
23 July 2008

Department of the Senate
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Parliament House
Canberra ACT 2600

Submission on the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 to the Senate Legal and Constitutional Affairs Committee

Yesterday, it was drawn to my attention that 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 and that the Committee has invited written submissions by 25 July 2008.

As I understand it, the Bill amends the Family Law Act 1975 (the Act) to provide for a variety of '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.

I understand there are a number of issues of fairness and justice that suggest some legal reform. As important as they are, it is vital that they are worked through patiently and with an eye on the wider social and cultural ramifications of proposed changes in legislation.

As it stands, the proposal to change references in the Act from 'marriage' and 'husbands' and 'wives' to the weaker 'couples' and 'partners' promotes a wider inclusion at the expense of the distinctives of the marriage relationship as promoted in the Act. It also seeks by stealth to circumvent a genuine public debate about the kinds of recognition appropriate to opposite-sex and same-sex relationships.

Whatever legislation our present elected representatives shape to provide for relationships other than marriage should not devalue the unique union of marriage that qualitatively stands apart from the variety of 'couple relationships' that exist at this historical moment.

The marriage union is, among other things, a publicly recognised and ratified institution that aims for lifelong commitment between a man and woman with morally and legally accountable vows and thus benefits state and society with stability in the social order which transcends the comparatively ephemeral nature of 'couplehood'.

Arguably, the enthusiastic endorsement of *de facto* relationships has not only realised its aim in lifting the status of those relationships but, as a side-effect, has been complicit in the weakening of longstanding cultural ideals of marriage that are reflected in Australian law.

While there is in Australian society some flexibility in the notion of 'family', and while the focus on the so-called 'nuclear family' can have cultural problems (e.g. the neglect of extended family), a longstanding presupposition in Australian society is that the good society is in part dependent upon households based upon the marriage union rather than the shifting intensity of romantic feeling or erotic desire, or temporary economic advantage. At this stage, a contrary position, if there is one, has not been adequately argued. Substantive change in law should not simply reflect in a reactive way temporary shifts in cultural mores but should rather be carefully adaptive *while* anchored in our traditions. The changes of wording from marriage terminology to 'couple' and 'partner' terminology is not an innocent change but one that implies a reduction in the esteem and regard due those citizens who pursue the demanding, sometimes costly, but nonetheless individually and socially rewarding path of marriage.

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Since law reflects society—‘us’ and our mutual regard—it should reflect the regard society actually has for various relationships. Marriage is endorsed virtually universally. De Facto relationships have a wide recognition without being collapsed into the same category as marriage. Same-sex couples do not share the same wide regard in our culture. To collapse these three categories into one is to abuse a distinction which has been made historically on good philosophical and empirical grounds.

The questions of justice and compassion with respect to these relationships and others can be pursued through other forms in civil law and contract. Or, alternative legislation could be drawn up. That is a harder process but it reflects the fact that the questions surrounding these relationships are still uncertain and harder to negotiate.

I therefore recommend that pursuit of means to grant certain rights or privileges to relationships apart from marriage should

- leave the language of the Family Act unchanged in affirmation of the uniqueness of the marriage union
- leave State law to continue to deal with these matters in an ongoing conversation with Federal policymakers and lawmakers in recognition of the *cultural* effects of shifts in law
- be clearly distinguished from marriage laws
- consider carefully at length the social responsibilities of any relationship along with rights *and* the ability of said relationships to adequately fulfil those responsibilities

Yours faithfully

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