

“How can we deny to others that which we freely enjoy for ourselves”

Providing Proof a Defacto Relationship Exists

Recommendations:

- Relationship registration certificates to provide full and satisfactory evidence of a defacto relationship for 5 years from the date of signing
- Relationship registration certificates at the local council level to also be recognised under these bills as evidence of a defacto relationship
- That overseas civil union and same-sex marriage certificates be recognised as full and satisfactory evidence of the existence of a defacto relationship, for the entire lifetime of the relationship
- That a point system be introduced to make the process of proving the existence of a defacto relationship clear and transparent
- Cohabitation to not be a necessary requirement of a defacto couple, for all three bills
- That both partners in a male same-sex couple also be recognised as parents to the child, if the child is fathered using the gametes of one of the men and if both partners agreed to bring a child into their family
- That where a non-biological parent is named on a birth certificate, that it be legally assumed that the non-biological parent also agreed to bring the child into the family
- That both same-sex parents be named on birth certificates, in order to facilitate the rights of the child, in the event of a relationship break up
- That couples be able to utilise interstate relationship registration, where it is not available in their home state, so that they also have the opportunity to provide clear proof that their relationship exists.

This submission is addressed to all three inquiries,
however one section in the third part addresses superannuation specifically.

[On a PC, hold down the Alt key and press V and then D, to view the useful click-able document map.]

10. Proving a defacto relationship exists (and how long it existed for)

As I mentioned earlier, we need to not only look at the rights themselves, but to explore whether the delivery vehicle for those rights gives ready access to those rights.

For example, if one cannot provide proof of a defacto relationship, these new rights may be denied. This is why having clear processes in place for couples to prove the existence of a defacto relationship is important.

“A major difference between a marriage and a de facto relationship is establishing when a de facto relationship has commenced or ended. With marriage, it is very clear when a couple have commenced their marital relationship because of the ceremonial requirements and declarations made before witnesses and authorised celebrants.

Equally, it is usually easier to determine the end of a marriage because of the formality of divorce.

In the case of a de facto relationship, identifying whether a relationship existed, and when it was on foot or not, can be more difficult.”

The Hon Robert McClelland MP
Hansard, p. 5824, 25 June 2008

One intention of these bills is to reduce the costs and time spent in legal proceedings.¹ (I thank the government and their legal team for trying to reduce the time spent within these costly proceedings.)

In advice to the City of Sydney Council, Mr Martin Gorrick (barrister at law) and Mr Gerard Gooden (solicitor) stated that,

“In legal proceedings involving de facto relationships, the dispute often turns on:

- whether or not a de facto relationship actually existed; and/or
- the duration and/or the commencement date of the relationship.”²

As disputes often turn on these two issues, one way to further reduce the amount of time spent in legal proceedings would be to provide ways for defacto couples to readily prove that their defacto relationship exists, and the date of its inception.

¹ The Hon Robert McClelland MP, Hansard, p. 1, 25 June 2008, “Where de facto couples have children and their relationship breaks down, currently they can find themselves with children’s issues in one of the federal family law courts and property issues remaining 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. Clearly this is not the most efficient and effective way to resolve these matters. I am glad to say that this bill will address and resolve these issues.”

² Item 3A. City of Sydney Council Minutes, 28 July 2004, page 3 (copy attached)

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By making the process of proving this straight-forward, non-onerous, readily available and uniform across all legislation, defacto couples will have certainty that they will be able to access their defacto rights when they are required.

Sometimes different companies or government organisations interpret legislation in different ways, thus requesting different documents from their clients. But if the requirements for proof are clear and uniform across all spheres, then couples need not fear that they will be denied rights because their evidence will not be accepted or will be regarded as insufficient.

Couples need to know what specific documents will be accepted as proof of their defacto relationship, so that they can start to assemble or keep that documentation now. Often the death of a partner or the breakdown of a relationship is the not the best time to gather such documents together, because of the increased emotional and logistical pressures at those times, but it may be the time when these documents are required. A wise couple would prepare these ahead of time.

11. Relationship Registration – interstate and local council

“Under existing ACT law, while same sex relationships are given legal status; if this is not accepted by a third party the couple may need to prove that they are in a domestic partnership in order to exercise a legal right.

This is a difficult process which has to refer to a large number of indicators such as the length of the relationship, whether they are living together, and whether there is a sexual relationship.

If a registration system was established, the question of whether people were in a domestic partnership would be solved by simply showing a certificate”.

ACT Department of Justice and Community Safety
The Recognition of Same Sex Relationships in The ACT
Discussion Paper, 2005, p. 8.³

As the ACT Department of Justice states above, providing proof for a defacto relationship is a “difficult process which has to refer to a large number of indicators.” However this difficult process can be made easier if relationship certificates are recognised as providing full proof of a defacto relationship.

These bills do provide for the recognition of relationships registered under state and territory legislation. I thank the government and their team for their foresight in including this provision in these bills.

However, relationship registration is not currently available in NSW, nor is there any sign that it will be introduced in the near future. In fact, I believe only Tasmania, Vic-

³ http://www.jcs.act.gov.au/eLibrary/discuss_papers.html

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toria, the ACT, and perhaps South Australia will have relevant legislation in place for their citizens to access by the time these bills are passed.

For those of us who live in the other states/territories, could you please allow us to do a “Senator Conroy” and travel to another state/territory to avail ourselves of rights not available in our home state.⁴

Currently relationship registration is not available to those who usually reside outside of those Australian states/territory that offer it. I ask the Federal Government to enable all registration schemes to be accessed by those who usually reside outside those states/territory. (One solution might be for those states/territory that offer registration, to simply turn a blind eye to those who come from inter-state to register.)

I also request that you state within your bill that relationship certificates will provide *complete and satisfactory proof* that a defacto relationship exists for a period of 5 years and 1 month from the date on which they were signed. (I do not know whether your bills state that relationship registration certificates provide only partial or complete proof that a defacto relationship exists.)

Those states and territory which have relationship registrations, could enable their citizens to re-affirm their commitment every 5 years or so. Therefore these couples can continually update their relationship certificate, enabling them to have continuous, legal proof that they are a defacto couple.

This will enable defacto couples to avoid having to prove the existence or duration of their relationship within legal proceedings.

I also ask that this bill recognise relationship registration which is available at the local council level, such as the City of Sydney Relationship Declaration scheme. This will enable NSW citizens to avail themselves of registration, even though their state government does not wish to implement relationship registration.

As you would be aware, *NSW has the highest population of same-sex couples in Australia*, so it is relevant and important for these couples to have access to an easy, low cost method of proving their defacto relationship exists, and its start date.

Just as Senator Stephen Conroy showed, citizens should not be disadvantaged by where they live.

12. Overseas Civil Union and Marriage Certificates as evidence

Section 88EA of the Marriage Amendment Bill 2004 states that a same-sex union solemnised in a foreign country must not be recognised as marriage within Australia, however it does not prohibit such relationships from being recognised as a defacto relationship.

⁴ In Hansard (p. 4498) on 4 June 2008, The Hon Graham Perrett MP describes the surrogacy journey that Senator Stephen Conroy and his wife Paula Benson went through to conceive their child, Isabella. Such surrogacy arrangements were illegal in Senator Conroy’s home state of Victoria, so they went to NSW to access surrogacy.

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I ask that these bills be amended so that an overseas civil union or same-sex certificate provide complete and satisfactory proof as to the existence of a defacto relationship within Australia, until such date that separation by the divorce or death occurs.

Some organisations do not accept relationship registration certificates as proof that a relationship exists, as they say that there is no obligation on the part of both parties to formally dissolve the registration, should breakdown occur.⁵ This is not the case with a marriage or civil union, and therefore I request that make clear in your bills that certificates from overseas marriages and civil unions will provide complete and sufficient proof that a defacto relationship exists until the divorce or death of a partner.

13. Point system

One way to make the process of proving one has a defacto relationship clear, is to use a point system. A similar point system is used by Austrac and Centrelink for identification purposes. These point systems list various documents with different point values.

There are different ways of doing structuring a point system and to show you the range, I have attached:

- Austrac 100 point identity checklist⁶
- Centrelink, Proving Your Identity (see pages 3 and 4)⁷
- NSW Registry Changing Your Name Application Form (page 5)⁸

For Austrac, the client must produce multiple documents which add up to 100 points or more; while the NSW Registry requires one document from 4 different categories. So there are different ways that a point system can be structured so as to ensure ineligible couples are not able to circumvent the system.

However, I would also request that if not enough points are accumulated, there could be a small middle zone, where the person processing the application (for example, the superannuation fund trustee) would be able to use their discretion as to whether a genuine defacto relationship exists. This would be helpful as it may be difficult to source some of these documents after the fact (especially after the death of one's partner) and it would give a chance for genuinely eligible people to access their rights.

A point system would provide a transparent and clear system for couples to prove their relationship status.

⁵ This point of view is also seen in the Zurich letter, dated 5 (6) January 2006, point 3 of page 3 (attached to Part A of this submission).

⁶ http://www.austrac.gov.au/files/201_point_check.pdf

⁷ [http://www.centrelink.gov.au/internet/internet.nsf/multifilestores/mcss231_0512/\\$File/mcss231_0512en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/multifilestores/mcss231_0512/$File/mcss231_0512en.pdf)

⁸ <http://www.bdm.nsw.gov.au/changeName/applicationForm.htm>

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And it will enable couples to start assembling this documentation now – for example they can start by putting utility bills in both partner’s names, so that this piece of evidence is ready when required. This is something they may not have thought of doing.

As I have already flagged, some pieces of evidence are difficult to generate at the time they are needed – for example it would be impossible to put a joint utility bill in a both partner’s name after one partner’s death. And it is at the time of a partner’s death that one is required to prove that one was in a legitimate relationship with the deceased, for the purposes of claiming their superannuation and other property, especially if no will is left – or to prove that one has the right to make the funeral arrangements or to be named on the death certificate.

14. Cohabitation

“This bill also contains some significant reforms. For example, it extends compellability provisions in the Evidence Act to ensure that same-sex couples cannot be compelled to give evidence against their partner. ...

The compellability provisions will also be extended to provide that de facto partners who may not cohabit but are in a genuine de facto relationship will have the same right to object to giving evidence against their de facto partner in a criminal proceeding as currently exists for a married spouse.”

The Hon Senator Joe Ludwig
Hansard, p. 2813, 19 June 2008

I note that within the Evidence Amendment Bill 2008 there is a provision to allow defacto partners who do not cohabit to be defined as being within a genuine defacto relationship.

I do not know if this provision is also in the other two bills, but if it is not, I ask that this also be included in those bills, and all future bills concerning defacto relationships.

As Senator Ludwig, rightly implies, these are real-world scenarios – some defacto couples do not live in the same house, or they move interstate for work purposes, or they have to move in to care for a sick relative.

A relationship can viably exist even though both parties do not reside in the same dwelling.

15. Recognising children

“The bill does not create relationships that do not already exist.

The issue from the government’s perspective is not about encouraging gay parenting but about ending discrimination.

The reforms in this bill recognise real family situations. Recognition is necessary if we as a community are to remove discrimination against same-sex families and their children.”

The Hon Robert McClelland MP
Hansard, p. 4522, 4 June 2008

“By applying this definition, opposite-sex and same-sex families are treated equally. This is not an assault on any families. Instead, it is the triumph of common sense.”

The Hon Graham Perrett MP
Hansard, p. 4498, 4 June 2008

I note that both same-sex parents are recognised as parents of the child if both of these conditions are met:

- the child is the biological child of at least one person in the relationship, i.e. is conceived utilising the gametes of one party to the relationship; *or* the child is the birth child of a woman in the relationship

and

- the child arose from the actions of the couple to add a child to their relationship.⁹

I note that the child does not have to be both biologically related to a parent and be the birth child of a woman in the relationship, to be recognised as having two same-sex parents – only one of these conditions needs to be fulfilled.

Examples 1 and 2, on page 9 of the Explanatory Memorandum of the Same-Sex Relationships (Equal Treatment in Commonwealth Laws — Superannuation) Bill 2008, do not include examples using male gametes (sperm), and both examples also include one partner being the birth mother of the child, so there is no surrogacy involved in any of the examples.

I would like the inquiry to confirm that the definition of the child’s parents applies equally to male same-sex couples. That is, where one partner of a male same-sex couple uses his sperm via surrogacy to create a child, both male same-sex partners will be considered the parents of that child.

⁹ Explanatory Memorandum, Same-Sex Relationships (Equal Treatment in Commonwealth Laws — Superannuation) Bill 2008, pp 8-9.

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Just like Senator Stephen Conroy, who utilised his sperm to father a child via surrogacy, both partners can be considered parents of the child, so long as both partners made the conscious decision to bring a child into their family.

However, in the event of a breakdown in the relationship, it may be difficult to prove whether both parents made a conscious decision to bring the child into their family. Allowing both same-sex parents to be named on the child’s birth certificate would give greater assurance that both parents would be responsible for providing (maintenance) for that child, in the event of a break up.

The bills could even stipulate that where both parents are named on the birth certificate, that both parents are legally considered parents of the child. This would remove the opportunity for any legal challenge which argued that only the biological parent was the parent of the child because both partners did not make a conscious decision to have a child. For example, it may be claimed that whilst the couple were together at the birth of the child, only one partner originally decided to conceive the child – and therefore only one partner can be legally considered a parent of the child.

Only some states allow both men to named as parents on the birth certificate, so perhaps the government can also facilitate this being consistent across the whole of Australia, so that the interests of the child can be protected in the event of a break up.