

Submission

on the

Evidence Amendment Bill 2008

to the

Senate Legal and Constitutional Affairs Committee

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1. Introduction

On 18 June 2008, the Senate referred the Evidence Amendment Bill 2008 to the Legal and Constitutional Affairs Committee for inquiry and report by 25 September 2008.

The Bill will amend the Evidence Act 1995 to implement the majority of recommendations made by the ALRC, the NSW Law Reform Commission and the Victorian Law Reform Commission as a result of their inquiry into the operation of the uniform Evidence Acts.

The Committee has invited written submissions by 25 July 2008.

2. De facto partner

Clause 94 of Schedule 1 of the Bill would add, as a new Section 11 of Part 2 of the dictionary of the Evidence Act 1995, the following definition:

11 References to de facto partners

(1) A reference in this Act to a de facto partner of a person is a reference to a person who is in a de facto relationship with the person.

(2) A person is in a de facto relationship with another person if the two persons have a relationship as a couple and are not legally married.

(3) 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:

(a) the duration of the relationship;

(b) the nature and extent of their common residence;

(c) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;

(d) the ownership, use and acquisition of their property;

(e) the degree of mutual commitment to a shared life;

(f) the care and support of children;

(g) the reputation and public aspects of the relationship.

(4) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether two persons have a relationship as a couple.

(5) For the purposes of subclause (3), the following matters are irrelevant:

(a) whether the persons are different sexes or the same sex;

(b) whether either of the persons is legally married to someone else or in another de facto relationship.

The term “de facto partner” would be substituted for the term “de facto spouse” by clauses 5-8 of Schedule 1 of the Bill in subsection 18(2); paragraph 20(3)(a); subsection 20(4); and paragraphs 20(4)(b) and 20(5)(b) of the Evidence Act 1995.

These provisions of the Evidence Act 1995 all deal with the compellability of witnesses and provide, in relation to certain criminal proceedings, for the spouse, de facto spouse, parent or child of a defendant to object to being required to give evidence.

Under common law, spouses were neither competent (able to give evidence) nor compellable witnesses in most criminal proceedings. The rationale for the common law principle of a spouse being unable to give evidence at a criminal trial against his or her spouse is explained by Wendy Harris thus:

“The various authorities supporting that proposition are detailed in the judgement of Lord Wilberforce in *R v Hoskyn* where it was noted that it was well established by the time of Coke in 1628. Those authorities based the incompetence on the doctrine of unity of husband and wife coupled with the privilege against self-incrimination, the danger of perjury and the repugnance likely to be felt by the public seeing one spouse testifying against the other. Coke further suggested ‘it might be a cause of implacable discord and dissension between the husband and the wife, and a means of great inconvenience.’”¹

There were specified exceptions. Statutory reforms in all common law jurisdictions replaced the common law principle of spousal non-competence so that spouses are now competent witnesses in all matters.

More recently the non-compellability of spouses has been reduced to a right to object to giving evidence, which is then considered by the court and may be accepted or rejected after taking certain matters into account.

Subsection 18 (5) of the Evidence Act 1995 provides that:

A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that:

- (a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence; and*
- (b) the nature and extent of that harm outweighs the desirability of having the evidence given.*

The concern that harm “would or might be caused (whether directly or indirectly) to the relationship between the person and the defendant” is rooted in the common law view of the sanctity of marriage and society’s interest in preserving marriage.²

The Bill would include partners in a same-sex relationship in the compellability provisions which currently apply to spouses. This implies a policy position that the state has the same interest in preserving same-sex relationships as it has in preserving marriage.

Alternatively the inclusion could be seen as a move to significantly broaden the categories of relationships to which the compellability provisions would apply. If so, there would be no reason to limit this broadening to persons who “have a relationship as a couple”. It could apply more widely, say, to any persons who were financially and emotionally interdependent. However, given that the principle of non-compellability needs to be balanced against the interest the court has in hearing all the available evidence, any such general broadening would seem to be unwarranted.

3. The uniqueness of marriage

Peter Sprigg of the US Family Research Council has put a strong case against extending to same-sex relationships the benefits given to marriage. In evidence to the Maryland House of Delegates on 28 February 2008, he said:

“Society does not give ‘benefits’ to marriage because individuals want them or would be helped by them. Society gives ‘benefits’ to marriage because marriage gives benefits to society. Therefore, when those who are not married, such as people in homosexual or cohabiting relationships, seek to receive such public ‘benefits’, they bear the burden of proof. They must show that such relationships benefit society (not just themselves) in the same way and to the same degree that the authentic, natural institution of marriage between a man and a woman does. This is a burden they cannot meet. Only the union of a man and a woman can result in the natural reproduction that is essential literally to continue the human race. And research clearly demonstrates that married men and women - and children raised by their married, biological mother and father - are happier, healthier, and more prosperous than people in any other living situation. These are the true ‘benefits of marriage.’

“The legal and financial ‘benefits’ of marriage are not an entitlement for every citizen regardless of lifestyle. They give an incentive to enter into the socially beneficial relationship of authentic marriage, and give protection to the social institution of marriage. Awarding such benefits to the unmarried makes no more sense than giving veterans’ benefits to people who never served in the military.”³

There are good reasons for society, and therefore, also for government, to distinguish marriage from other possible relationships, including male-female cohabitation and same-sex relationships, and to privilege marriage over such relationships by bestowing particular benefits only on married couples.

Marriage, as defined in the *Marriage Act 1961* at section 5 means “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”.

There are two key reasons for distinguishing marriage from other relationships and granting it a privileged status in comparison to other relationships. Firstly, marriage provides the best environment for raising children. Secondly, marriage regulates the relationships between men and women in a way that benefits both men and women as well as society.

3.1 Marriage provides the best environment for raising children.

A large body of social science research confirms the near universal belief, across times and cultures, that marriage is the best environment for raising children.

Children flourish best, on a range of indicators, (including educational outcomes, school misbehaviour, smoking, illegal drugs, and alcohol consumption, sexual activity and teen pregnancy, illegal activities and psychological outcomes), when they are raised by a mother and a father in a publicly committed, lifelong relationship.⁴

A few examples of particular research findings illustrate this general conclusion.

Three- and four-year-old children with two biological parents are three times less likely than those in any other type of families to have emotional or behavioural problems such as attention deficit disorder or autism.⁵

Girls whose fathers left the family early (before age 5) were five times more likely in the U.S. and three times more likely in New Zealand to become pregnant as a teenager compared to girls from traditional families.⁶

Male adolescents in all types of families without a biological father (mother only, mother and step-father, and other) were more likely to be incarcerated than teens from two-parent homes, even when demographic information was included in analyses. Youths who had never lived with their father had the highest odds of being arrested.⁷

Children's well being is adversely affected by being deprived of either a mother or a father. Fathers and mothers make different contributions to a child's upbringing. Neither can adequately substitute for the other.⁸

3.2 Marriage benefits both men and women

Marriage is the institution which regulates the relations of men and women in a way that benefits both men and women. Marriage socialises men in important ways. Societies with significant numbers of unmarried men often have significant social problems.

A 2005 report on findings from social sciences on the significance of marriage concludes:

*“Married men drink less, fight less, and are less likely to engage in criminal activity than their single peers. Married husbands and fathers are significantly more involved and affectionate with their wives and children than men in cohabiting relationships (with and without children). The norms, status rewards, and social support offered to men by marriage all combine to help men walk down the path to adult responsibility.”*⁹

Associate Professor in Sociology at La Trobe University, David de Vaus, writing in *Family Matters*, says that women also benefit significantly from marriage, with better mental health outcomes. *“When a range of types of mental disorders are considered, marriage reduces the risk of mental disorders for both men and women.”*¹⁰

These social benefits for children, men and women are sufficient grounds for society and governments to encourage marriage by granting it a unique legal status, and to bestow particular benefits only on married couples. This includes the benefit of being able to object to giving evidence against a spouse in most criminal proceedings.

3.3 Same-sex relationships are not equal to marriage

No matter how intense they may appear to be, same-sex relationships cannot be considered the equivalent of marriage. They confer none of the unique benefits of marriage and family on Australian society.

Both male homosexual and lesbian relationships are significantly more unstable than marriage, with lesbian relationships breaking up within the first 8 years at *over three times* the rate of marriages.¹¹

Same sex relationships are naturally sterile. Same sex relationships are not capable of producing children. Society has no valid interest in encouraging those in such relationships to procure children through either adoption or reproductive technologies, because these processes necessarily involve a third party biological parent. Whatever means are used to procure a child, the child is intentionally deprived of a genuine parental relationship with either a father or a mother.

A key Australian study has shown significant detrimental outcomes from homosexual parenting. Dr Sotirios Sarantakos, when Associate Professor of Sociology at Charles Sturt University, Wagga Wagga, NSW, has done a number of studies on heterosexual and homosexual couples. In 1996 he published a paper, *Children in three contexts*, where he explored the relationship between family environment and behaviour of primary school children living in three family contexts - married heterosexual couples, cohabiting heterosexual couples and homosexual partners.¹²

The major finding of the study was that family type did make a significant difference to the children's school achievements. Children in families where their biological parents were married to each other scored best of the three groups in language ability (7.7), mathematics (7.9) and sport (8.9). Children of cohabiting heterosexual couple families generally did next best in these areas (6.8, 7.0 and 8.3), while children of homosexual partners scored lowest (5.5, 5.5, 5.9). In class behaviour more children of homosexual partners were reported to be timid and reserved, unwilling to work in a team or talk about family life and holidays. In general they felt "uncomfortable when having to work with students of a sex different from the parent they lived with". Sex identity was reported by teachers to be a problem area for some children of homosexual families. Sarantakos cautiously concludes that "married couples seem to offer the best environment for a child's social and educational development".

Advocates of parenting by homosexual partners frequently claim that about 50 studies have been done "proving" no difference in outcome between children raised by married couples or by homosexual partners. Any social science study depends for its validity on following rigorous statistical and research procedures. Dr Robert Lerner and Dr Althea Nagai, experts in quantitative analysis, after dissecting each of 49 of such studies found at least one fatal research flaw in each study.¹³ These studies are therefore no basis for good science or good public policy.

Professor Lynn D Wardle shows even from those studies which conclude in favour of homosexual parenting that there is data showing that homosexual parenting may be harmful.¹⁴ There is a greater incidence of homosexual orientation in the children raised by homosexual partners with resulting problems including suicidal behaviour, promiscuity, etc. There is also a greater incidence of anxiety, sadness, hostility, defensiveness and inhibitions (some of these especially among boys of lesbian mothers).

In the light of this research data there is no compelling reason for any benefit currently given to married couples to be extended to two men or two women in a same-sex relationship. This includes the benefit of being able to object to giving evidence against a spouse in most criminal proceedings.

Recommendation 1:

All references in the Bill to the new term "de facto partner", including the definition of this term, that is clauses 5-8 and 94 of Schedule 1 should be deleted.

4. Specific problems with the definition of "de facto partner"

Aside from the principal public policy reason of not extending benefits given to married couples to those in other relationships, there are several practical problems with the proposed definition of "de facto partner".

4.1 Vagueness and complexity

The definition is of necessity vague. The fact of a marriage can usually be readily established with documentary evidence. The difficulty of establishing the existence of a de facto relationship is illustrated by the list of seven factors and the direction to the court that "all the circumstances of the relationship are to be taken into account" while "no particular finding in relation to any circumstance is to be regarded as necessary in deciding whether two persons have a relationship as a couple."

This is a very broad inquiry which a court must undertake before it could rule on whether or not a person is qualified to object under the compellability provisions or not. The inquiry would seemingly need to include the calling of witnesses. How else could the court investigate "the reputation and

public aspects of the relationship”? Other factors would necessitate the production of documentary evidence such as bank records or property titles.

Such an inquiry could unnecessarily delay court proceedings. It would be more difficult for the court to be aware of the circumstances where subsection 18(4) of the Evidence Act 1995 might apply.

4.2 Contrivance

One argument against retaining non-compellability for spouses has been that an accused person could marry a potentially damaging witness in order to take advantage of the non-compellability provisions. With such an open definition of “de facto partner” it could well be attractive for the accused to conspire with one or more potentially damaging witnesses to object to giving evidence on the grounds of being a de facto partner of the accused.

The definition helpfully accommodates such expansive claims by providing that “it is irrelevant whether either of the persons is legally married to someone else or in another de facto relationship”.

This provision is bearing on the farcical and is suggestive of a script for a comedy film in which happily married Mafiosi all purport to be gay lovers of their godfather to avoid being compelled to give evidence against him.

Recommendation 2:

The definition of “de facto partner” is seriously flawed and should be removed from the Bill.

5. Endnotes

1. Wendy Harris, *Spousal Competence and Compellability in Criminal Trials in the 21st Century*, Faculty of Law, Queensland University of Technology; <http://www.law.qut.edu.au/ljj/editions/v3n2/pdf/harris.pdf>.
2. See the discussion in *Competence and Compellability of Spouses as Witnesses in Criminal Proceedings*, Law Reform Commission of Western Australia, 1997, p 18-20, <http://www.lrc.justice.wa.gov.au/2publications/reports/P31-R.pdf>.
3. Testimony of Peter Sprigg to the Maryland House of Delegates, 28 February 2008, <http://www.frc.org/get.cfm?i=TS08B03>.
4. Barbara Schneider, Allison Atteberry, and Ann Owens, *Family Matters: Family Structure and Child Outcomes* (Birmingham: Alabama Policy Institute, June 2005).
5. Coiro, M., Zill, N., & Bloom, B. “Health of our nation’s children. National Center for Health Statistics” in *Vital Health Statistics*, 1994, Vol 10, p 191.
6. Ellis, B., Bates, J., Dodge, K, Fergusson, D., Horwood, L.J., Pettit, G. & Woodward, L. “Does father absence place daughters at special risk for early sexual activity and teenage pregnancy?” in *Child Development*, 2003, Vol. 74, 801-821.
7. Harper, C., & McLanahan, S., *Father absence and youth incarceration*, (2003: Center for Research on Child Wellbeing) Working Paper 99-03.

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8. W. Bradford Wilcox, "Reconcilable Differences: What Social Sciences Show About the Complementarity of the Sexes & Parenting" in *Touchstone*, Vol 18, Issue 9.
 9. [*Why Marriage Matters, Second Edition: Twenty-Six Conclusions from the Social Sciences*](#), (New York: Centre for Marriage and Families, September 2005).
 10. David de Vaus, "Marriage and Mental Health" in *Family Matters* No.62 Winter 2002, pp 27-32.
 11. Andersson, G., "Divorce-Risk Patterns in Same-Sex Marriages in Norway and Sweden", *PAA 2004 Annual Meeting*, Boston, 1-3 April 2004.
 12. Sarantakos, S, "Children in three contexts", *Children Australia*, 1996, Vol 21, No 3.
 13. Lerner, Robert and Nagai, Althea, 2001, *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting*, Marriage Law Project, Ethics and Public Policy Center, Washington, DC, 2003.
 14. Wardle, Lynn D, 1997, "The Potential Impact of Homosexual Parenting on Children", *University of Illinois Law Review*, Vol 1997, Issue 3, p 833.