legislation – the Family Law Bill and the Same-Sex Superannuation Bill – which contain definitions of 'de facto relationship' and 'couple relationship' respectively.[22]

List of factors to be taken into account by court

3.21 Inconsistent terminology and definitions are used in all three bills to capture similar or identical concepts. For example, while the definition of 'de facto partner' in the Evidence Bill is very similar to the definition of 'de facto relationship' in the Family Law Bill, the definition in the Family Law Bill contains two additional criteria which may be considered by a court when determining whether a de facto relationship exists. These additional criteria are listed in paragraphs 4AA(2)(c) and (g) of the Family Law Bill and relate to:

- whether a sexual relationship exists; and
- whether the relationship is or was registered under a prescribed law of a state or territory.

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19 *Submission 8*, p. 5.

20 *Submission 8*, p. 4.

21 *Submission 8*, p. 5.

22 The committee tabled its report in relation to the Family Law Bill on 28 August 2008 and is scheduled to table its report in relation to the Same-Sex Superannuation Bill on 8 October 2008. See further Senate Legal and Constitutional Affairs Committee, *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008*, August 2008 and Senate Legal and Constitutional Affairs Committee, *Same-Sex Relationships (Equal Treatment in Commonwealth Laws–Superannuation) Bill 2008*, October 2008.

3.22 The Same-Sex Superannuation Bill uses a definition of 'couple relationship', to replace the use of other terms such as 'marital relationship' in relevant superannuation legislation – for example, in the *Parliamentary Contributory Superannuation Act 1948*.

3.23 The definition of 'couple relationship' in the Same-Sex Superannuation Bill shares some similarities with the definition of 'de facto relationship' in the Family Law Bill. The Same-Sex Superannuation Bill and the Family Law Bill refer to, respectively, couples living together on 'a permanent and bona fide domestic basis' and 'on a genuine domestic basis'. However, the Evidence Bill does not contain any such requirement and, therefore, takes a broader approach.

3.24 In an answer to a question on notice relating to the Family Law Bill, the Department (Attorney-General's Department) advised that there is a range of other federal legislation containing definitions of terms other than 'de facto relationship' but which encompass de facto relationships (for example, the terms 'spouse', 'marital relationship' and 'member of a couple' can be found in various pieces of federal legislation).[23]

Absence of particular indicia from list of factors to be considered by the court

3.25 A departmental representative noted that 'the formulation of the definition of 'de facto partner' in the Evidence Bill was developed prior to the definition and the test contained in the Family Law Bill'.[24] The departmental representative indicated that the definition in the Family Law Bill was based on that used in the Evidence Bill, with the addition of the two further criteria set out above.[25]

3.26 The representative from the Department informed the committee that, in the development of the definition in the Evidence Bill, 'the SCAG working group had regard to the fact that other relevant considerations can and would be taken into account by the court in particular cases'.[26]

3.27 The committee notes that the Commissions, in their Uniform Evidence Law Report, recommended only three specific matters that the court might take into account for the purpose of determining whether a relationship between two persons is to be considered a relationship as a couple, namely:

- the duration of the relationship;

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23 Family Law Bill, *Answers to questions on notice*, received 20 August 2008, p. 3. See further *Income Tax Assessment Act 1997* (section 995-1), the *Parliamentary Contributory Superannuation Act 1948* (section 4B), the *Social Security Act 1991* (subsections 4(2)-(6A)), and the *Aged Care Act 1997* (section 44-11).

24 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 9.

25 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 9.

26 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 11.

- the extent to which the persons have a mutual commitment to a shared life; and
- the reputation and public aspects of the relationship.[27]

3.28 At the public hearing, Professor McCrimmon commented that the ALRC does not consider it necessary to include, in the Evidence Bill, the additional criteria set out in the Family Law Bill since 'it is not required that all the indicia be complied with, it is just indicia for the court to determine whether a de facto relationship [exists]'.[28]

3.29 A departmental representative explained why the criterion relating to the existence of a sexual relationship had been specifically included in the Family Law Bill:

> …we are limited to…the definition of 'de facto relationship' in the referring bill. Our advice is that the factors we have listed should reflect that definition to the maximum extent, and that is why paragraph C [which refers to the existence of a sexual relationship], for example, is in the definition.[29]

3.30 Another representative from the Department explained the rationale for the exclusion of any requirements of co-habitation or a sexual relationship in the Evidence Bill's definition of 'de facto partner':

> It was a decision of the ALRC, which was supported by the evidence working group and adopted by SCAG, that the definition for the purposes of the Evidence Act should be broader and capture non-cohabitation to reflect the situation that currently exists in society where there may be one partner who has to move interstate for work, who may be living in a nursing home or who may have to go and look after an elderly parent and may be out of the house for a significant period of time. In those situations, it was considered that having a reference to a sexual relationship may actually remove some couples who would otherwise be considered to be in a genuine de facto relationship under the Evidence Act from the consideration of the court…[30]

3.31 As to the express omission of an exclusivity requirement in the definition contained in the Evidence Bill, a representative from the Department explained that:

> (I)t is possible for somebody to be legally married and also in a de facto relationship with another person. Both relationships involving the same

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27 Uniform Evidence Law Report, Recommendation 4-6, p. 122.

28 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 7.

29 *Committee Hansard, Family Law Bill*, 7 August 2008, p. 13. The Family Law Bill relied on referrals by the states to the Commonwealth under subsection 51(xxxvii) of the Constitution.

30 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 10.

> person would be covered and protected in the context of the Evidence Bill.[31]

3.32 The Family Law Bill also has no requirement of exclusivity which, in that case, is again linked to the referral legislation from the states:

> …there has not been an understanding by us that the relationship necessarily requires exclusivity. Indeed, the reference legislation that I have referred to, the New South Wales bill, talks about a de facto relationship existing even if the de facto partner is legally married to someone else or is in another de facto relationship. The understanding of the state referrers was that the relationship did not have to be exclusive.[32]

Rationale for inconsistencies

3.33 In response to questioning on the reasons for the various differences in approaches to the definitions, a departmental representative indicated that, in the context of the Evidence Bill, there was 'a concern with the SCAG working group that [the inclusion of certain] indicia may be interpreted to exclude some of the genuine de facto relationships'.[33]

3.34 Another departmental representative noted that:

> From the Evidence Bill perspective, we are looking at a situation where what is to be protected is a category of close personal relationships. That obviously forms part of a test that has consequences procedurally for what evidence may be available to a court in proceedings or not; that is different from a situation where there might be Commonwealth benefit or another benefit available to particular categories that live in that close personal relationships definition.[34]

3.35 Associate Professor Miranda Stewart from Melbourne Law School also offered an explanation as to why different statutes should be distinguished, with particular reference to the rationale for the broad approach in the Evidence Act:

> (I)t must be acknowledged that in different statutes different things are provided, or the purpose of the couple definition serves a different purpose in the different statutes. So in the Evidence Act, it serves the purpose of ensuring that the other member of the couple does not give evidence. Just to give a couple of examples, the Evidence Act has the purpose of ensuring that a member of a couple cannot be required to give evidence. There is a good criminal law reason for that evidence prohibition: not only is it emotionally difficult for the member of the couple, but also the evidence is

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31 *Committee Hansard*: *Evidence Bill*, 7 August 2008, p. 12. See also Uniform Evidence Law Report, p. 121.

32 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 16.

33 *Committee Hansard*: *Evidence Bill*, 7 August 2008, p. 10.

34 *Committee Hansard*: *Evidence Bill*, 7 August 2008, p. 10.

> not trustworthy. It is appropriate then to bring same-sex couples within exactly the same sort of regime and definition that is already applying for opposite-sex couples. There is a reason for that particular list of factors. We want to encompass all relationships that satisfy those factors.[35]

3.36 A departmental representative suggested that, while it may be desirable for the Commonwealth to have a consistent approach across all relevant legislation, consistency is not the only consideration to be taken into account when determining such matters.[36] Indeed, there are specific public policy reasons behind the different tests:

> This amendment to the Evidence Act is consistent with the underlying rationale of the Evidence Act, which is that the community should not make unduly harsh demands of its members by compelling them where the general interest does not require it to give evidence that will bring punishment upon those they love, betray their confidences or entail economic and social hardships. The ALRC and working group in looking at that made the decision that that category of people, in terms of de facto relationships—and the court is actually there to look at the nature of the relationship between those two parties—has been expanded a little in terms of non-cohabitation, in terms of the fact that one or both the parties can be under the age of 18 and in terms of the fact that it has been extended to same-sex relationships. The reasoning for that has been set out by the ALRC in [the Uniform Evidence Law Report].[37]

3.37 Further:

> The other difference between our provision and those [corresponding provisions in the Same-Sex Superannuation Bill and the Family Law Bill] is that this is a threshold test in that once that has been established the court is then required to look at whether the evidence of that party outweighs the prejudice that could be done to the relationship. There is a second step in that process. While this may create a broader category of relationship that the court recognises that damage could be done to as a result of giving evidence, there is then that step above it which is that the court then considers the probity of that evidence against the dangers that exist in that relationship. The third public policy reason is, as we have said before, that this is a uniform evidence scheme and this definition had been determined through consultation with not only a number of stakeholders through the ALRC process but through state and territory and Commonwealth consultations with the SCAG process.[38]

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35 *Committee Hansard*, *Same-Sex Superannuation Bill*, 6 August 2008, p. 6.

36 *Committee Hansard*: *Evidence Bill*, 7 August 2008, p. 13.

37 *Committee Hansard*: *Evidence Bill*, 7 August 2008, p. 17.

38 *Committee Hansard*: *Evidence Bill*, 7 August 2008, p. 17.

3.38 Professor McCrimmon from the ALRC also emphasised the importance of achieving uniformity:

> [The ALRC's] focus was to try to have uniformity across the jurisdictions that were going to enact the uniform Evidence Act as opposed to ensuring that the definition of de facto across Commonwealth legislation was the same as in the uniform Evidence Act, because we had to get the agreement of the states and territories on the definition.
>
> …
>
> In relation to the Evidence Act, our view is that it is more important to have a uniform definition across the state, territory and Commonwealth legislation as opposed to the Commonwealth legislation and other pieces of Commonwealth legislation.[39]

3.39 Professor McCrimmon explained further:

> The issue from an Evidence Act perspective is this: would the requirement for the individual to give evidence against an accused in a criminal trial who is their partner fracture the relationship? The judge has to determine whether the importance of the evidence that is being given outweighs the result that would occur in the event that the evidence is required to be given; that is, the damage to the relationship. The choice of the term 'partner' was chosen deliberately. It was chosen to be broader and it was not chosen with reference to other pieces of legislation.[40]

Suggestions to overcome inconsistencies

3.40 Some witnesses at the public hearings for the Same-Sex Superannuation Bill and the Family Law Bill suggested that a more consistent approach should be taken across all three bills, and indeed, all federal legislation. For example, Mr Wayne Morgan, Senior Lecturer in Law at the Australian National University, suggested that the ideal approach would be for the Commonwealth to adopt an 'umbrella' term (such as 'couple relationship'), which could be inserted into the *Acts Interpretation Act 1901* (Acts Interpretation Act) to include three broad categories of relationship:

> (a) a valid marriage under Australian law;
>
> (b) a de facto relationship; and
>
> (c) a registered relationship.
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> 'De facto relationship' and 'registered relationship' would then be subject to further definitions.[41]

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39 *Committee Hansard*: *Evidence Bill,* 7 August 2008, p. 5.

40 *Committee Hansard*: *Evidence Bill,* 7 August 2008, p. 7.

41 *Submission j59*, p. 5; and see also *Committee Hansard*: *Same-Sex Superannuation Bill,* 6 August 2008, p. 41.

3.41 Associate Professor Miranda Stewart responded to suggestions that a single uniform definition is the preferable approach to achieving consistency:

> Some have suggested that having a single uniform definition of 'couple' might be the simplest way to go…that the word apply across all federal laws—because obviously we have nearly 100 laws that might refer to this notion. In some ways, I would support that. From a drafting perspective that would be simple. But I do acknowledge, and I think it is clear in these bills, that different federal laws have different definitions of 'couple' for different purposes and it is appropriate, then, to amend those specific definitions to remove the discrimination rather than necessarily change the whole structure of the federal law with one uniform definition. I do support the idea that we would have an amendment to the Commonwealth superannuation law's concept of 'couple', an amendment to the Evidence Act's concept of 'de facto relationship' and so on. I think that is appropriate.[42]

3.42 As a fallback position, Mr Morgan considered that registration of a relationship under a state or territory law should be conclusive proof of the existence of a de facto relationship under Commonwealth law.[43] With specific reference to the Evidence Bill, Mr Morgan submitted that it should be amended to reflect a scheme that properly recognises registered relationships.[44]

3.43 HREOC also noted that the Evidence Bill does not include registration of a relationship under a state or territory law as one of the factors to be taken into account in determining whether two people are in a de facto relationship. HREOC pointed out that the *Same-Sex: Same Entitlements* report recommended that such registration should be considered evidence of the existence of a de facto relationship, and that this approach is also consistent with that taken in the Same-Sex Superannuation Bill.[45]

3.44 Accordingly, HREOC recommended that registration of a relationship under a state or territory law allowing for the registration of relationships should be included in the list of circumstances to be taken into account in determining whether two people are in a de facto relationship for the purposes of the Evidence Act.[46]

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42 *Committee Hansard*, *Same-Sex Superannuation Bill*, 6 August 2008, p. 2.

43 *Submission j59*, pp 6 and 8.

44 *Submission j59*, p. 8. However, the committee also notes evidence it received in the course of the inquiry into the Same-Sex Superannuation Bill in relation to the inconsistent availability of registration schemes throughout Australia. See further Senate Legal and Constitutional Affairs Committee *Same-Sex Relationships (Equal Treatment in Commonwealth Laws–Superannuation) Bill 2008*, October 2008.

45 p. 6. As explained earlier in Chapter 3, the committee notes that the Family Law Bill also includes registration of a relationship under state or territory law as a factor to be considered in determining whether a de facto relationship exists.

46 pp 6-7.

Other issues – interdependent relationships

3.45 The Evidence Bill does not expressly exclude the category of 'interdependent relationships' from the ambit of the definition of 'de facto partner'. The committee notes that the definition contained in the Family Law Bill specifically requires that the relevant persons must not be related by family.[47] Again, this is because the definition in the Family Law Bill is derived from the definition of the term 'de facto relationship' in the state referral legislation, which does not include caring relationships.[48]

3.46 When questioned by the committee in relation to the non-exclusion of this particular category of relationship in the Evidence Bill, Professor McCrimmon from the ALRC stated that it is conceivable that someone in an interdependent relationship could also be covered by the definition of 'de facto partner'.[49]

3.47 A representative from the Department disagreed with Professor McCrimmon's view in this regard:

> If we are talking about an interdependency relationship where we perhaps have two elderly siblings living together, that would not be captured by the Evidence Act because the Evidence Act requires under paragraph 2 of clause (11) in schedule (2) of the dictionary that the persons have a relationship as a couple.[50]

3.48 However, the departmental representative conceded that, although the intention is that the definition only cover 'types of relationships where the two people have a relationship as a couple', as stated in the EM, there is no definition of 'couple' or 'couple relationship' in the Bill (or in the Evidence Act as it currently stands).[51]

3.49 A representative from the Department also confirmed that there is no definition of 'couple' in the Acts Interpretation Act. Therefore, the term 'couple' would have its ordinary meaning as interpreted and applied by the courts.[52]

Same-Sex Relationships (Equal Treatment in Commonwealth Laws–General Law Reform) Bill 2008

3.50 On 4 September 2008, the Same-Sex Relationships (Equal Treatment in Commonwealth Laws–General Law Reform) Bill 2008 (Same-Sex General Law Reform Bill) was introduced into the House of Representatives. On the same day, the Senate referred the provisions of the Same-Sex General Law Reform Bill to the

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47 Proposed paragraph 4AA(1)(b).

48 EM to Family Law Bill, p. 11.

49 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 7.

50 *Committee Hansard: Evidence Bill*, 7 August 2008, p. 11.

51 *Committee Hansard: Evidence Bill*, 7 August 2008, pp 11 and 12.

52 *Committee Hansard*: *Same-Sex Superannuation Bill*, 7 August 2008, p. 16.

committee, for inquiry and report by 30 September 2008. On 18 September 2008, the Senate agreed to extend the reporting date for this inquiry until 8 October 2008.

3.51 The Same-Sex General Law Reform Bill includes a new definition of 'de facto partner' which will be inserted into the Acts Interpretation Act. This definition will be gender neutral and will encompass members of both same-sex and opposite-sex de facto relationships.

3.52 Section 22A of the Acts Interpretation Act will require that an Act or a provision of an Act may specify that the definition in the Acts Interpretation Act applies to that Act or that provision. This means that the application of the definition of 'de facto partner' in the Acts Interpretation Act will have no effect unless it is 'triggered' by express provisions in the substantive Act to avoid 'any possibility of unintended consequences'.[53]

3.53 Section 22A will prescribe two different circumstances in which a person will be considered to be the de facto partner of another person. Paragraph 22A(a) of the Acts Interpretation Act will provide that a person is a de facto partner of another person if the person is in a 'registered relationship' with another person under section 22B of the Acts Interpretation Act.[54] Paragraph 22A(b) of the Acts Interpretation Act will provide that a person is a de facto partner of another person if the person is in a 'de facto relationship' with that person under section 22C of the Acts Interpretation Act.[55]

3.54 Section 22C of the Acts Interpretation Act will provide that, for the purposes of paragraph 22A(b) of the Acts Interpretation Act, a person is in a 'de facto relationship' with another person if the members of the couple are not legally married, are not related by family, and have a relationship as a couple living together on a genuine domestic basis.[56]

3.55 Subsection 22C(2) of the Acts Interpretation Act will provide that all the circumstances of the relationship between the persons are to be taken into account when determining whether two persons have a relationship as a couple for the

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53 EM to Same-Sex General Law Reform Bill, p. 6.

54 Under section 22B, a person will be considered to be in a registered relationship with another person for the purposes of paragraph 22A(a) if the relationship is registered under a prescribed law of a state or territory as a prescribed kind of relationship. This will only apply to relationships that are registered under state or territory laws that are prescribed for the purposes of the Acts Interpretation Act and are of a kind that has been prescribed. For example, the EM states that provisions of state and territory laws that provide for registration of 'caring' or 'interdependent' relationships will not be prescribed as kinds of relationships that will be taken to be a registered relationship for the purposes of the Acts Interpretation Act: p. 6.

55 EM, p. 6.

56 EM, p. 7.

purposes of paragraph 22C(1)(c) of the Acts Interpretation Act, including any or all of the following relevant factors:

- the duration of the relationship;
- the nature and extent of their common residence;
- whether a sexual relationship exists;
- the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- the ownership, use and acquisition of their property;
- the degree of mutual commitment to a shared life;
- the care and support of children; and
- the reputation and public aspects of the relationship.[57]

3.56 The committee notes that the definition of 'de facto relationship' to be inserted into the Acts Interpretation Act is identical to the definition of 'de facto relationship' contained in the Family Law Bill.

3.57 In an answer to a question on notice, the Department confirmed that the definition of 'de facto partner' in the Acts Interpretation Act will not apply in the context of the Evidence Bill or the Evidence Act due to the specific policy objectives:

> (T)he Evidence Amendment Bill 2008 implements the Model Uniform Evidence Bill definition of de facto partner, which is defined in terms of a person in a de facto relationship. This provision was developed in consultation with the Standing Committee of Attorneys-General Working Group of State and Territory officials based on recommendations in the Australian, New South Wales and Victorian Law Reform Commissions' report on *Uniform Evidence Law*. The provision was then approved by SCAG as part of a uniform approach on compellability of witnesses. The Government will proceed with this provision of the Evidence Amendment Bill as drafted to promote and maintain harmonisation amongst jurisdictions on evidence law.[58]

3.58 The interaction of the new definition of 'de facto partner' (and other relevant definitions) with existing definitions in the Same-Sex Superannuation Bill will be examined in the committee's forthcoming reports on the Same-Sex Superannuation Bill and the Same-Sex General Law Reform Bill.

Committee view

3.59 The committee agrees with the views expressed by the Commissions in the Uniform Evidence Law Report, and the views expressed by various organisations

57 EM, p. 7.

58 *Answer to question on notice*, received 15 September 2008, p. 1.

during the course of this inquiry, that harmonisation of the laws of evidence across all jurisdictions is important and should be pursued (unless there is good reason to the contrary).

3.60 The committee notes the extensive consultation process, undertaken over a number of years, which gave interested stakeholders the opportunity to contribute to the development of the model evidence provisions. The committee also notes that the model evidence provisions have been endorsed by SCAG, have already been enacted in New South Wales, and are likely to be introduced in other jurisdictions. The committee encourages all remaining jurisdictions to enact the model evidence provisions as soon as possible in order to ensure uniformity and consistency throughout Australia.

3.61 One of the significant issues in this inquiry, as well as in recent inquiries undertaken by the committee into the Family Law Bill and the Same-Sex Superannuation Bill, was the inconsistency of key concepts and terminology relating to 'de facto partner', 'de facto relationship', and 'couple relationship'. There is also a range of other federal legislation which contains definitions of terms other than 'de facto relationship' but which encompass de facto relationships (for example, the terms 'spouse', 'marital relationship' and 'member of a couple').

3.62 The committee is pleased to note relevant amendments contained in the Same-Sex General Law Reform Bill, particularly the proposed insertion of a definition of 'de facto partner' into the Acts Interpretation Act. According to the Attorney-General, the definition in the Acts Interpretation Act 'will become the standard definition for most Commonwealth laws' and 'will provide a more consistent and uniform approach to defining who is a de facto partner across a range of Commonwealth laws'.[59] The committee commends this approach but notes that the new standard definition will not apply across *all* Commonwealth laws.

3.63 In a broad sense, the committee expresses its preference for consistency and uniformity across federal legislation, and has reservations about the existence of inconsistent terminology and definitions in different federal statutes to describe identical or similar concepts. The committee intends to explore this issue further in its forthcoming reports relating to the Same-Sex Superannuation Bill and the Same-Sex General Law Reform Bill.

3.64 At the same time, however, the committee acknowledges the explanation provided by the Department in relation to the important public policy reasons for the slightly broader approach taken in the Evidence Bill. The committee recognises the value of establishing uniformity between federal, state and territory laws (as opposed to uniformity or consistency of definitions between the uniform evidence laws and other unrelated federal legislation). The committee also acknowledges and supports

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59 The Hon. Robert McClelland MP, Attorney-General, Same-Sex General Law Reform Bill, Second Reading Speech, *House of Representatives Hansard*, p. 4.

the policy objective of protecting a broad range of relationships from the ambit of the compellability requirement, in line with the underlying rationale of the Evidence Act.

3.65 In any case, regardless of the form that the definition of 'de facto partner' takes in the Evidence Bill, it is ultimately a matter for the court to assess whether or not the relationship exists and whether, taking into account all the various factors, the discretion should be exercised to excuse a witness from being compelled to give evidence. While the Evidence Bill may allow a court to recognise a broader category of relationship, the court will then be required to consider the probity of the relevant evidence against the potential prejudice that could be done to the relationship. The committee is cognisant that this 'additional step' does not exist in the context of the Same-Sex Superannuation Bill or the Family Law Bill.

3.66 For these reasons, the committee is of the view that the Senate should pass the Evidence Bill unamended.

Recommendation 1

3.67 The committee recommends that the Senate pass the Evidence Bill.

Senator Trish Crossin

Chair

ADDITIONAL COMMENTS BY LIBERAL SENATORS

1.1 Liberal Senators wish to make the following additional comments in relation to the Evidence Amendment Bill.

Conflicting definitions

1.2 Liberal Senators note that the majority report acknowledges the confusion and undesirability of three bills – the Evidence Bill, the Same-Sex Superannuation Bill and the Family Law Bill – being introduced with three different definitions of 'de facto relationship'. The majority report states that, in a broad sense, the committee expresses its preference for consistency and uniformity across federal legislation, and opposes the existence of inconsistent terminology and definitions in different federal statutes to describe identical or similar concepts.

1.3 However, Liberal Senators believe that the majority report fails to acknowledge the seriousness of this issue.

1.4 The Federal Government's ineptitude in introducing three different definitions of the same term in three related bills, introduced within weeks of each other, is staggering.

1.5 It is disconcerting that the Federal Government has introduced in the same Parliament three bills on closely related matters which each contain significantly differing definitions of important and contentious terms, such as 'de facto partner' and 'de facto relationship'. Liberal Senators hold the strong view that there is no obvious purpose to be served by this confused approach to legislative reform. Despite government rhetoric about simplicity and certainty, it reflects a reckless indifference by the government to the importance of consistency in the law.

1.6 Consistent with the committee's approach in relation to the Family Law Bill,[1] Liberal Senators are of the view that the Federal Government should review the definitions of 'de facto partner', 'de facto relationship', 'couple relationship' and any related definitions, across all relevant federal legislation, with a view to ensuring a consistent approach.

Recommendation 1

1.7 While maintaining the independent and privileged status of marriage, the committee recommends that the Federal Government undertake a review of all federal legislation containing definitions of 'de facto' and 'couple' relationship

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1 See Senate Legal and Constitutional Affairs Committee, *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008*, August 2008.

and 'de facto partner', and any related definitions, with a view to ensuring consistent concepts and terminology are used wherever appropriate.

Multiple relationships

1.8 Liberal Senators note that proposed paragraph 11(5)(b) of Part 2 of the Dictionary currently provides that 'a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship'.

1.9 Liberal Senators are of the view that this provision is unsatisfactory insofar as it:

- may undermine and devalue marriage as a union between a man and a woman to the exclusion of all others; and
- may be viewed by some to approve a form of polygamy.

1.10 Liberal Senators conclude that proposed paragraph 11(5)(b) of Part 2 of the Dictionary should be deleted from the Evidence Amendment Bill, and that any assessment of these matters should be left at the discretion of the courts.

Recommendation 2

1.11 Liberal Senators recommend that paragraph 11(5)(b) of Part 2 of the Dictionary in the Evidence Amendment Bill should be removed.

Senator Guy Barnett **Senator Mary Jo Fisher**

Deputy Chair

Senator Russell Trood

APPENDIX 1

SUBMISSIONS RECEIVED

Submissions received from organisations

Submission Number	Submitter
1	Lesbian and Gay Solidarity Melbourne
2	FamilyVoice Australia
3	Attorney-General for Western Australia – Jim McGinty MLA
4	Let's Get Equal Campaign (South Australia)
5	Australian Family Association
6	Commonwealth Director of Public Prosecutions
7	Australian Law Reform Commission
8	Gay and Lesbian Rights Lobby (NSW)
9	Australian Family Association (South Australia)
10	Law Council of Australia
11	Australian Coalition for Equality
12	Human Rights and Equal Opportunity Commission

Submissions received from individuals

Submission Number	Submitter
m1	John Goldbaum
m2	Michael Smith and Warren Fuge
m3	Claire Watkins
m4	Martin Sobey
m5	F.C.Brohier
m6	Martin Bleby
m7	Don and Maureen McKenzie
m8	Roger McWhinney
m9	Edward Roose
m10	Darryl Allen
m11	Bruce and Judith Morgan
m12	Bruce Gorton
m13	Mrs Norma Cayzer
m14	Peter Rice
m15	Rev Gordon C. M. Boughton

m16	Mrs Valda Collison
m17	Jonathan Fry
m18	Margaret Baguley
m19	Confidential
m20	Jim Woulfe and Andreas Ohm
m21	Colin Smith
m22	Mrs D. Purcell
m23	David O. Paech
m24	Colin Richardson
m25	Robert Bom
m26	Mr Robert and Mrs Dahlis Willcocks
m27	Andrew Soper
m28	Jill Dickson
m29	Dr B. Christina Naylor
m30	Mrs Sharan Hall
m31	Steven Flanagan
m32	Dr Jamie Mattner
m33	David Glen
m34	Margaret J. Dickson
m35	Glenice Vladich
m36	Dr Donald W. Hardgrave
m37	Mrs Betty Oldfield
m38	Mrs Belinda Birch
m39	Confidential
m40	John Kingsmill
m41	Mrs Merle Ross
m42	Confidential
m43	Name withheld
m44	Ian Joyner
m45	Ken and Evelyn Graham
m46	Richard John Moore
m47	Arthur Gilmour

Standard letters and form letters

Submission Number	Submitter
f1	Variations on a standard letter received from 9 individuals
f2	Variations on a standard letter received from 105 individuals
f3	Form letter received from 47 individuals
f4	Form letter received from 24 individuals

Submissions addressing the committee's inquiries into Same-Sex Relationship (Equal Treatment in Commonwealth Laws—Superannuation) Bill 2008, Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 and Evidence Amendment Bill 2008

Submission Number	Submitter
j1	Variations on a standard form letter received from 41 individuals
j2	Andrew Elder
j3	Patrick Seedsman
j4	Name withheld
j5	Brian Greig
j6	Queensland Association for Healthy Communities
j7	Tom Wise
j8	Mr D. I. Nicholson
j9	Keith and Sheila Thompson
j10	Melanie Vella
j11	Name withheld
j12	E. R. Peel
j13	Adrian Gunton
j14	Rev J. E. and Mrs Studd
j15	Mark Ford
j16	Arun
j17	Johannes Pors
j18	Martin and Fiona Cran
j19	Moreen and Max Clanfield
j20	Spencer Gear MA
j21	Peter Hibbert
j22	Alan Bailey
j23	Dallas Clarnette
j24	Reg and Patricia Brody
j25	Peter Jenkins

j26	Matthew Bowles
j27	Ken and Jean West
j28	Denis Colbourn
j29	Maxwell J. Hilbig
j30	John Caldwell
j31	Andrew James Brumpton
j32	Lyn and Michael Lawson
j33	Nick Goumas
j34	Jonathan Fry
j35	Metro Church Melbourne — Pete Buckley
j36	Mr D. I. Nicholson
j37	Tom and Amanda McInnerney
j38	Robert Barden
j39	Confidential
j40	Beryl Turnbull
j41	Michael Thorpe
j42	Raymond G. Coughlan
j43	Simon Lambourne
j44	Mrs Jill M. Wehr
j45	Elizabeth Ryan
j46	Dan and Adeline Keenan
j47	John Kingsmill
j48	Tom and Jenine Foster
j49	Mrs Karen Nelson
j50	Mrs J. A. Miller
j51	Gae Harris
j52	Lindsay and Lioubov Wright
j53	Margaret Laundy
j54	Frederik and Geraldena Bekker
j55	Walter Lee
j56	Salt Shakers
j57	Christine Loundes
j58	Steve Landers
j59	Wayne Morgan, Senior Lecturer in Law, ANU College of Law
j60	Variations on a standard letter received from 16 individuals
j61	Name withheld
j62	Name withheld
j63	Greg Chenhall

ADDITIONAL INFORMATION RECEIVED

1 Australian Law Reform Commission: answer to question on notice, received 14 August 2008

2 Attorney-General's Department: answers to questions on notice, received 20 August 2008

3 Attorney-General's Department: answer to a Question on Notice, received 15 September 2008

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, Thursday 7 August 2008

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

FITCH, Ms Catherine, Acting Assistant Secretary, Administrative Law and Civil Procedure Branch
Attorney-General's Department

McCRIMMON, Professor Les, Commissioner
Australian Law Reform Commission

WILLIAMS, Ms Kimberley, Senior Legal Officer, Evidence and Legislative Framework Section
Attorney-General's Department