

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

### **Summary of Bill**

The Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 introduces significant reforms to allow opposite-sex and same-sex de facto couples to access the federal family law courts on property and spouse maintenance matters on relationship breakdown.

The Memorandum notes that there was an agreement in principle between the Commonwealth and the States as long ago as 2002 for the transfer of powers in relation to “de facto” property adjustments, and that this was aimed at overcoming the problem of multiple de facto regimes applying across the States. In addition, arrangements have recently been put in place for splitting of superannuation and for making financial agreements between partners.

### **Status of “marriage”**

The Amendment Bill has the effect of lowering the status of “marriage” relative to “non-marriage” relationships.

The LFAA suggests that before the Parliament proposes to make changes of this kind having a fundamental impact on family life, it should have a clear idea about what the institution of “marriage” means, or should mean in the future. Specifically, does Parliament believe that “marriage” is essentially the same thing as a “de facto relationship”? Or if not, should it be? What is the point of moving towards making an essentially meaningless distinction between the two types of relationship?

### **Convergence of “marriage” and “de facto relationships”**

The definitions of “marriage” and “de facto relationships” have in legal terms (via both court judgments and legislation) moved much closer together in recent decades. This is due to a great number of factors, but one of the key factors has been the introduction in 1976 of the new concept of “no-fault” divorce. As indicated above, the latest proposed legislation would virtually abolish the remaining distinction between the two.

### **No-fault divorce**

The introduction of the concept of “no-fault divorce” has led to a situation where either partner (in practice, in the majority of cases, the wife) can at any time break the “contract” unilaterally, and in many cases obtain an advantage in doing so by being awarded residency of the children and associated property and child support contributions from the other parent.

Other factors leading to the above trend include general social attitudes supporting a more free and easy approach to human relationships of all kinds, in a world of higher incomes and more extensive opportunities - including forms of employment, ease of travel, and access to information of all kinds.

A stable couple relationship between a man and woman, who combine to create a home in which their children can be raised to be happy individuals and good citizens, has been regarded as a fundamental - perhaps the most fundamental - pillar of all human societies since civilisation began, if not before. In spite of legislation oriented towards “social engineering”, this continues to be a fundamental feature of the human experience.

### **Meaning of discrimination**

Discrimination can be perceived in different ways by different observers, depending on their own personal mindset and their own vested interest. Discrimination is measured in very many cases from an arbitrary and/or personal vested interest viewpoint.

### **Discrimination against de facto relationships**

The arguments about supposed “discrimination” in the present context are overdone, and in some cases misleading. Like in any other area of the law, the principle should be that where a contract - in this case a “marriage” contract - is entered into, penalties should apply to the party breaking the contract. If not, the supposed “contracts” are effectively no such thing. A “no-contract” situation is a different situation, and should be treated differently. That is the point about contracts.

### **Enhanced status of “de facto” relationships**

As noted by one observer, “Court cases have shown a distinct trend towards a broader, more flexible interpretation of the de facto category of relationships. A less formalistic approach to the indicia of cohabitation and a lesser focus on traditional wallmarks that are thought to be marriage-like (such as public reputation, mixing of finances, and putative monogamy).” And “The existence and duration of a de facto relationship by virtue of its lack of formalisation is entirely factual.” But it is worth noting that this situation could, over time, lead to the progressive formalisation of supposedly “de facto” relationships.

### **Discrimination on the basis of sexuality**

The Explanatory Memorandum states that the Bill is consistent with the Government’s policy not to discriminate on the basis of sexuality. The Bill applies to both opposite-sex and same-sex de facto couples.

### **Same-sex relationships**

Same-sex couples should in equity be entitled to the same protections and assistance as heterosexual relationships to the extent that they have the same characteristics. However, by their nature, same-sex domestic relationships cannot ever be a copy of

heterosexual relationships whose purpose (inter alia) is to perpetuate the human species. To pretend that they can be is to store up trouble for the future by failing to give proper recognition and responsibilities of biological parenthood.

There are typically much heavier responsibilities on couples with children than on other couples. Couples with children are, arguably, entitled to receive special consideration to support their vital role in the life of the nation and the community. The formalisation of marriage as a type of contract assigning responsibilities and establishing corresponding rights is such an essential support.

The reality is that two men, or two women, by themselves, are not capable of procreating children, whereas a couple made up of man and a woman can. There is a fundamental difference between the two cases. Therefore, to claim that the first case and the second are essentially the same, and must therefore be treated the same, or there will be “discrimination” against one of them, is essentially absurd.

### **Usage of terms and definitions in legislation**

For the Government to be scouring through multiple Acts of Parliament to remove any references to “fathers”, “mothers”, “husbands”, and “wives”, and replacing these with references to “partner” or some such vague term is to pursue a narrow ideological agenda of relevance to a small minority of the community, supported by others who have not thought through the longer-term indications.

Children, in their mental and moral development, need the love, guidance, and good example of their parents of both sexes (on a daily basis). They can obtain this, in the vast majority of cases, from her biological parents. “Mother” and “father” are the most honourable of titles and descriptions, and are not to be carelessly cast aside in legislation in favour of some supposedly-gender neutral but vague substitute.

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