SUBMISSION TO

THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE FAMILY LAW AMENDMENT (DE FACTO FINANCIAL MATTERS AND OTHER MEASURES) BILL 2008

from

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My background

I am a Professor of Law and was Chair of the Family Law Council, a statutory body which advises the federal Attorney-General, from 2004-2007. Prior to that (from 2001-04) I was a member of the Council. I also chaired the Ministerial Taskforce on Child Support (2004-05) that led to the new Child Support Scheme that was introduced recently. I have written widely on family law issues and am a member of the Executive Council of the International Society of Family Law.

I am writing this submission in my personal capacity.

Summary of position on the Bill

The Bill will have the effect of treating de facto relationships (whether heterosexual or same-sex) in exactly the same way as marriages for the purposes of property division and spousal maintenance if relationships break down. That has profound implications, yet the Government has never commissioned any research or opinion polls to determine whether people who have chosen not to marry want to be treated as if they were married, and whether they would like the consequences of marriage to be imposed upon them without their consent. People in heterosexual de facto relationships have the freedom to marry; same sex couples do not, but there has also been little research done on whether same-sex couples want all the property and maintenance consequences of being married.

This Bill raises fundamental moral and social questions that have not been properly considered. These include:

- Whether it undermines marriage (which the Government ought to be promoting because of its much greater stability), to treat marriages and de facto relationships as being entirely equivalent

- Whether the proposed laws discriminate against people in heterosexual de facto relationships who have chosen not to marry by depriving them of the fruits of that choice.

Recommendation

The Bill should be withdrawn until such time as the Government has commissioned, and received the findings of, large-scale research on whether or not people in heterosexual or same-sex relationships want to be treated as if they had been married for the purposes of property division and spousal maintenance if their relationships break down, and whether the Australian people as a whole support treating marriages and de facto relationships as being equivalent for all purposes.

The Australian Institute of Family Studies has the expertise to conduct such research properly and in a timely manner, using random-dial telephone interviewing to gain the views of a nationally representative sample of participants. Alternatively, a consultancy company or opinion poll organisation could be contracted to conduct such research.

If the findings of properly conducted research demonstrate that the majority of people in heterosexual de facto or same sex relationships want to be treated as if they had married, then of course, the Government should proceed with the Bill. If the findings of the research are that the majority of people who would be treated as if they were married do not support this legislation, it should be reconsidered.

Reasons

So often, people only find out about legislation of this kind long after it has been enacted. Yet it involves profound implications for people. In Australia, unlike in other countries, all the property that married people own, whensoever and howsoever it was required, is available for division at the discretion of the judge. It is not simply the fruits of the partnership that are divided, as in continental Europe and a great many other jurisdictions around the world. Australia also has one of the most discretionary systems in the world. So treating people as if they were married when they have chosen not to do so has profound implications and repercussions. Imposing a marriage paradigm of socio-economic partnership and responsibility for the wellbeing of the other partner after separation may also be inconsistent with the way in which some same-sex couples view their relationship.

Origins of the Bill: The State-Commonwealth Agreement

This Bill is not a political Bill (that is, to the best of my knowledge, it is not based upon any particular election commitment and nor is it a matter about which I would expect any division on party lines). The Bill has been prepared by the Attorney-General's Department to implement an agreement made in the Standing Committee of Attorneys-General (SCAG) in November 2002.

At the present time, if a marriage breaks down, the financial affairs of the husband and wife are dealt with under the *Family Law Act 1975*, which is a Commonwealth statute. If a de facto relationship breaks down, the financial issues are determined under State law. There

are substantial differences between the laws of the various states and territories, as will be explained further below.

At the 2002 SCAG meeting, an in-principle agreement was apparently reached for States to refer their powers over the property division of de factos to the Commonwealth. Most States, but not all, indicated their assent. The Bill has now been introduced after referrals of power from all States except South Australia and Western Australia. The latter has given only a limited reference.

As I understand it, (and this is a matter on which I am sure the Attorney-General's Department could advise the Committee) the assumption at the original SCAG meeting was that the Family Law Act would be amended so that the same legal principles that currently apply to married couples would be extended to de factos, even though this was not the law in the two most populous states, NSW and Victoria. This has certainly been the basis on which the Attorney-General's Department has proceeded ever since.

I don't know how this decision was reached and whether it was based on any serious consideration of the issues, including the important social and moral questions involved in the assimilation of marriage and cohabitation. I am certainly not aware of any major policy document prepared for the consideration of the Attorneys-General, canvassing all the issues involved in choosing a marriage paradigm for the resolution of property disputes between heterosexual couples who have chosen not to marry or considering the available alternatives; I am also not aware of any attempt to review the approaches of other jurisdictions (there are very few jurisdictions in the world that have adopted the proposed Australian approach).

The issue appears to have been considered without the benefit of proper research or community input. No research was conducted on what people in de facto relationships actually wanted. The advice of the Family Law Council was not sought on the policy issues and nor was there a referral to any other law reform commission or advisory body. The Family Law Council was subsequently consulted, but only on technical aspects of the Bill. It must have just been *assumed* that the obvious approach was to assimilate cohabitation with marriage, after all, that had the benefit of simplicity.

The NSW Law Reform Commission had certainly been working on the topic, and it reported in 2006 (*Relationships*, Report no 113) recommending an approach very similar to the current Bill; but beyond its general call for submissions, it confined its research on community views to a small survey of those in same sex relationships (69 people who filled in questionnaires and a couple of focus groups). It also failed to conduct any serious examination of the social science research relevant to this issue.

It is interesting to note that neither the Equity Division of the Supreme Court of NSW nor the Victorian Bar supported the extension of the Family Law Act principles to de facto relationships in their entirety (see NSWLRC report at 189-193). There was a lot of support for the approach eventually proposed by the Commission from people in same sex relationships (for whom marriage is not an option). However, the questionnaire was limited. It asked them what factors should be taken into account, but not how those factors should be taken into account. For example, a lesbian respondent would not have realised from that questionnaire (attached as an appendix to the report) that in implicitly endorsing the Family Law Act approach to property division, her inheritance from her late grandmother, or the investment property she had acquired and paid off before she met her partner, could be made

available in a property division to meet her partner's future needs. People need a lot more information about how courts currently divide property before they can make an informed assessment of whether they really want this for themselves.

There has also been a reform process in Victoria leading to new legislation this year (which awaits implementation), but again it is far from clear whether the proposed reforms in that jurisdiction have the assent of a majority of those who will be so profoundly affected by them.

Certainly, the Commonwealth has engaged in no research or public consultation of its own on this issue – the Bill has just emerged from the Department with consultation only occurring on the detail of the Bill with family lawyers. It was originally developed in the last year of the Howard Government, however that government did not, in the end, bring such legislation forward to the Parliament because of concerns amongst backbench MPs.

It follows from this brief history that this Bill, although years in development, has simply not been subject to proper consultation or based on substantial research and policy evaluation. There is simply no way of knowing whether this Bill is supported by the Australian community, and few people in de facto relationships would be aware of how dramatic a change may be about to occur in matters of great importance to them.

The significance of the changes in the proposed Bill

a) *The current law in relation to marriage*

Under the *Family Law Act*, the courts treat a married couple as partners in a socio-economic sense. It really doesn't matter what the role division is between them. In some relationships, both husband and wife work full-time. In many others, particularly where there are children, the partners have differential investments. One, most often the wife, is the primary carer while the other one invests first and foremost in the world of work. Typically the Courts treat them as equal partners in the social and domestic enterprise whatever their role division. Their contributions to the property which is built up in the course of the marriage are usually treated as equal. An unequal division on the basis of contributions will be justified where there was property brought into the marriage at the beginning by one of the parties, or there have been subsequent inheritances or awards of compensatory damages for injury, but the longer the relationship, the less significance tends to be placed on the origins of the assets, and it is very common to find judges giving little weight in the overall property division to the fact that property was acquired before marriage or by inheritance. Treating marriage as a socio-economic partnership accords with most people's intentions. Typically married couples have joint bank accounts, they jointly own homes, and they intend to leave property to each other in their wills.

Assessing contributions is only the first stage of the decision-making process. There is often also an adjustment in the division of property to take account of the future needs of the parties and a disparity of financial resources. The traditional marriage vow is that couples take each other for richer or poorer, in sickness and in health, until death them do part. If they separate, and in particular if there are dependent children, one parent may have greater financial needs than the other. One major need is to house the children in an appropriate way. A husband or a wife who is physically disabled or otherwise unable to work through sickness may also have greater financial needs than one who is able-bodied and healthy.

However, it is not just needs the court takes into account. It is also a disparity in financial resources. Here again, premarriage property, inheritances and damages awards come into the equation. The fact that one party has a substantial inheritance (even one coming after separation) may well justify the court in giving most of the rest of the property to the other party.

When a marriage breaks down the Court takes all these matters into account - the issues concerning the past and issues concerning the future - in working out what is a fair division of the property between them.

b) *The current law on de facto relationships*

The laws concerning the property of de factos vary from one State to another.[1] There is a threshold before the statutes apply which is usually living together for at least two years. A period less than this typically suffices if they have a child together. In some States such as Queensland[2] and Western Australia,[3] there is little or no difference between the principles that apply on the breakdown of de facto relationships and the principles which apply on the breakdown of marriages. In other States such as New South Wales and Victoria, there are some significant differences in the way that formerly married couples and de factos are treated in the law. However, Victoria has recently enacted, but not yet implemented, new legislation on the subject which is more similar to Queensland and Western Australia.[4]

The main difference between the laws in different States is whether the courts, in dividing the property of the former de facto partners, take account of the future needs of the other partner as they do for formerly married couples. In New South Wales and Victoria (at present), the law is confined to dividing the property on the basis of the past contributions of the parties. There is no additional component to take account of future needs or financial resources. By contrast, in other States there is an allowance made for future needs and resources in dividing the property.

One important difference between all the State laws and the *Family Law Act* is that there is no power under State law to make orders which will split the superannuation entitlements. The courts may only take account of a significant imbalance in superannuation entitlements by giving the other partner more of the tangible property. Under the *Family Law Act,* the courts have more options. The superannuation can be valued in accordance with formulae that are defined in regulations, and the court may split the entitlements in various ways if this is the best way of doing justice between the parties. A major motivation for the reference of powers by the States was to allow a former de facto partner the same rights to gain a direct share of the other partner's superannuation as she would have if she had been married to him.

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1 For a summary,as at 2003, see Lindy Wilmott, Ben Mathews and Greg Shoebridge, "De Facto Relationships Property Adjustment Law – A National Direction?" (2003) 17 *Australian Journal of Family Law* 37.

2 *Property Law Act* 1974 (Qld).

3 *Family Court Act 1997* (WA) as amended by *Family Court Amendment Act* 2002.

4 Relationships Act 2008.

Should de facto partners be treated as if they were married?

There is a very real question whether de facto relationships should be treated as a socio-economic partnership in which 'all that I have is yours and all that you have is mine'. Of course, some de factos may see themselves as partners in everything for life. The couple may have all their property in joint names and may have made a commitment to each other which both regard as being equivalent to the marriage vows.

However the evidence, such as it is, suggests that de facto relationships are typically rather more conditional and are less likely to involve sharing of property. Glezer, for example, reported in 1991 that 51% of men and 43% of women who had been in cohabiting relationships considered that cohabitation involves less commitment than marriage. Only 66% of cohabitees bought things jointly and only 46% had a joint bank account. In contrast, research concerning married couples in many English-speaking countries shows that almost all treat property as jointly owned.[5] Couples who are married also tend to engage in a greater role division than those who are not, even when there are no children.[6]

That cohabitation should generally involve less sharing and commitment than marriage is hardly surprising. For many young people, a de facto relationship is a form of trial marriage. Its purpose is to test whether the relationship should lead to marriage. To treat that decision as having already been made is to jump the gun. Many others enter de facto relationships following divorce, and one or both partners may be very reluctant indeed to make the kind of commitment involved in a marriage. Once bitten, twice shy. Supporting this, Glezer found that there were significant differences between cohabitees who had previously been married and those who had not, with less sharing occurring in post-divorce cohabitation.[7] A relatively small-scale study in Melbourne on attitudes towards property division on relationship breakdown indicates that the level of convergence in attitudes between married, heterosexual de facto and same sex couples is more significant than the level of divergence.[8] However, the details of this study in terms of the differences between the groups have not been released and there is a dearth of evidence overall that de factos want to be treated as if they were married and that their relationships mimic the socio-economic partnership which is typical of marriage.

Despite all this, the Bill proposes that marriages and de facto relationships should be treated legally as if they were entirely equivalent. The assumption is made by many lawyers at least

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5 See e.g. J Todd and L Jones, *Matrmonial Property* (1972) 38; A Manners and I Rauta, *Family Property in Scotland* (1981) 12; Institute of Law Research and Reform, University of Alberta, *Working Paper on Matrimonial Property* (1974) app. A; William Hines, "Personal Property Joint Tenancies: More Law, Fact and Fancy" (1970) 54 *Minnesota Law Review* 509, 574.

6 See J Baxter and E Gray, "For Richer or Poorer: Women, Men and Marriage". Paper given at Australian Institute of Family Studies Conference, Melbourne, 2003; J Baxter, "Marital Status and the Division of Household Labour: Cohabitation versus Marriage" (2001) *Family Matters* no 58, 16;

7 Helen Glezer, "Cohabitation" (1991) *Family Matters*, 30, 24.

8 N Lewers, H Rhoades and S Swain, "Judicial and Couple Approaches to Contributions and Property: The Dominance and Difficulties of a Reciprocity Model". (2007) 21 *Australian Journal of Family Law*, 123. See also in Britain, A Barlow, S Duncan, G James, and A Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (2005).

10 Helen Glezer, *Cohabitation and Marriage Relationships in the 1990s*, 47 *Family Matters* 5 (1997); Kathleen Kiernan, *Cohabitation in Western Europe*, 96 *Population Trends* 25 (1999); Ann Berrington, *Entry into Parenthood and the Outcome of Cohabiting Partnerships in Britain*, 63 *J. Marriage & Family* 80 (2001); Renate Forste, *Prelude to Marriage or Alternative to Marriage? A Social Demographic Look at Cohabitation in the U.S.*, 4 *J. L. & Fam. Studies* 91 (2002).

that all relationships that look like a marriage should be treated the same way as marriages whatever the people in those relationships may have intended. It is one thing to confer the legal incidents and privileges of marriage on those who have not made that commitment, but it is another thing to impose responsibilities. Treating heterosexual de facto relationships exactly the same way as marriages for the purpose of property division means forcing the marriage paradigm upon both the willing and unwilling. Yet the willing have a perfectly obvious and freely available choice – to get married. The issues are of course different in relation to same sex relationships.

There is a human rights issue here. People need the freedom to choose other kinds of relationships. People who do not want marriage for whatever reason should not be treated as if they are married. Of course it is possible under State legislation, and it will be possible under the federal Bill, to contract out of the legislative scheme. People will be able to make a Binding Financial Agreement to divide their property in some other way. However, this is largely a theoretical solution. People start living together for a variety of reasons without necessarily considering at the beginning the way in which an exit from the relationship should be managed. There is no safety video screened when people get on board the cohabitation aircraft. Most would have not given any thought to the legal consequences of such a relationship, and it is only when the plane is about to crash that these consequences become part of their consciousness for the first time. It might be expected that the very well-heeled and those who have gone through divorce experiences before would consider a Binding Financial Agreement. However such agreements are expensive; they require people to turn their minds to what may happen at a future time which may seem a long way away; and they are also very unromantic. Love lives on hope. Indeed it requires it. Planning for failure at the commencement of a relationship may make it more likely. The ability to contract out of the legislative scheme is not an answer to the dilemma about choice.

Another issue that the federal government needs to consider is what it should do to preserve the distinctiveness of marriage. If we are to treat all those who have lived in a heterosexual de facto relationship for two years or longer as in a relationship equivalent to marriage then we further undermine any distinctiveness that marriage might have. Marriage is a protective fence which relies for its effectiveness both on the moral power of promise and the restrictions on divorce - limited as they are. That protective fence helps people to work through difficult times in their relationship. Of course, the protective fence can only hold people in until the pressures that affect the relationship become too great to withstand, or one partner chooses to leap over the fence regardless.

Cohabiting relationships have been shown, around the western world, to be much more unstable than marriage by a considerable magnitude.[10] The instability of cohabitation should not be surprising. A relationship that has no protective fence is a less secure and safe environment in which to cope with difficult times. It is also a less secure and safe environment in which to bring up children. Supporting marriage involves both education and differentiation from other forms of partnering. In the last twenty years in Australia, most of the differences between marriage and cohabitation have been whittled away.

Thus there ought to be a consensus amongst those who are both concerned about the future of marriage as a special status and those who are concerned about the human rights of those not in marriages that marriage and cohabitation should not be treated exactly the same. There is a case for treating de facto relationships more like marriages where children are involved. Whatever the parties may have agreed amongst themselves when children are born to a de

facto relationship then the same issues of socio-economic dependency and the needs of the children for housing come into play. The orientation towards childrearing has long-term economic implications for women, primarily as a consequence of interrupted workforce participation.[11] Furthermore, it should not matter in a society that puts children first whether the parents were married or living in a de facto relationship. The important thing is that the children's needs can be met.[12] When children are young it is often the case that the primary carer works part-time or is full-time at home and she therefore has a much lower earning capacity to be able to afford rent or the mortgage on the house. There are good reasons therefore when there are children who are born to the relationship whether by marriage or de facto, we should treat them as a socio-economic partnership in which the future needs of the primary carer and the children carry significant weight.

Conclusions

These are important issues which have a major impact on the lives of Australian families. The Senate should ensure that this major legislation is not imposed upon the Australian people without some work being done to ensure that it is wanted by

a) heterosexual de factos
b) people in same sex relationships
c) The general community.

If there are differences in views between these groups, then the Parliament will need to make decisions accordingly; but the first step is to find out. Passing the Bill would be irresponsible without such work being done.

It need not take a long time. The Australian Institute of Family Studies conducted a major community survey on attitudes to child support within about three months as part of the work of the Ministerial Taskforce on Child Support. They are very busy with other work at present, and should not necessarily be asked again to burn the midnight oil for this study; but the point is that there does not need to be a long postponement of consideration of this Bill if the Government puts the resources into finding out what the Australian people think.

The fact is, the Government should have done this years ago, and it cannot now argue that legislation for which it has no mandate, and on which it has not consulted the Australian people, should be rushed through the Australian Parliament just because it has taken several years to implement the flawed SCAG agreement of 2002.

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[11] Kate Funder, Margaret Harrison and Ruth Weston, *Settling Down* (Melbourne: AIFS, 1993).

[12] I have developed these arguments in the context of unmarried cohabitation in Parkinson P, "The Property Rights of Cohabitees: Is Statutory Reform the Answer?" in David Pearl, Andrew Bainham and Ros Pickford (eds) *Frontiers of Family Law* (2nd ed) (John Wiley, Chichester, England), 301-319. See also: Parkinson P, "Quantifying the Homemaker Contribution in Family Property Law" (2003) 31 *Federal Law Review* 1-55.