

Submission

on the

Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008

to the

Senate Legal and Constitutional Affairs Committee

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1. Introduction

On 26 June 2008, the Senate referred the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 to the Legal and Constitutional Affairs Committee for inquiry and report by 27 August 2008.

The Bill would amend the Family Law Act 1975 (the Act) to provide for opposite-sex and same-sex de facto couples to access the federal family law courts on property and maintenance matters. The Bill would also amend the Act to provide for amendments relating to financial agreements between married couples and superannuation splitting, and for an amendment to the Act providing for certificates given in relation to family dispute resolution.

The Committee has invited written submissions by 25 July 2008.

2. Referral to the Commonwealth Parliament

The Commonwealth Parliament has no head of power in Section 51 of the Constitution enabling it to legislate in regard to de facto relationships in general or financial aspects of de facto relationships when they break up.

The Bill therefore relies on referrals by States to the Commonwealth in accordance with subsection 51(xxxvii) of the Constitution. 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.

Western Australia has also enacted a referral statute which is limited to certain superannuation matters. This is because of the unique nature of the Family Court of Western Australia, which is already empowered under State law to deal with property and maintenance matters in connection with de facto relationships.

Subsection 51 (xxxvii) of the Constitution provides that the Parliament shall have the power to make laws with respect to “Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.”

This subsection is permissive not prescriptive. The fact that several States have enacted referral legislation on this matter does not oblige the Commonwealth Parliament to accept the referral or to pass any particular law based on the referred power.

The Family Law Act 1975 has an extensive regime for dealing with property and maintenance matters following the break-up of a lawful marriage through separation and divorce. This regime is based on the specific head of power the Commonwealth Parliament has by virtue of subsection 51 (xxii.) of the Constitution to make laws with respect to “divorce and matrimonial causes”.

Marriage, by law in Australia, is “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”. When a marriage is dissolved by divorce there is a need for a just settlement of property and maintenance matters based on the unique nature of marriage as a “union” of a man and a woman. Marriage is unlike any other legal or social relationship in this characteristic of being a “union”.

Civil celebrants are required by law to remind those about to marry of the nature of marriage. It is assumed that religious celebrants will do so in a similar way in the light of their own religious traditions.

By contrast, de facto relationships are entered into not by any formal or decisive act. By the very meaning of the qualifier “de facto” such relationships come into existence as a matter of fact rather than of law. It would be very odd then for the law to treat these relationships as if they were the same as marriage.

Those entering into a de facto relationship do not necessarily bring into the relationship any shared understanding or commitment to a “union” of the two persons involved. It seems perverse and unjust to effectively impute to the parties to a de facto relationship any shared set of intentions and obligations.

A man and a woman who are free to marry each other but who have chosen not to do so should not be treated as if they have been married. By choosing not to enter into the socially and legally well-understood relationship of a marriage, a union between a man and a woman, they have chosen, as it were, to have an ad hoc relationship. Financial and property matters in dispute between parties to a de facto relationship should be treated on the basis of the common and civil law that applies to such matters between any two persons in general and not treated on the basis that were in effect in a “union” equivalent to marriage.

It is open to the parties in a de facto relationship, and to the parties in a same-sex relationship, to enter into civil contracts to protect their individual interests in property. Any such contracts should be governed by State and territory law. There is no need for them to be included within the purview of the Family Law Act 1975.

Recommendation 1:

The Commonwealth Parliament is not obliged to enact legislation based on the referral from certain States of property and maintenance matters connected with de facto relationships. There is no good reason to act on this referral since de facto relationships are not equivalent to marriages. Insofar as this Bill is based on such a referral it should not be supported.

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."¹

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.²

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.³

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.⁴

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.⁵

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.⁶

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.”⁷

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.*”⁸

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.

For all its defects (such as too easy, unilateral, no-fault divorce) the Family law Act 1975 plays a necessary role in providing for property and maintenance matters on the break-up of a marriage through separation and divorce. It protects, or at least ought to protect, the valid interests and expectations of spouses who entered marriage understanding it to be “the union of a man and a woman voluntarily entered into for life to the exclusion of all others”.

There is no valid reason to extend any similar, let alone identical, regime to de facto relationships, including same-sex relationships. These relationships are of no interest to society and those who enter into them do not enter into a “union” equivalent to marriage. The parties to such relationships should take care of their own property and financial interests, having recourse if they choose to do so to the contract and civil law.

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.⁹

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, undertook 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.¹⁰

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 “proved” there is 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.¹¹ These studies are therefore no basis for good science or good public policy.

Professor Lynn D Wardle shows that, even those studies which conclude in favour of homosexual parenting include evidence that homosexual parenting may be harmful.¹² 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 a property and maintenance regime on dissolution of the relationship.

Recommendation 2:

As there is no compelling reason to extend to other relationships the benefits given to married couples, insofar as the Bill provides for de facto relationships it should not be supported.

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

The Bill would introduce a new definition into the Family Law Act 1975 as follows:

4AA De facto relationships

Meaning of de facto relationship

(1) A person is in a ***de facto relationship*** with another person if:

- (a) the persons are not legally married to each other; and
- (b) the persons are not related by family (see subsection (6)); and
- (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

Paragraph (c) has effect subject to subsection (5).

Working out if persons have a relationship as a couple

(2) Those circumstances may include any or all of the following:

- (a) the duration of the relationship;
- (b) the nature and extent of their common residence;

- (c) whether a sexual relationship exists;
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- (e) the ownership, use and acquisition of their property;
- (f) the degree of mutual commitment to a shared life;
- (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
- (h) the care and support of children;
- (i) the reputation and public aspects of the relationship.

(3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a de facto relationship.

(4) A court determining whether a de facto relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(5) For the purposes of this Act:

- (a) a de facto relationship can exist between 2 persons of different sexes and between 2 persons of the same sex; and
- (b) a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.

When 2 persons are related by family

(6) For the purposes of subsection (1), 2 persons are related by family if:

- (a) one is the child (including an adopted child) of the other; or
- (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or
- (c) they have a parent in common (who may be an adoptive parent of either or both of them).

For this purpose, disregard whether an adoption is declared void or has ceased to have effect.

Aside from the principal public policy reason that benefits given to married couples should not be extended to those in other relationships there are several practical problems with the proposed definition of “de facto partner”.

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 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.

Recommendation 3:

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.

5. Condoning and privileging adultery

Paragraph 5 (b) of the definition 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.”

This provision would, if enacted, represent an egregious attack on marriage.

Marriage by law in Australia is “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”.

This provision would openly bestow on adulterous relationships a legal status - of “de facto relationship”. Furthermore, it would give the third party a claim on the property and possible maintenance from the adulterous spouse which necessarily would impact on what is due from that person to his or her spouse.

This provision directly undermines the status of marriage in Australia by giving legal status to relationships entered into in direct contravention of the nature of marriage, acknowledged by law to be “the union of a man and a woman to the exclusion of all others”.

Traditionally, the law has held upheld the rights of the wife over the claims of a mistress. This provision would reduce marriage to just another relationship. A married man’s adulterous affairs with either women or men could be treated by a court as equal in status to his marriage. A married woman’s adulterous affairs with either men or women could be treated by a court as equal in status to her marriage.

This provision would allow supporters of polygamy to engage in multiple simultaneous *legally recognised* relationships as long as only one of these was a marriage.

Recommendation 4:

If the Bill proceeds then the definition of de facto relationship should be amended so that no person who is married can be found to be in a de facto relationship.

Proposed paragraph 4AA (5) (b) should be deleted and replaced by a provision that:

“A de facto relationship cannot exist even if one of the persons is legally married to someone else.”

6. Support for State and Territory relationship registers

Paragraph (2) (g) of the proposed definition of a “de facto relationship” provides that one of the “circumstances” that a court must consider in determining whether or not a de facto relationship exists is “whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship”.

Tasmania’s Relationship Act 2003, Victoria’s Relationships Act 2008 and the Australian Capital Territory’s Civil Partnerships Act 2008 each provide for the registration of “couple relationships” including both male-female and same-sex relationships.

The Australian Constitution gives the power to legislate with respect to *marriage* to the Commonwealth Parliament.¹³ However, the legal significance of marriage is that it is a legally recognised relationship between a man and a woman, entered by a formal legal procedure, which creates a legally recognised status for the purpose of granting certain rights and benefits.

The State and Territory laws providing for the registration of “couple relationships” have created a similar legally recognised relationship, to be known as a “registered relationship” or “civil partnership”, in direct competition with *marriage* defined under Commonwealth law.

Furthermore, provision for registration of non-marital couple relationships by the registrars of births deaths and marriages creates an expectation that such registered relationships would be given additional legal rights and benefits of marriage, including those affecting children such as access to adoption and IVF services.

6.1 Impact on marriage

Legislation to provide for legal registration of non-marital couple relationships for the purpose of granting them marital rights and benefits is not justice; it is injustice. The concepts of equality and justice are often confused. Only the similar treatment of similar situations promotes justice, and it is this principle that created the common law.¹⁴ Insistence on treating different situations equally does not promote justice.

6.1.1 Marriage ‘lite’

Provision for unmarried male-female couples to register their relationships has introduced into State or Territory law a legally recognised “marriage lite” – granting the benefits of marriage without the obligations.

Marriage celebrants are required, under the Marriage Act 1961, to remind a man and woman about to be married that the relationship they are about to enter is “to the exclusion of all others”.¹⁵ This exclusive nature of marriage originally derives from the biblical commandment: “You shall not commit adultery.”¹⁶ Adultery represents a fundamental breach of marital vows.

Most Australian married couples expect faithfulness from each other. The very public separation of Shane and Simone Warne over famous spin bowler Shane’s repeated infidelities is indicative of that expectation.¹⁷

The Australian Marriage Act 1961 also requires a civil celebrant at a wedding to say: “I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter ... for life.”¹⁸ This is an enduring promise - for life. Not all marriages endure, but most first marriages do last until the death of one party.¹⁹

In contrast, registered relationships and civil partnerships do not require any enduring commitment.

For example in Victoria, to be a registrable relationship the law only requires that “one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other”.²⁰

Registered relationships are inherently temporary and can be terminated at will by either party through simply serving a termination notice on the other party and waiting 90 days.²¹ Consequently, registered relationships do not foster endurance. Instead they cultivate a culture of transience that would undermine the ideal of lifelong commitment in marriage.

While it would not be permitted to register a relationship if either of the persons is in another “registrable relationship”²² or married, no ongoing commitment to exclusivity is required.

Given the detrimental impact of laws providing for registered relationships and civil partnerships on the status of marriage it is inappropriate that the Commonwealth Parliament which has responsibility for upholding and preserving marriage give any further status to such relationships through a Commonwealth law.

6.1.2 Same-sex unions

Provision for same-sex couples to register their relationships mimics marriage by granting them the benefits of marriage – but without the obligations.

Registration of same-sex partners, like the registration of unmarried male-female partners, involves no commitment for the relationship to be either exclusive or enduring. While some homosexual partners remain together for lengthy periods, most are relatively brief. Dr James Dobson, of Focus on the Family, has said: “Studies show that homosexual men in particular have a difficult time honouring even the most basic commitments of ‘marriage’. A recent study conducted in the Netherlands ... found that the average homosexual relationship lasts only 1.5 years and that gay men have an average of eight sexual partners per year outside of their “primary” relationship...”²³

Registration of same-sex relationships strikes at the foundations of society by ignoring the most fundamental reason for marriage: to safeguard our future as a nation. Every society which wants to continue - whether secular or religious - must encourage the bearing and raising of children as good future citizens. Every society therefore has a vital interest in protecting the family as the basic social unit of society and marriage as the heart of the family. Relationship registers undermine the special status of marriage and the natural family and thereby place at risk the future of the society.

Research shows that marriage is the most enduring of human sexual relationships - more stable than male-female cohabitation and far more stable than homosexual cohabitation. Children raised by their married parents do better than those raised by cohabiting parents, who do better than children raised by same-sex partners. Children brought up in non-marriage contexts have higher rates of physical and mental health problems, child abuse, criminality, drug abuse and poor academic performance. See for example the careful study by Associate Professor Sarantakos of Charles Sturt University in NSW “Children in three contexts”²⁴ and the report by Barbara Schneider, Allison Atteberry and Ann Owens.²⁵

Recommendation 5:

If the Bill does proceed paragraph 4AA (2) (g) should be deleted so as to give no support in Commonwealth law to “registered relationships” or “civil partnerships” established in competition to marriage under State or Territory laws.

7. Endnotes

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9. Andersson, G., "Divorce-Risk Patterns in Same-Sex Marriages in Norway and Sweden", *PAA 2004 Annual Meeting*, Boston, 1-3 April 2004.
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12. Wardle, Lynn D, 1997, "The Potential Impact of Homosexual Parenting on Children", *University of Illinois Law Review*, Vol 1997, Issue 3, p 833.
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15. *Marriage Act 1961* (Cth), s 46(1).
16. Exodus 20:14 and Deuteronomy 5:18.
17. "Shane tore our family apart", *New Idea*, 30 July 2005, pp 10-15.
18. *Marriage Act 1961*, s 46(1).
19. "Family facts: divorce trends," *Family Matters* (Australian Institute of Family Studies) No 35, August 1993, pp 28-29.
20. *Relationships Act 2008*, Section 5.

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21. *Relationships Act 2008*, Section 15, cf. *Tasmanian Relationships Act 2003*, s 15.
 22. *Relationships Act 2008*, Section 6.
 23. *Family News From Dr James Dobson*, September 2003, p 5, citing a study by Xiridou, Maria *et al.*, "The Contribution of Steady and Casual Partnerships to the Incidence of HIV Infection Among Homosexual Men in Amsterdam," *AIDS*, 17 (2003): 1029-38.
 24. Sarantakos, *op.cit.*
 25. Barbara Schneider, Allison Atteberry and Ann Owens, *op.cit.*