

Submission
on the
Evidence Amendment Bill 2008
to the
Senate Legal and Constitutional Affairs Committee

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by

Ian Joyner

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In making this Submission to the Senate Legal and Constitutional Affairs Committee, I would like to express my support for the Submission by Family Voice Australia on this Bill, from which I have adapted my material.

1. The uniqueness of marriage.

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.

Same-sex relationships are not equal to marriage.

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 a property and maintenance regime on dissolution of the relationship.

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.

2. Specific problems with the definition of “de facto relationships”.

The definition of a de facto relationship 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 nine 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 the persons are in a de facto relationship”.

It may be difficult for a person to know with certainty whether or not they would be held by a court to be in a de facto relationship. As this Bill would establish significant obligations of a financial nature on a person found by a court to have been in a de facto relationship with another, this is most unsatisfactory. The vagueness of the definition also invites fraudulent claims.

2.1 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 relationship” is seriously flawed. Its application could lead to grave injustices and is open to fraudulent claims. There is no obvious way to remedy the vagueness of the definition and so the Bill insofar as it deals with de facto relationships should not be supported.

Conclusion:

- Since marriage is a committed union of a man and woman, spouses should be protected from being forced to give evidence against each other. Non-married relationships don't deserve this privilege.
- Criminals could exploit such a law by claiming that witnesses against them were in a de facto or same-sex relationship with them, to avoid a criminal associate giving evidence.

Reference.

Family Voice Australia Submission on the Evidence Amendment Bill 2008 to the Senate Legal and Constitutional Affairs Committee
http://www.aph.gov.au/senate/committee/legcon_ctte/evidence/submissions/sub06.pdf