

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter provides a brief background to the Bill, and then outlines the main provisions of the Bill.

Background to the Bill

Purpose of the Bill

2.2 The primary purpose of the Bill is to amend the Family Law Act to provide opposite-sex and same-sex de facto couples access to the federal family law courts in relation to property and maintenance matters.

2.3 Currently, same-sex and opposite-sex de facto couples can access the federal Family Court to resolve child-related matters. However, financial and property arrangements between separated de facto couples are subject to state and territory law, which varies between jurisdictions. As was explained by the Attorney-General in his second reading speech:

...where de facto couples have children and their relationship breaks down, they can find themselves with children issues in one of the federal family law courts and property issues in a State court.

This will mean couples having to run parallel proceedings in two court systems, placing unnecessary additional costs and inconvenience on de facto couples, as well as an administrative burden on the federal and State court systems.¹

2.4 The Bill attempts to address these issues by enabling federal family law courts to deal in the one proceeding with both financial and child-related matters arising for separated de facto couples. As the Explanatory Memorandum (EM) states:

The Bill will offer de facto couples covered by the Bill a nationally consistent financial settlement regime, to minimise jurisdictional disputes and uncertainties that sometimes impede settlement of these matters under State and Territory law.²

2.5 The EM further explains that the Bill will:

...offer these de facto couples access to the family law system for determination of their financial matters arising on relationship breakdown. The family law courts have experience in relationship matters, and have

1 The Hon Robert McClelland, MP, Attorney-General, *House of Representatives Hansard*, 25 June 2008, p. 1.

2 p. 1; see also The Hon Robert McClelland, MP, Attorney-General, second reading speech, *House of Representatives Hansard*, 25 June 2008, p. 1.

procedures and dispute resolution mechanisms more suited to handling family litigation.³

Constitutional position

2.6 The Bill relies on referrals by states to the Commonwealth under subsection 51(xxxvii) of the Constitution. This gives effect to a decision at the November 2002 meeting of the Standing Committee of Attorneys-General to proceed with Commonwealth implementation of references of state powers in this area, with support from a majority of state and territory governments.⁴

2.7 Since then, for example, New South Wales has enacted the *Commonwealth Powers (De Facto Relationships) Act 2003*, and Victoria, Queensland and Tasmania have legislated in similar terms. The Commonwealth is relying on its power over territories to apply the new legislation in relation to the Australian Capital Territory, Northern Territory and Norfolk Island.⁵

2.8 Western Australia (WA) has its own family court (WA Family Court) under the *Family Court Amendment Act 2002* (WA). The WA Family Court administers child-related matters and property settlements for married and de facto (including same-sex) couples.⁶

HREOC inquiry on same-sex entitlements

2.9 The Bill applies to both opposite-sex and same-sex de facto couples. The Attorney-General stated, in his second reading speech, that the Bill 'is consistent with the Government's policy not to discriminate on the basis of sexuality'.⁷ This is apparently also consistent with the referrals provided by the states.⁸

3 p. 1.

4 EM, p. 3.

5 The Hon Robert McClelland, MP, Attorney-General, second reading speech, *House of Representatives Hansard*, 25 June 2008, p. 1. See also footnote 8 below.

6 WA Attorney-General, *Submission 2*, p. 1.

7 The Hon Robert McClelland, MP, Attorney-General, *House of Representatives Hansard*, 25 June 2008, p. 1.

8 *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW), ss 3-4; *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld) ss 3-4; *Commonwealth Powers (De Facto Relationships) Act 2004* (Vic), ss 3-4; *De Facto Relationships (Northern Territory Request) Act 2003* (NT), ss 3-4.

2.10 The Bill would therefore implement certain aspects of the *Same-Sex: Same Entitlements* report by the Human Rights and Equal Opportunity Commission (HREOC), which reported in May 2007.⁹ This report found that:

...at least 58 federal laws relating to financial and work-related entitlements discriminated against same-sex couples and their children. These laws breach the International Covenant on Civil and Political Rights. Laws that discriminate against the children of same-sex couples and fail to protect the best interests of the child in the area of financial and work-related entitlements also breach the Convention on the Rights of the Child.¹⁰

2.11 Among other matters, the HREOC report recommended that:

- same-sex and opposite-sex de facto couples should both have access to the federal Family Court for property and child-related matters;
- the Family Law Act should be amended to set out a model definition of 'de facto relationship'; and¹¹
- the parenting presumptions under the Family Law Act should be amended – this is discussed further in relation to the definition of 'child of a de facto relationship' in the next chapter.¹²

Consultation

2.12 The EM also outlines the consultations undertaken by the Attorney-General's Department (Department) in relation to the Bill. According to the EM, consultation occurred over the period November 2006 to March 2007 with states and territories, the Family Court of Australia, the Federal Magistrates Court, the Family Law Section of the Law Council of Australia, the Family Law Council and with affected government agencies. In particular, the EM states that:

The Family Court of Australia and the Federal Magistrates Court of Australia were consulted about the financial impact of additional workload generated by the proposed amendments.¹³

Key provisions

2.13 The EM states that 'the primary objective of the Bill is to extend the financial settlement regime under the Act to parties to a de facto relationship'.¹⁴ The Bill does

9 HREOC, *Same-Sex: Same Entitlements*, National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits, May 2007 (HREOC *Same-Sex: Same Entitlements* report).

10 HREOC, *Submission 19*, p. 3.

11 See paragraph 4.6.2(b) at p. 80 of Chapter 4 of the HREOC Report.

12 HREOC *Same-Sex: Same Entitlements* report, pp 279-280.

13 p. 3.

14 p. 1.

this by inserting a new Part VIIIAB into the Family Law Act¹⁵ which confers jurisdiction on certain courts – the Family Court of Australia and the Federal Magistrates Court – to make orders in relation to de facto financial matters. These matters include proceedings for distribution of property or financial resources, or for provision of maintenance between parties to a de facto relationship.¹⁶

New definitions

2.14 Some of the key new definitions proposed by the Bill are set out below.

De facto relationship – new section 4AA

2.15 The Bill proposes to repeal the existing definition of 'de facto relationship' in subsection 4(1) of the Family Law Act (item 5 of Schedule 1). A new definition of 'de facto relationship' is set out in proposed new section 4AA in item 21 of Schedule 1.

2.16 The new definition is based on the current definition in subsection 4(1) of the Family Law Act of a 'couple living together on a genuine domestic basis' although not legally married to each other. However, the new definition encompasses both opposite-sex and same-sex de facto relationships,¹⁷ unlike the previous definition, which was confined to opposite-sex de facto relationships.

2.17 Subsection 4AA(2) provides a list of circumstances for a court to consider in determining whether a de facto relationship exists, including:

- 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;
- whether the relationship is or was registered under a prescribed law of a state or territory as a prescribed kind of relationship;
- the care and support of children; and
- the reputation and public aspects of the relationship.

15 The Bill also makes amendments to existing Parts VIIIAA and VIIIIB of the Family Law Act, as well as consequential amendments to other legislation.

16 See the proposed new definition of 'de facto financial cause' in item 3 of the Bill. This provides jurisdiction for de facto financial matters in all financial matters presently available under the Act between parties to a marriage.

17 See paragraph 4AA(5)(a).

2.18 In relation to registered relationships, as referred to in proposed paragraph 4AA(2)(g), the EM explains that:

Some State and Territory laws provide for registration of certain relationships that are not marriages on Relationships Registers maintained by the relevant State or Territory Registrar of Births, Deaths and Marriages. The relationship must be of a kind that has been prescribed, as some State Relationships Registers provide for the registration of relationships that do not fall within the definition of 'de facto relationship' in the State reference Acts, for example caring relationships.¹⁸

2.19 Proposed subsection 4AA(3) provides that no particular finding in relation to any listed circumstance is necessary in deciding whether there is a de facto relationship.

2.20 Proposed paragraph 4AA(5)(b) clarifies that a de facto relationship can exist even if a person in the relationship is legally married to another person or in another de facto relationship.

2.21 Proposed paragraph 4AA(1)(b) requires that the persons must not be related by family. According to the EM, this is derived from the definition of the term 'de facto relationship' in the state reference Acts, which does not include caring relationships.¹⁹

Child of a de facto relationship – new section 90RB

2.22 Proposed section 90RB provides a definition of 'child of a de facto relationship' for the purposes of Part VIIIAB²⁰ as follows:

- a child of whom each of the parties to the de facto relationship are the parents;
- a child adopted by the parties to the de facto relationship or by either of them with the consent of the other; or
- a child under subsection 60H(1) of the Family Law Act – this subsection sets out rules relating to parentage of a child born to a woman as a result of an artificial conception procedure while the woman was married to a man.

2.23 Subsection 90RB(3) provides that, for the purposes of section 90RB, existing subsection 60H(1) of the Family Law Act applies to same-sex de facto couples in a corresponding way to the way in which it applies to opposite-sex de facto couples. The EM states that 'this provision extends the application of subsection 60H(1) to both opposite-sex and same-sex de facto couples'.²¹

18 p. 11.

19 p. 11. See also subsection 4AA(6) which provides when two persons are considered to be 'related by family', which includes adoptive relationships.

20 The definition will not affect the operation of other parts of the Family Law Act: EM, p. 22.

21 p. 23.

Participating jurisdiction – new subsection 90RA(1)

2.24 A 'participating jurisdiction' is defined in new subsection 90RA(1) as each 'referring State' and each territory. A 'referring State' is then defined in subsection 90RA(2) to mean a state that has provided to the Commonwealth a reference of powers over financial matters relating to de facto relationships arising out of the breakdown of those relationships. The provision applies equally to states that have not yet, but may, in the future, refer power to the Commonwealth.²² The EM explains that:

Because the Commonwealth power to legislate for de facto financial matters relies on powers referred by State Parliaments, the Bill will only apply to the territorial limits of those 'referring States', and does not apply in States that have not referred powers over these matters.²³

The Bill's relationship with state and territory laws – new section 90RC

2.25 Where federal jurisdiction applies to de facto financial matters under the provisions of the Bill in participating jurisdictions, state and territory laws dealing with the same subject matter are excluded. Detailed provisions dealing with the relationship between the new de facto financial provisions in the Family Law Act and state and territory laws are set out in new section 90RC in subdivision B.

2.26 The EM states that:

The effect of section 90RC is to carve out an 'exclusion zone' for the operation of new federal de facto financial provisions, to the exclusion of State and Territory laws dealing with or referring to those matters. Those areas of operation of State and Territory laws excluded by federal law are necessarily confined to the scope of the State referred powers, being in relation to financial matters arising out of the breakdown of de facto relationships, and to the area dealt with under federal law.²⁴

2.27 Proposed subsection 90RC(2) describes the areas of law in which federal law operates to override the application of state law.²⁵ Proposed subsections 90RC(3) to (5) then set out the exceptions to the operation of subsection 90RC(2), where state and territory law will continue to operate despite the operation of federal law under the provisions of the Bill.

2.28 For example, under proposed subsection 90RC(3), state law will apply to a de facto relationship if the geographical requirements under proposed sections 90SD or 90SK cannot be met. The Bill gives two examples, including the following:

22 EM, p. 22.

23 p. 8.

24 p. 23.

25 See further EM, p. 24.

Abbey and Bob are parties to a de facto relationship that has broken down, and have never been ordinarily resident in a participating jurisdiction. Subsection (3) has the effect that State law will govern financial matters arising out of the breakdown of their relationship.²⁶

Declaration of the existence of a de facto relationship – new section 90RD

2.29 In his second reading speech, the Attorney-General observed:

A major difference between a marriage and a de facto relationship is establishing when a de facto relationship has commenced or ended...In the case of a de facto relationship, identifying whether a relationship existed, and when it was on foot or not, can be...difficult.²⁷

2.30 Proposed section 90RD therefore enables the court to make a declaration about the existence of the de facto relationship for the purposes of maintenance and property proceedings under Part VIIIAB. This declaration can also declare certain other matters relating to the existence of the relationship, including:

- the period or periods of the de facto relationship;
- whether there is a child of the de facto relationship; and
- when the relationship ended.²⁸

2.31 The EM states that the aim of section 90RD is to facilitate early determination of these 'gateway issues' that parties are required to establish for the application of Part VIIIAB.²⁹ A person affected by a section 90RD declaration may apply for a declaration to be varied or set aside if new facts or circumstances arise.³⁰

2.32 Proposed section 90RG imposes a geographical requirement – that one of the persons about whom the declaration is sought was ordinarily resident in a participating jurisdiction when the primary proceedings commenced.

26 See example 1 after paragraph 90RC(3)(b).

27 The Hon Robert McClelland, MP, Attorney-General, *House of Representatives Hansard*, 25 June 2008, p. 2.

28 Proposed subsection 90RD(2). Note that an application for a section 90RD declaration may be brought by any party to the primary proceedings, including a party who is not a party to the relevant de facto relationship, such as an affected third party or a trustee in bankruptcy: see proposed section 90RF.

29 p. 26.

30 proposed section 90RH.

Maintenance and property orders – Division 2 of Part VIIIAB

Application of Division 2

2.33 Under proposed section 90SB, before making a maintenance or property order under Division 2,³¹ the court must be satisfied that either:

- the relationship lasted for a period, or periods, totalling 2 years; or
- there is a child of the de facto relationship (as defined in section 90RB); or
- the party to the de facto relationship who applies for the order or declaration made substantial financial or other contributions³² and serious injustice would result to that party if the order or declaration was not made; or
- the relationship is or was registered under a prescribed state or territory law.

2.34 The EM states that this requirement 'is derived from equivalent provisions operating under State law before the commencement of these provisions.'³³

2.35 Division 2 ceases to apply in relation to a de facto relationship if the parties marry each other – in which case, existing Part VIII of the Family Law Act applies.³⁴

Maintenance orders – Division 2, Subdivisions A and B

2.36 Proposed section 90SE allows the court to make orders for the maintenance of one of the parties to the de facto relationship after the breakdown of that relationship. According to the EM, 'this largely replicates the effect of section 74 in relation to parties to a marriage' under the existing Part VIII of the Family Law Act.³⁵

2.37 Proposed section 90SF sets out matters for the courts to take into consideration when making a maintenance order. These matters replicate the matters which courts are required to consider under subsection 75(2) of the Family Law Act.³⁶

2.38 Proposed section 90SD contains a geographical requirement linking the parties to the de facto relationship to a participating jurisdiction before a court can make a maintenance order in relation to a de facto relationship.

31 Under sections 90SE (maintenance of a party to a de facto relationship), 90SG (urgent maintenance) or 90SM (alteration of property interests), or a declaration of property interests under section 90SL.

32 of a kind mentioned in proposed paragraphs 90SM(4)(a), (b) or (c).

33 p. 28.

34 Proposed section 90SC.

35 p. 29.

36 EM, p. 29.

Property orders – Division 2, Subdivision C

2.39 Subdivision C contains provisions enabling the court to make a declaration of property interests (proposed section 90SL) and orders altering the property interests of parties to de facto relationships (proposed section 90SM). Proposed subsection 90SM(4) sets out the factors the court must take into account when considering what property settlement order should be made (if any).

2.40 Proposed section 90SK contains a geographical requirement linking the parties to the de facto relationship to a participating jurisdiction before a court can make a property order in relation to a de facto relationship.

Financial agreements – Division 4 of Part VIIIAB

2.41 Division 4 of proposed Part VIIIAB would allow parties to a de facto relationship in participating jurisdictions³⁷ to enter into binding financial agreements (Part VIIIAB financial agreements). These provisions allow parties to enter into agreements about how they will distribute their property or financial resources or maintain each other if their relationship breaks down. Agreements can be made before³⁸ or during³⁹ a de facto relationship, or after⁴⁰ it has broken down.

2.42 A Part VIIIAB financial agreement can include another person or persons as a party to the agreement.⁴¹ A financial agreement is binding if it complies with the requirements in section 90UJ (for example, it must be signed by all the parties). A Part VIIIAB financial agreement will not, however, have force unless a separation declaration is made under proposed section 90UF. The EM explains that:

This replicates the anti-avoidance effect of section 90DA in relation to Part VIIIA financial agreements...The aim of the provision is to ensure that agreements...are genuine arrangements, and are not used to defeat the interests of creditors.⁴²

2.43 A Part VIIIAB financial agreement ceases to be binding if the parties to the agreement marry each other (proposed subsection 90UJ(3)).

2.44 Provisions relating to maintenance and property orders in proposed Division 2 do not apply to matters that are dealt with in a Part VIIIAB financial agreement.⁴³

37 Note that the parties to the de facto relationship must be ordinarily resident in a participating jurisdiction when they make the agreement (see proposed section 90UA).

38 Proposed section 90UB.

39 Proposed section 90UC.

40 Proposed section 90UD.

41 Explanatory Memorandum, p. 35.

42 Explanatory Memorandum, p. 35.

43 See subsection 90SA(1), which is subject to subsection 90SA(2).

Superannuation splitting – Schedule 3

2.45 Items 51 to 78 of the Bill propose to extend existing Part VIII B of the Family Law Act to provide for superannuation splitting to de facto couples. In his second reading speech, the Attorney-General explained that, for the first time:

...the Bill will allow de facto couples to split their superannuation interests in the event of a breakdown in that relationship. This will enable recognition of the important contribution many de facto couples make over the course of their relationship to each other's superannuation to be reflected in the proper apportionment between them of what they have accumulated for their retirement. This is an important benefit that has been available under the Family Law Act for married couples since 2002.⁴⁴

Other amendments

2.46 Part 2 of Schedule 1 of the Bill contains transitional provisions relating to the application of the Bill to de facto relationships to which state or territory laws currently apply. Schedule 2 to the Bill makes consequential amendments to related Commonwealth legislation flowing from the extension of the Family Law Act to de facto financial matters.

2.47 Schedule 3 contains other amendments to the Family Law Act relating to:

- financial agreements between married couples (Part 1 of Schedule 3);
- separation declarations (Part 2 of Schedule 3);
- superannuation splitting (Part 4 of Schedule 3); and
- the definition of 'matrimonial cause' to cover proceedings by third parties in relation to binding financial agreements (Part 3 of Schedule 3).

2.48 Schedule 4 proposes to amend subsection 60I(8) of the Family Law Act to allow family dispute resolution practitioners to give an additional certificate to parties who attend family dispute resolution. It also makes a minor drafting correction to paragraph 330(4)(ba) of the *Proceeds of Crime Act 2002*.

44 The Hon Robert McClelland, MP, Attorney-General, *House of Representatives Hansard*, 25 June 2008, p. 2.