



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

Mary Anne Neilsen  
Law and Bills Digest Section

### Contents

Purpose. . . . .	3
Committee consideration . . . . .	3
Background. . . . .	3
Basis of policy commitment. . . . .	3
Commonwealth Constitution—Referral of powers . . . . .	3
Referral of powers by the States. . . . .	4
State referral legislation for the Bill . . . . .	6
Current jurisdiction of the Family Court of Australia, the role of state and territory courts, and de facto property legislation . . . . .	7
States and territories de facto legislation and same sex relationships. . . . .	8
Western Australia and family law. . . . .	8
Relationships registers. . . . .	9
Structure of the Digest. . . . .	10
The position of significant interests groups—Arguments for the Bill . . . . .	10
Equity and efficiency. . . . .	10
Superannuation. . . . .	11
Children . . . . .	11
Same sex recognition. . . . .	11
The position of significant interests groups—Arguments against the Bill . . . . .	12
De facto relationships are different to marriage . . . . .	12
Marriage. . . . .	13
Condoning and privileging adultery . . . . .	13
Financial implications . . . . .	14
Main provisions. . . . .	15
Schedule 1—Amendments relating to de facto financial matters. . . . .	15

Definitions . . . . .	15
Definition of ‘de facto relationship’ . . . . .	15
Debate and commentary about the definition of de facto relationship . . . . .	17
Jurisdiction in ‘de facto financial causes’ . . . . .	19
Part VIIIAB—Financial matters relating to de facto relationships. . . . .	19
Participating jurisdictions . . . . .	20
Meaning of a child of a de facto relationship. . . . .	20
Relationship between the Bill and state and territory laws . . . . .	21
Declarations about the existence of de facto relationships . . . . .	21
Maintenance, declarations and alterations of property interests. . . . .	22
Geographical requirement for maintenance and property orders . . . . .	22
Maintenance . . . . .	23
Modifying and ceasing maintenance orders. . . . .	24
Declarations and alterations of property interests. . . . .	24
Notifying third parties and bankruptcy trustees . . . . .	25
Court powers . . . . .	26
Orders and injunctions binding third parties . . . . .	26
Part VIIAB financial agreements . . . . .	26
Geographical connection for Part VIIIAB financial agreements . . . . .	27
The effect of binding financial agreements on maintenance and property matters . . . . .	27
Making of Part VIIAB financial agreements . . . . .	27
Superannuation . . . . .	30
Transitional provisions for Schedule 1 . . . . .	30
Schedule 2—Consequential amendments relating to de facto financial matters . . . . .	31
Schedule 3—Amendments relating to financial agreements about marriage and other miscellaneous amendments . . . . .	32
Concluding comments . . . . .	32

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

**Date introduced:** 25 June 2008

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** Various dates as set out in clause 2 of the Bill. The substantive amendments relating to de facto financial matters (Schedules 1 and 2) commence 6 months from the day of Royal Assent or earlier by Proclamation.

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

To extend federal jurisdiction under the *Family Law Act 1975* (the Act) to financial matters arising out of the breakdown of de facto relationships, including both opposite sex and same sex relationships.

### Committee consideration

The Bill has been referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 27 August 2008. ('the Senate inquiry'). Details of the inquiry are at: [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/family\\_law/index.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/family_law/index.htm)

The Digest draws on submissions and evidence given to the Senate inquiry.

### Background

#### Basis of policy commitment

Commonwealth Constitution—Referral of powers

This Bill relies on the states referring their powers to the Commonwealth in accordance with section 51(xxxvii) of the Constitution.

The Commonwealth Constitution allows for the re-distribution of powers from the states to the Commonwealth in section 51(xxxvii) by enabling a state or states to refer power to

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the Commonwealth.<sup>1</sup> The referral process is not spelled out in section 51(xxxvii) and referral can be accomplished in different ways. For example the states can agree on a draft Bill which is then enacted by the Commonwealth. A second way is where the states refer matters in ‘general terms’—although they may well wish to be as specific as possible in what they do refer.

The need for the states to refer power to the Commonwealth to legislate with respect to the financial affairs of de facto couples is predicated on the fact that the Commonwealth otherwise lacks the power to deal with that matter. The Family Law Act derives its constitutional basis from the marriage power, and the divorce and matrimonial causes power (sections 51(xxii) and 51(xxiii) of the Constitution).<sup>2</sup>

### Referral of powers by the States

Referral of powers over the property rights of de facto couples has been on and off the political agenda for some time. It was raised in 1976 during meetings of the Australian Constitutional Convention by then NSW Attorney-General who unsuccessfully suggested the Convention should resolve that powers over the property rights of de facto couples should be referred to the Commonwealth. A similar suggestion was made by the Constitutional Commission in 1988<sup>3</sup> and in subsequent fora and reports.<sup>4</sup>

In 1994, the Queensland Government announced that it would refer its power to the Commonwealth and the Attorney-General of the day urged other States to follow suit.<sup>5</sup> In 1999, the then Commonwealth Attorney-General, Daryl Williams QC MP indicated that the Commonwealth would agree to a referral of powers even if only some States wanted to refer their powers. He said:

One significant gap in the family law system is its coverage of the 10 per cent of couples who choose to live in defacto relationships.

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1. Section 51(xxxvii) also enables a state or states to adopt a Commonwealth law enacted as a result of a referral of power.
  2. The marriage power enables the Commonwealth Parliament to make laws about ‘marriage’. The divorce and matrimonial causes power enable the Commonwealth Parliament to make laws about ‘divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants’.
  3. Constitutional Commission, *Final Report*, volume 2, p. 686.
  4. The 1992 Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act recommended that the ‘Commonwealth Government seek a reference of powers from the States in relation to the jurisdiction of de facto property disputes’.<sup>4</sup> *The Family Law Act 1975: Aspects of its Operation and Interpretation*, November 1992, p. 272.
  5. Attorney-General, *States urged to act on de facto rights*, media release, 21 October 1994.

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I am concerned that, if they separate, de facto couples do not have the same ability to resolve their property and parenting issues through nationally consistent processes. This is especially a problem since the High Court's decision in *Re Wakim*, which declared the Commonwealth/State cross-vesting scheme unconstitutional.

The issue of the referral to the Commonwealth of State powers concerning de facto relationships has been discussed in the Standing Committee of Attorneys-General (SCAG) since 1992. Without a reference of state powers, the Commonwealth does not have constitutional power to legislate in the area of de facto relationships.

The Law Council of Australia has indicated that its preferred approach is to have all States and Territories refer power in relation to de facto relationship property matters to the Commonwealth.

I believe such a move is overdue. However, I am also a realist and I recognise that it might not be possible to get the agreement of all the States. It is now appropriate, I believe, to consider action on a reference of power by some States, even if other States are not prepared to participate. I intend to raise this issue soon with my State and Territory colleagues through the SCAG forum.<sup>6</sup>

It was on 8 November 2002 at the SCAG meeting that an in-principle agreement was finally reached for the states to refer their powers to the Commonwealth in relation to dealing with property disputes relating to separating de facto couples.<sup>7</sup>

When announcing the introduction of the Bill, the Attorney-General, the Honourable Robert McClelland MP, stated that the Bill implements this 2002 SCAG agreement and also honours a commitment in the Government's National Platform to ensure that family law applies in a consistent and uniform way to de facto relationships.<sup>8</sup> The Attorney also stated:

Consistent with the Government's policy, the legislation will not discriminate between opposite-sex and same-sex de facto couples. Nothing in the legislation will alter marriage laws.<sup>9</sup>

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6. The Hon Daryl Williams, Attorney-General, National Press Club Telstra Address, 'Shaping Family Law for the Future', Wednesday 27 October 1999.

7. The Hon Daryl Williams, Attorney-General, *Commonwealth wins de facto property power*, media release, 8 November 2002.

8. The Hon Robert McClelland, Attorney-General, *Financial burden lifted from separating de facto couples*, media release, 25 June 2008.

9. *ibid.*

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## State referral legislation for the Bill

Currently, NSW, Victoria, Queensland and Tasmania have enacted legislation allowing the referral.<sup>10</sup> For example, the [\*Commonwealth Powers \(De Facto Relationships\) Act 2003\*](#) (NSW) refers to the Parliament of the Commonwealth from the date of commencement the following matters:

Financial matters relating to de facto partners arising out of the breakdown of de facto relationships between people of opposite sexes.

Financial matters relating to de facto partners arising out of the breakdown of de facto relationships between people of the same sex.

De facto relationship is defined to mean:

a marriage-like relationship (other than a legal marriage) between two persons.

Financial matters are defined to mean any or all of the following:

- the maintenance of de facto partners
- the distribution of the property of de facto partners
- the distribution of any other financial resources of de facto partners, including prospective superannuation entitlements or other valuable benefits of or relating to de facto partners.

Victoria, Queensland and Tasmania's referral legislation is in similar terms.

South Australian and Western Australia have not passed legislation, although Western Australia has legislation that would give a partial referral in relation to the superannuation interests of de facto couples. During hearings at the Senate inquiry into the Bill, an officer from Attorney-General's Department told the Committee that the Commonwealth Attorney-General has been in discussions with the South Australian Government about a possible referral.<sup>11</sup>

The Bill will apply in the territories by virtue of section 122 of the Constitution.

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10. New South Wales and Queensland passed referral legislation in 2003, Victoria in 2004, and Tasmania in 2006. All state Acts commence on proclamation.

11. (Mr Kym Duggan, Assistant Secretary, Family Law Branch, Attorney-General's Department, Senate Standing Committee on Legal and Constitutional Affairs, *Committee Hansard*, 7 August 2008, [Proof copy]. Subsequently referred to as SLCA Hansard.

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## Current jurisdiction of the Family Court of Australia, the role of state and territory courts, and de facto property legislation

Most states have referred their powers over children born outside of marriage to the Commonwealth<sup>12</sup> – meaning the Family Court can hear all disputes relating to residence and contact with children regardless of whether the parents were ever married. However, disputes about property have not as yet been referred to the Commonwealth, so unmarried couples have been forced to use the federal Family Court for disputes over children and state courts for disputes over property.<sup>13</sup>

The laws concerning the property of de facto couples vary from one State to another.<sup>14</sup> 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<sup>15</sup> and Western Australia, 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.<sup>16</sup> In other States such as New South Wales and Victoria, there are some significant differences in the way that married couples and de facto couples are treated in the law. However, Victoria has recently enacted, but not yet implemented,<sup>17</sup> new legislation on the subject<sup>18</sup> which is more similar to Queensland and Western Australia.

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12. Between 1986 and 1990 all states except Western Australia referred their legislative powers over children born outside marriage to the *Commonwealth Powers (Family Law - Children) Act 1986* (NSW); *Commonwealth Powers (Family Law - Children) Act 1986* (Vic); *Commonwealth Powers (Family Law) Act 1986* (SA); *Commonwealth Powers (Family Law) Act 1987* (Tas); *Commonwealth Powers (Family Law - Children) Act 1990* (Qld).
  13. Note that at one stage, an unmarried couple with children *could* bring (join) property matters in Family Court proceedings, but this fell foul of the *Re Wakim* decision which made such cross vesting unconstitutional (*Re Wakim; ex parte McNally* (1999) 198 CLR 511).
  14. This summary of state de facto laws has largely been extracted from: Patrick Parkinson, Submission No. 6, Senate Standing Committee on Legal and Constitutional Affairs, '*Inquiry into Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008*', p. 5. The inquiry is subsequently referred to as the SLCA inquiry.
  15. Property Law Act 1974 (Qld).
  16. Family Court Act 1997 (WA) as amended by Family Court Amendment Act 2002 (WA).
  17. The Act commences in December 2008 or earlier by proclamation.
  18. *Relationships Act 2008* (Vic).

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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 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.

Another difference relates to spousal maintenance. In South Australia, Queensland and Victoria a primary caregiver cannot access maintenance payments from their ex partner, whilst in New South Wales and the ACT spousal maintenance is only available until the child reaches 12 years of age.<sup>19</sup>

Possibly the most significant 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.

## States and territories de facto legislation and same sex relationships

Every state and territory formally recognises both opposite sex and same sex relationships in some manner. When the various states and territories passed laws recognising same sex couples, these reforms included access to existing state property division regimes for de facto couples so that now same sex couples have equal access to such laws in all states and territories.

## Western Australia and family law

The Family Court of Western Australia is the only state Family Court created under the provisions of the Commonwealth Family Law Act. As such the Court exercises both state and federal jurisdiction in family law matters.

The Court has for some years been exercising jurisdiction in cases involving property disputes between parties to de facto marriage relationships including same sex couples.<sup>20</sup> The Family Court of Western Australia argues that as a result, parties in de facto

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19. It should be noted that child support payments are treated separately from spousal maintenance under the Child Support Scheme.

20. The jurisdiction was conferred on the Court under the *Family Court Act 1997* (WA).

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relationships have much the same rights and obligations as parties to marriages following the breakdown of their relationships.<sup>21</sup> There is however one exception and that relates to the ability of the Court to make ‘superannuation splitting orders’.

The Western Australian Attorney-General in his submission to the Senate inquiry into this Bill<sup>22</sup> notes that it does not implement the Western Australian Parliament’s reference of powers contained in the *Commonwealth Powers (De facto Relationships) Act 2006* (WA). This Act refers powers over superannuation matters relating to de facto partners arising out of the breakdown of de facto relationships and relates to both same sex and opposite sex relationships. The Attorney-General argues that by not implementing the Western Australian reference of power, de facto partners in that state will, in comparison to those in other Australian jurisdictions in superannuation matters, be discriminated against. If the Commonwealth Bill took up the WA reference of power this discrimination would be avoided.<sup>23</sup>

There appears to be no federal Government explanation of why the Bill does not implement the WA reference of powers in relation to superannuation.

### Relationships registers

Several submissions to the Senate inquiry into the Bill requested the Bill be amended to recognise the unique status of registered relationships. Further discussion of this issue is on page 16 of the Digest.

Relationships registers have been created in some states and territories to allow legislative recognition of couples’ relationships. Tasmania’s *Relationship Act 2003*, the Australian Capital Territory’s *Civil Partnerships Act 2008* and Victoria’s *Relationship Act 2008* (to come into effect later in 2008) each provide for the registration of ‘couple relationships’ including both same sex and opposite sex relationships. The legislation also provides for the registration of interdependent relationships.

The Commonwealth Attorney-General has stated that the federal Government strongly supports and indeed thinks it would be a good thing if states and territories would agree upon a uniform system of registration of same sex relationships; indeed close personal relationships, along the lines of the Tasmanian or Victorian models.<sup>24</sup>

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21. Family Court of Western Australia, Submission No. 10, SLCA inquiry.

22. Details of the Senate inquiry are set out at p. 3 of the Digest.

23. Jim McGinty MLA, Attorney-General for Western Australia, Submission No. 1, SLCA inquiry.

24. The Hon Robert McClelland, Attorney-General, *Transcript of conference*, Parliament House, 30 April 2008, p. 5.

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## Structure of the Digest

Note that the general discussion below includes only debates about the broad principles of the Bill. The relevant Main Provisions section of the Digest contains debate about specific provisions such as the definition of ‘de facto relationship’, the definition of ‘child of the relationship’ the status of relationships registers, and the geographical jurisdictional requirements is found in the relevant

## The position of significant interests groups—Arguments for the Bill

### Equity and efficiency

Several submissions to the Senate inquiry supported the Bill on the basis that it promotes equity and efficiency. Women’s Legal Services Australia submits that the Family Court is the appropriate institution to resolve all property and spousal maintenance disputes, as opposed to state and territory supreme courts. The Family Court has experience and expertise in relationship matters and its processes and procedures provide the most efficient pathway for resolution of disputes following relationship breakdown. In particular the conciliation and mediation procedures of the Family Court have traditionally been effective in resolving the vast majority of such disputes at a relatively early stage, avoiding the need for litigation.<sup>25</sup>

Professor Jenni Millbank from the Faculty of Law, University of Technology, Sydney, states that the general approach of the reforms directed towards gender neutral de facto relationships is correct, sensible and equitable. Further the discretionary approach to property adjustment means that unmeritorious claims can be dealt with and the ability to enter into binding financial agreements means that couples who do not wish to be covered by the regime may exit it at any stage in their relationship.<sup>26</sup>

The Bill is strongly supported by the Law Council of Australia as being much needed and socially advantageous legislation which is long overdue given the high and ever-increasing percentage of Australians who live, regardless of gender, in marriage-like relationships in preference to formal marriage.<sup>27</sup> The Australian Institute of Family Studies states that according to the 2006 Census, persons living in a cohabiting relationship accounted for 15% of all persons living with a partner in 2006 compared with 10% in 1996.<sup>28</sup>

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25. Women’s Legal Services Australia, Submission No. 9, SLCA inquiry, p. 2. Prior to these amendments, superannuation was treated as a ‘future resource rather than ‘property’.

26. Jenni Millbank, Submission No. 5, SLCA inquiry, p. 1.

27. Law Council of Australia, Family Law Section, Submission No. 20, SLCA inquiry, p. 2.

28. Australian Institute of Family Studies, Submission No. 17, SLCA inquiry.

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## Superannuation

Since December 2002, the Family Court has the power to divide superannuation contributions between the parties (Part VIII B of the Act).<sup>29</sup> Superannuation funds are a significant asset, indeed often the largest asset a person owns. State courts do not have the power to divide such funds. Providing de facto couples with access to the Act's superannuation splitting regime will provide parties with maximum flexibility in structuring their property settlements, promoting the likelihood of settlements that are 'just and equitable in all the circumstances'.<sup>30</sup>

## Children

The Bill is said to be beneficial to children's rights. Aspects of the Family Law Act's property distribution scheme are specifically oriented towards protecting a child's right to an adequate standard of living. In some state property regimes for de facto couples the court may only take into account past contribution, in contrast to the family law regime's twin focus on past contribution and future needs. From a children's rights perspective, it is essential that courts examine the future needs of the parties to ensure primary caregivers have access to the resources necessary to care for children on a long-term basis.<sup>31</sup>

## Same sex recognition

Human rights organisations and gay and lesbian rights groups are in strong support of the Bill, particularly of the definition of 'de facto' that treats de facto couples, including same sex couples, in a similar fashion to married couples for the purposes of property division. The New South Wales Gay and Lesbian Rights Lobby notes that this reflects current practice in state and territory de facto regimes, which between 1994 and 2006 were amended to include same sex couples or were introduced from the outset with same sex couples included. Their submission argues that the inclusion of same sex couples is therefore well established and anything less would be a backward step.<sup>32</sup>

The Law Council also strongly supports equal access to the law for same sex couples, their position being that 'any step towards eliminating discrimination brings us closer to

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29. Prior to these amendments, superannuation was treated as a 'future resource' rather than 'property'.

30. Women's Legal Services Australia, *op. cit.*, p. 2.

31. *ibid.*

32. Emily Gray, Gay and Lesbian Rights Lobby, Senate Standing Committee on Legal and Constitutional Affairs, *Committee Hansard*, 5 August 2008, [Proof copy].

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meeting our international human rights obligations, makes us a fairer, more just community and ought to be greeted with strong approval'.<sup>33</sup>

## The position of significant interests groups—Arguments against the Bill

The Bill has also been criticised for raising fundamental moral and social questions that have not been properly considered.

De facto relationships are different to marriage

A question asked is whether a Commonwealth legislative regime should apply uniformly to de jure (i.e. married), de facto and same sex relationships. It is suggested that different legislative regimes should apply to these relationships because they *are* different and those who choose to enter de facto and same sex relationships do not wish their relationship to be regulated in exactly the same way as de jure couples.

Patrick Parkinson, Professor of Law, University of Sydney, and specialist in family law, states that the Bill raises important issues which have a major impact on the lives of Australian families and therefore should not be imposed upon the Australian people without further research being done to ensure that it is wanted by both same sex and opposite sex de facto couples and by the general community.<sup>34</sup>

Professor Parkinson argues that the sociological evidence available suggests that there are significant differences between people who have chosen to marry and those who have not. The evidence would suggest that de facto relationships are typically rather more conditional and are less likely to involve sharing of property.<sup>35</sup>

Parkinson says that what the Bill does is to take the marriage paradigm, the idea that marriage is a lifelong socioeconomic partnership, and applies it to people who have never chosen that, who had had a free choice whether to choose it, and, who would be shocked to know that they are being treated as if they are married when they are not.<sup>36</sup>

There are big issues about property owned before the relationship began. The Family Court treats marriage as a socio-economic partnership and, the longer it lasts, the less weight it gives to whoever brought the property into the relationship. Professor Parkinson contends that this can be quite at odds with the intentions of people in de facto relationships for whom 'what I have is mine and what you have is yours'. That is perfectly

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33. Law Council of Australia, op. cit., p. 2.

34. Patrick Parkinson, Submission No. 6, SLCA inquiry, p. 8.

35. *ibid.*, p. 6.

36. Patrick Parkinson, Senate Standing Committee on Legal and Constitutional Affairs, Committee Hansard, 5 August 2008, [Proof copy].

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sensible and egalitarian way to organise a relationship, but is not how the Family Court sees marriage.<sup>37</sup>

While Professor Parkinson acknowledges that binding financial agreements can give couples choice to contract out of the property regime of the Act and to divide their property in some other way, he believes this is a largely theoretical solution. Such agreements are expensive and they are not an answer to the dilemma about choice.<sup>38</sup>

## Marriage

A number of submissions to the Senate inquiry criticised the Bill for undermining the institution of marriage by treating marriages and de facto relationships as being entirely equivalent.

They point to sociological evidence suggesting that the Government should be promoting marriage because of its much greater stability. FamilyVoice Australia (formerly Festival of Light Australia) states that 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.<sup>39</sup>

FamilyVoice Australia also argued that same sex relationships particularly, were not equal to marriage because they confer none of the benefits of marriage and family on Australian society.<sup>40</sup>

FamilyVoice concludes there is no compelling reason that the benefits of the Family Law Act should be extended to de facto couples (either same sex or opposite sex relationships).<sup>41</sup>

## Condoning and privileging adultery

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’.

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37. *ibid.*

38. *ibid.*

39. FamilyVoice Australia, Submission No. 4, Senate Standing Committee on Legal and Constitutional Affairs, ‘Inquiry into the Bill, *op. cit.*, p. 3.

40. *ibid.*, p. 4.

41. *ibid.*, p. 5.

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Many submissions put the view that the Bill does undermine the institution of marriage because its provisions recognise not only the person in a marriage relationship but that the same person can also be in a separate de facto relationship.<sup>42</sup>

They argue the definition of 'de facto relationship' in the Bill<sup>43</sup> 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. FamilyVoice Australia states:

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.<sup>44</sup>

## Financial implications

The Bill will confer additional jurisdiction on federal courts. The Explanatory Memorandum states that in anticipation of the increased workload, additional resources were provided to the courts in the 2007-08 Budget.<sup>45</sup>

The figures from the 2007-08 Budget Paper No. 2 are set out below.<sup>46</sup> While they show additional resources for the Federal Magistrates Court it is of note that the cost will be met from the existing resources of the Family Court of Australia.

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42. Proposed subsection 4AA(5) defines a de facto relationships to include a relationship between two people where one partner is legally married to someone else or in another de facto relationship.

43. For more detail on this definition see pp. 15–17 of the Digest.

44. FamilyVoice Australia, op. cit., p. 7.

45. Explanatory Memorandum, p. 3.

46. Budget Measures 2007-08, Part 2 Expenses, p. 86.

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## Federal Magistrates Court of Australia — additional magistrates for family law

Expense (\$m)	2007-08	2008-09	2009-10	2010-11
Federal Magistrates Court of Australia	1.3	1.4	1.4	1.4
Family Court of Australia	-1.3	-1.4	-1.4	-1.4
Total	-	-	-	-

The Government will provide \$6.1 million over five years (including \$0.7 million in 2006-07) to appoint four additional magistrates to deal with increased family law workloads in the Federal Magistrates Court.

The cost of the additional magistrates will be met from within the existing resourcing of the Family Court of Australia, as new judges will not be appointed to fill recent vacancies.

Mr Duggan, an officer with the Commonwealth Attorney-General's Department at hearings of the Senate inquiry confirmed that there will be four additional magistrates made available to the Federal Magistrates Court and one additional Family Court judge to deal with the additional workload.<sup>47</sup>

## Main provisions

### Schedule 1—Amendments relating to de facto financial matters

It is of note that many provisions in this Schedule relating to de facto financial matters essentially replicate provisions in Part VIII of the Act regarding financial matters for married couples. Where this is the case the Digest does not provide detailed explanation but does refer to the equivalent provisions.

#### Definitions

**Items 2 to 23 of Schedule 1** are definition provisions. They include new definitions (such as 'de facto financial cause') and also modifications to existing definitions (such as 'financial matters'). Most of the definitions are designed to encompass de facto relationships into the current Family Law Act provisions.

#### Definition of 'de facto relationship'

Central to the Bill is the definition of 'de facto relationship' in **proposed section 4AA (item 21)**. It provides that a person is in a de facto relationship with another person if:

- they are not married to each other; and

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47. Kym Duggan, op. cit.

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- they are not related to each other by family; and
- having regard to all the circumstances of the relationship:
  - they have a relationship as a couple living together on a genuine domestic basis.

Importantly the new provision makes it clear that a de facto relationship can exist:

- between two people of opposite-sex and same sex, and
- between two people where one partner is legally married to someone else or in another de facto relationship. (**proposed paragraphs 4AA(5)(a) and (b)**).<sup>48</sup>

Under **proposed subsection 4AA(2)**, the circumstances to be considered in determining if two people have a relationship as a couple 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<sup>49</sup>
- 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, and
- i) the reputation and public aspects of the relationship.

No particular finding is required in relation to any one of these circumstances in deciding whether the persons have a de facto relationship (**proposed subsection 4AA(3)**). The Court therefore has a significant discretion.

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48. The Explanatory Memorandum refers to subsection 4AA(2) rather than 4AA(5) (see p. 7).

49. This is in contrast to the Evidence Amendment Bill 2008 and the Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008 currently before the Parliament. In those Bills, the definitions of de facto and couple-like relationships, do not include a reference to a sexual relationship. Evidence from the Department of Attorney-General's officer at the Senate inquiry hearings suggests that paragraph (c) was included to align the definition more closely with the state referral legislation definition which refers to a 'marriage-like relationship'. For further discussion, the reader is referred to the Senate inquiries into these Bills.

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These circumstances are set out in almost identical terms to the definition in section 4 of the *Property (Relationships) Act 1984* (NSW) with the addition of a criteria relating to whether the relationship is registered. The list is in contrast to the non specific definition in the referral legislation which defines a de facto relationship as a marriage-like relationship (other than a legal marriage) between two persons.<sup>50</sup>

Debate and commentary about the definition of de facto relationship

The definition of de facto relationship has been at the centre of debate about the Bill.

### *Relationships registers*

Several submissions to the Senate inquiry expressed concern about the status that the definition gives to relationships registers. They submit that where a relationship is or was registered as described in (g) that this should be conclusive proof that that has been a 'relationship as a couple living together on a genuine domestic basis' as required by paragraph 4AA(1)(c).

For example, Wayne Morgan, Senior Lecturer, College of Law ANU, is of the opinion that registered relationships should not be defined as a sub-category of de facto relationships. If, however, the Government decides to pursue this route, at the very least, proof of registration of a relationship under a state or territory law must be conclusive proof of the existence of a de facto relationship under Commonwealth law, without the need to prove the usual criteria that must be proved before a (presumptive) de facto relationship is taken to exist (such as cohabitation).<sup>51</sup>

Judy Harrison, Senior Lecturer, College of Law, ANU argues such an adjustment would promote certainty, reduce dispute, save legal costs and court time. It is also more dignified and less intrusive.<sup>52</sup>

### *Interdependent relationships*

Another question is whether the definition should include interdependent relationships. Senator George Brandis, in discussions at hearings during the Senate inquiry, suggested that the Bill is being inspired by a desire to remove unjust discrimination against people in a certain category of relationship— that is same sex relationships. In order to be socially

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50. The state referral legislation is described above at p. 6. The reader is referred to the Senate inquiry hearings for further discussion on why the Bill includes this list of indicia as opposed to the non specific definition in the referral legislation.

51. Wayne Morgan, Submission No. J59, SLCA inquiry. Note also Submission No. 37, from Miranda Stewart, Associate Professor, Melbourne University Law School.

52. Judy Harrison, Submission No. 16, SLCA inquiry, p. 2.

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just, discrimination against people in all close loving domestic relationships, however defined, should be removed. Senator Brandis posed the question that, leaving aside marriage, which is acknowledged as having a special cultural and moral status, why should the Bill privilege some permanent loving domestic relationships and discriminate against others.<sup>53</sup>

#### *Departmental response*

At the Senate inquiry hearings, the Attorney-General's Departmental officer, Mr Duggan noted that because of the Commonwealth's lack of power in regard to de facto relationships, the legislation rests entirely on references of power from the states. Therefore it is necessary for the Bill to mirror as far as possible the referral legislation. In the referral legislation a de facto relationship means a marriage like relationship between two persons.<sup>54</sup>

The undisclosed legal advice received by Attorney-General's Department suggested that the definition in the Bill is what is encompassed in the referring legislation and therefore gives the strongest constitutional link.

Mr Duggan also pointed out that the breadth of relationships that could be registered under state law means that there may be relationships that would not otherwise be regarded as a de facto relationship and arguably the Commonwealth power under the referrals does not extend that far.<sup>55</sup>

In other words, Mr Duggan argued that the Commonwealth does not have the power to make a registered relationship determinative (as opposed to indicative) of there being a de facto relationship. For example a relationship registered for only a short time may not come within power because generally speaking a definition of a de facto relationship would usually relate to a relationship of some longevity.<sup>56</sup>

With regard to interdependent relationships, the Commonwealth could also not include in the definition such relationships because they are not 'marriage like relationships'.<sup>57</sup>

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53. The Hon. George Brandis, Senate Standing Committee on Legal and Constitutional Affairs, *Committee Hansard*, 5 August 2008, [Proof copy], pp. 4–5.

54. Kym Duggan, *op. cit.*, pp. 12–13.

55. *ibid.* This is because the state and territory registration schemes are not confined to marriage like relationships but do extend to interdependent relationships which may have different elements.

56. Kym Duggan, *op. cit.*

57. *ibid.* Although interdependence can be a relevant *element* in a de facto relationship.

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## Jurisdiction in 'de facto financial causes'

The Bill creates a new 'de facto financial cause' in subsection 4(1) of the Act (**item 3**). A de facto financial cause includes:

- proceedings for distribution of property or financial resources (including superannuation)
- proceedings for provision of maintenance between parties to a de facto relationship, and
- proceedings involving third parties, binding financial agreements, and related bankruptcy matters.

Due to the particular reference of power from the states, the definition limits the proceedings in these matters to proceedings taken once the relevant de facto relationship has broken down.

**Item 33** inserts in Part V of the Act a **new Division 2** dealing with 'jurisdiction in de facto financial causes', containing **proposed sections 39A to 39G**. The new sections are the equivalent of section 39 and 40 in respect of matrimonial causes. **Proposed section 39A** provides that a de facto financial cause may be instituted under the Act in certain courts, namely the Family Court of Australia, the Federal Magistrates Court of Australia, the Supreme Court of the Northern Territory, and courts of summary jurisdiction in a participating jurisdiction. Under provisions in **item 36** an application relating to de facto financial causes must be made to the court within two years from the date the relationship ended. An application can only be made after that date if the court grants leave based on hardship or inability to self support.

## Part VIIIAB—Financial matters relating to de facto relationships

**Item 50** inserts **proposed Part VIIIAB** into the Family Law Act. It contains the central mechanism of the Bill to deal with financial matters<sup>58</sup> applicable to parties to a de facto relationship.

Part VIIIAB proceedings are defined as proceedings for orders with respect to:

- the maintenance of a party to the de facto relationship
- property of the parties to a de facto relationship, or
- proceedings in relations to Part VIIIAB financial agreements (**item 11**).

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58. Financial matters in relation to the parties to a de facto relationship mean any of the following: the maintenance of one of the parties; the distribution of the property or any other financial resources of the parties (**item 7**).

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## Participating jurisdictions

‘Participating jurisdictions’ is another threshold concept and key term used often in the Bill. **Proposed section 90RA** defines participating jurisdictions as each ‘referring state’ and the territories. **Proposed subsection 90RA(3)** clarifies that a state is not a referring state if it only refers to a limited class of matters. This would appear to be a reference to Western Australia that has provided a reference in relation to superannuation matters only. The territories are participating jurisdictions as the Bill will apply in the territories by virtue of section 122 of the Constitution.

## Meaning of a child of a de facto relationship

**Proposed subsection 90RB** defines a child of a de facto relationship and makes specific reference to existing subsection 60H(1) applying to same sex relationships. Subsection 60H(1) deals with children born through assisted reproductive technologies (ART) and provides for a presumption of parentage.

Section 90RB has been welcomed by the Law Society of New South Wales noting that it is in line with recent amendments by the NSW Government to the *Status of Children Act 1996* and the *Births, Deaths and Marriage Registration Act 1995*.<sup>59</sup>

However a number of submissions to the Senate Inquiry, including Professor Jenni Millbank, raised concerns about the limitations and discriminatory aspects of the definition. Millbank says the effect of the Bill is to recognise the parent-child relationship of children born through ART in two-female parent families only for the purposes of property division proceedings and not for the purpose of any child-related provisions under the Act.<sup>60</sup> She argues:

It makes no sense to acknowledge the existence of a parent-child relationship for the purpose of property division but not for the purpose of child support or child maintenance, parental responsibility or for decisions about time with children.<sup>61</sup>

As Professor Millbank points out, in recent years the approach of the states and territories (WA, NT, ACT, NSW, and Victoria later in 2008) is that a female de facto partner of the birth mother is also accorded parental status. These newer presumptions are not reflected in the current subsection 60H(1) which continues to use male-gender specific terminology. She argues the current section has been demonstrated to be confusing, inconsistent with state law, uncertain and discriminatory. She says it is in clear need of amendment.<sup>62</sup>

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59. Law Society of New South Wales, Family Issues Committee, Submission No. 7, SLCA inquiry.

60. Jenni Millbank, *op. cit.*, pp. 2–3.

61. *ibid.*

62. *ibid.*

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At Senate inquiry hearings, the Attorney-General's officer, Mr Duggan explained that in relation to the question of parenting presumptions more generally, the Commonwealth is currently considering a request by state and territory ministers to consider amendment of subsection 60H(1) to allow children of same sex relationships to be recognised as a child of the relationship for the purpose of the section.<sup>63</sup>

### Relationship between the Bill and state and territory laws

**Proposed section 90RC** sets out the relationship between the Bill and state and territory laws. Where federal jurisdiction applies to de facto financial matters under the provisions of the Bill, state and territory laws dealing with the same subject matter are excluded.<sup>64</sup>

### Declarations about the existence of de facto relationships

A major difference between a marriage and a de facto relationship is establishing when a de facto relationship has commenced or ended.<sup>65</sup> In a de facto relationship, identifying whether a relationship existed, and when it has ended can be more difficult than in a marriage. **Proposed sections 90RD–90RH** would assist, by providing courts with the ability to make a declaration about a range of characteristics of a de facto relationship.

**Proposed section 90RD** enables the court to make a declaration about the existence of a de facto relationship for the purposes of 'primary proceedings' involving maintenance or property orders. The court declaration may also declare any or all of the following matters:

- the period of the relationship
- whether there is a child of the relationship
- whether one of the parties to the relationship made a substantial contribution
- when the relationship ended, and
- where each of the parties was ordinarily resident during the relationship.

Any party<sup>66</sup> to a primary proceeding may apply for a declaration and such a declaration has effect as a judgement of the court (**proposed sections 90RF** and **90RE** respectively). Upon application by an affected person a court may vary or set aside a declaration if there are new and relevant circumstances (**proposed section 90RH**).

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63. Kym Duggan, op. cit., p. 14.

64. For more details on jurisdiction see pp. 23–25 of the Explanatory Memorandum.

65. It should be noted however that a marriage is not limited to being only from the date of the marriage to the date of a divorce. Time before the marriage date, and after separation and before actual divorce, are just as relevant in marriage relationship property matters.

66. Therefore, affected third parties as well as parties to the de facto relationship could apply.

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## Maintenance, declarations and alterations of property interests

**Proposed section 90SB** is a threshold provision and another key provision in the Bill. Before a court can make an order relating to maintenance, urgent maintenance, alteration of property interest, or declaration of interests in property, it must be satisfied that:

- the relationship lasted for a period totalling 2 years, or
- there is a child of the de facto relationship (defined in section 90RB), or
- there have been substantial contributions by a party and serious injustice would result to that party if the order or declaration was not made, or
- the de facto relationship is or was registered under a prescribed law of a State or territory.

This requirement does not arise in proceedings in relation to maintenance or property of parties to a marriage under Part VIII, but is derived from equivalent provisions operating under state de facto legislation. For example it essentially repeats the existing section 17 of the *Property (Relationships) Act 1984* in New South Wales but adds the concept of registration of a relationship.

The Law Society of New South Wales supports the use of the wording ‘total period of the de facto relationship ...’ in subsection 90SB(1) noting that it will avoid the problems that have occurred in cases under the Property (Relationships) Act about whether relationships with a break should be considered to be separate de facto relationships or whether the aggregated periods should count as a single relationship.<sup>67</sup>

**Proposed section 90SC** provides that Division 2 will not apply if the de facto partners marry. However prior orders, declarations or injunctions that were made in this division previously may be enforced or varied. If they are set aside, another can be substituted.

## Geographical requirement for maintenance and property orders

**Proposed section 90SD** deals with the threshold question of geographical requirements in relation to maintenance. Either or both parties must be ordinarily resident in a participating jurisdiction when the application for the maintenance order is made and in addition either:

- both parties must be ordinarily resident for at least a third of the relationship in the jurisdiction, or
- the applicant must have made substantial contributions to the relationship.

This residence or contribution requirement must be in a state that is a participating jurisdiction when the application was made, however it is not necessary that the state was

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67. Law Society of New South Wales, op. cit.

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a participating jurisdiction during the de facto relationship. This qualification allows for residence or contributions to be accumulated in states that refer powers after commencement of the Bill (for example possibly South Australia).

The Law Society of New South Wales notes that this is similar to section 15 of the Property (Relationship) Act in New South Wales. However the Society is concerned that the reference to *one third* rather than a *substantial period* may lead to situations where parties are excluded unfairly from using the legislation because their relationship has been conducted across several states. As it observes, people have become increasingly mobile. By referring to a substantial period rather than a set period the court would still have a discretion.<sup>68</sup>

**Proposed section 90SK** sets out the geographical requirements that must be established before the court can make an order or declaration about property in relation to the breakdown of a de facto relationship. It is the same requirement as for orders for maintenance in proposed section 90SD.

## Maintenance

The existing spousal maintenance provisions in the Act are contained in Part VIII. These provisions concern: the liability of one party to a marriage to maintain the other party; the enforcement of this liability through a maintenance order; and the variation of an existing maintenance order.

The provisions in the Bill relating to maintenance for parties to a de facto relationship will largely mirror the spousal maintenance provisions set out in Part VIII of the Act.

**Proposed section 90SE** sets out the power of the court in making maintenance orders. After the breakdown of the relationship, a court may make an order for maintenance for a party to a de facto relationship ‘as it considers proper’. The court must join any bankruptcy trustee or trustee of personal insolvency agreement as a party to proceedings if certain conditions are satisfied. The section is the equivalent of section 77 that deals with the power of court in matrimonial maintenance proceedings.

**Proposed section 90SF** details the principles the court is to apply and the matters to be considered when making such maintenance orders. The general principle that the court must apply is that a party to a de facto relationship must maintain the other party:

- only to the extent he or she is able to do so and only if that other party is unable to support himself or herself adequately by reason of :
  - having the care and control of a child of the relationship under 18 years

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68. Law Society of New South Wales, op. cit.

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- his or her age or physical or mental incapacity for appropriate gainful employment, or
- for any other adequate reason.

In applying the principle the court must take into account the matters set out in **proposed subsection 90SF(3)**. Section 90SF essentially replicates the equivalent provisions for the maintenance of a party to a marriage (sections 72 and 75). However, note the additional **paragraphs 90SF(3)(o), (p) and (s)** which require the court to take into account the terms of any order or declaration made in related proceedings either between parties to another de facto relationship or parties to a marriage. **Items 42–43**, make corresponding amendments to subsection 75(2).

**Proposed section 90SG** provides that urgent maintenance orders may be made, pending the completion of the substantive maintenance proceedings (equivalent of section 77 that deals with urgent spousal maintenance orders).

#### Modifying and ceasing maintenance orders

**Proposed section 90SI** sets out the matters a court must consider when making an order to modify existing maintenance orders (equivalent of section 83). Of note is **proposed subparagraph 90SI(3)(a)(i)** which allows for modification of a de facto maintenance order if the court is satisfied that the payee's circumstances have changed, including where the person has entered into a stable and continuing de facto relationship. The Bill also makes an equivalent amendment in relation to maintenance orders for parties to a marriage (**item 48, proposed subparagraph 83(2)(a)(i)**).

**Proposed section 90SJ** provides that a maintenance order ceases to have effect upon:

- the death of the party
- the death of the person liable to make payments under the order
- the marriage of the party, unless in special circumstances a court otherwise orders.

The New South Wales Law Society recommends that entering a new de facto relationship should be included as a terminating event for spousal maintenance (unless a court otherwise orders in special circumstances) in the same way that remarriage is a terminating event for married couples under subsection 82(4).<sup>69</sup>

#### Declarations and alterations of property interests

**Proposed section 90SL** allows the court to declare the title or rights to property of the parties in a de facto relationship in relation to the breakdown of that relationship. **Proposed section 90SM** allows the court to make such orders as it sees fit altering the

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69. *ibid.*

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property interests of the parties. The provisions equate to existing sections 78 and 79 respectively.

There are some additional provisions which deal with concurrent proceedings. **Proposed subsection 90SM(10)** provides that other parties are entitled to become a party to the proceedings. Other parties include:

- parties connected to the de facto relationship by reason of being in a marriage or another de facto relationship with one of the parties
- a party to a relevant binding financial agreement, and
- any other person whose interests may be affected by the making of an order.

**Proposed subsections 90SM(12) and (13)** provides that a third party may apply in these circumstances for property orders or declarations.

Note there are corresponding amendments to section 79 in **items 45 and 46** which expand the parties to proceedings under that section.

The Law Society of New South Wales notes that the drafting of these sections does not attempt to establish any criteria by which the Court determines the priority between a de facto property settlement claim and a marriage claim, whether based on the nature of the relationship, the length of the relationship or marriage, or the date of separation in either case. The Law Society observes that it is implicit in the drafting of these provisions that the legislature intends to leave it to the Courts to develop precedents and principles to guide the determination of just and equitable outcomes in such disputes.<sup>70</sup>

**Proposed section 90SN** allows for a person affected by a section 90SM order to apply for a variation or setting aside of that order. The grounds are the ones that apply under section 79A to set aside an order under section 79 of the Act with respect to the property to a marriage.

### Notifying third parties and bankruptcy trustees

Under **proposed section 90SM** mentioned above, third parties (including creditors) and bankruptcy trustees are entitled to become parties to proceedings regarding de facto property matters. **Proposed sections 90SO to 90SR** deal with the procedural matters of giving notice that the Rules of Court may provide for in relation to third parties and bankruptcy trustees. They are the equivalent of sections 79G and 79H for matrimonial property matters.

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70. Law Society of New South Wales, op. cit.

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## Court powers

**Proposed section 90SS** sets out the powers of the court when making maintenance and property orders in relation to Division 2 matters. It corresponds to section 80 that deals with the powers of the court under Part VIII in relation to matrimonial matters. In addition, **proposed subsections 90SS(5) to (11)** provide supplementary injunctive powers to a court exercising jurisdiction in other proceedings (for example in relation to bankruptcy or insolvency proceedings) for an order in circumstances arising out of the relationship. These injunctive powers replicate parts of section 114.

## Orders and injunctions binding third parties

**Proposed section 90TA** deals with the court powers to make orders and injunctions binding third parties. The drafting is unusual and complex. It provides for Part VIIIAB provisions<sup>71</sup> with appropriate modifications to also apply to orders and injunctions under Division 2 of Part VIIIAB relating to the maintenance or property of parties to a de facto relationship. The modifications are set out in **proposed subsections 90TA(2) and (3)**. They provide, for example, that references in Part VIIIAB to ‘marriage’ be replaced with references to ‘de facto relationship’ and references to ‘section 79’ be replaced with references to ‘section 90SM’. They do not alter the central effects of the sections.

## Part VIIIAB financial agreements

Since 2000, Part VIIIAB of the Act has enabled parties to a marriage to enter into a binding financial agreement concerning their property, financial resources and maintenance.<sup>72</sup> The effect of such an agreement is to enable parties to opt out of the financial provisions of the Act.

Division 4 of the Bill deals with financial agreements and de facto relationships—referred to as ‘Part VIIIAB financial agreements’. Notably the Bill has incorporated and where applicable replicated the Act’s financial agreement provisions that affect parties to a marriage. However a notable difference between the existing provisions and the proposed provisions is that a Part VIIIAB financial agreement can only deal with matters in the event of the breakdown of the relationship. The Explanatory Memorandum notes that this restriction is due to the specific terms of referred state powers.<sup>73</sup>

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71. The provisions of Part VIIIAB enable a court to bind persons other than a party to a marriage to give effect to property settlements between parties to a marriage.

72. *Family Law Amendment Act 2000*.

73. Explanatory Memorandum, p. 34.

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## Geographical connection for Part VIIIAB financial agreements

**Proposed section 90UA** contains a geographical requirement for Part VIIIAB financial agreements. The spouse parties<sup>74</sup> can only enter into a Part VIIIAB financial agreement if they are ordinarily resident in a participating jurisdiction when they make the agreement.

The Law Council of Australia states that it is unclear whether the provision as drafted require that both parties reside in the same participating jurisdiction; or whether they can be in separate jurisdictions; or if it is necessary for only one party to be in a participating jurisdiction.

While recognising the need for a geographical connection under the referring legislation, the Law Council argues the provision seems unduly restrictive and confusing. It is not uncommon for parties to reside in different locations before they enter their relationship—and some may not even live in the same country when an agreement is made. Similarly, many parties also relocate soon after separation and before settling financial arrangements.<sup>75</sup>

Judy Harrison recommends that the ambiguity in this section could be resolved by the following wording that the spouse parties:

...are ordinarily resident in a participating jurisdiction, *being the same or a different participating jurisdiction*, when they make the agreement.<sup>76</sup>

## The effect of binding financial agreements on maintenance and property matters

**Proposed section 90SA** provides that if there is a binding financial agreement under Part VIIIAB that binds the parties then maintenance and property provisions in Division 2 will not apply. However, the exclusion does not apply to proceedings between a de facto partner and a bankruptcy trustee (**proposed subsection 90SA(2)**).

## Making of Part VIIAB financial agreements

Part VIIAB financial agreements are essentially agreements made:

- *before* a de facto relationship according to **proposed section 90UB**
- *during* a de facto relationship according to **proposed section 90UC**
- *after* break up of a de facto relationship according to **proposed sections 90UD**), or
- agreements covered by **section 90UE (item 10, subsection 4(1))**.

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74. 'Spouse party' has a new definition, see **item 18**.

75. Law Council of Australia, op. cit., p. 3.

76. Judy Harrison, op cit, p. 3.

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Before a de facto relationship *commences*, parties may make a Part VIIIAB financial agreement if that agreement is expressed in writing as an agreement made under section 90UB and relates to any of the following matters mentioned in **proposed subsection 90UB(2)**:

- how the property or financial resources owned by the spouse parties at the time of the agreement or acquired at a later time are to be distributed in the event of a break down of the relationship
- matters relating to the maintenance of the spouse parties
- ancillary or incidental matters (**proposed subsection 90UB(3)**)

Financial agreements made according to **proposed subsection 90UB(1)** may vary or terminate previous financial agreements (**proposed subsection 90UB(4)**).

**Proposed sections 90UC** and **90UD** provide for the making of written financial agreements *during* a de facto relationship and *after* breakdown of the relationship. They are drafted in similar terms and about similar matters as proposed section 90UB above.

**Proposed section 90UE** is a transitional provision. It provides rules for recognition of financial agreements made under non-referring state legislation as Part VIIIAB agreements in the event that the state refers power after commencement of the new Act.

**Proposed subsection 90UF** provides that in the event of a breakdown of a de facto relationship, a separation declaration is required for the provisions relating to property or financial resources of a binding financial agreement to come into effect. This is the equivalent to a section 90DA separation declaration for financial agreements affecting parties to a marriage. It is an anti-avoidance measure aimed to protect the rights of creditors.<sup>77</sup>

**Proposed section 90UI** provides that if a provision in a financial agreement about maintenance would have the effect of making a person reliant on social security payments rather than on maintenance payments, the court will retain its jurisdiction under the Act to make a maintenance order. This is to ensure that people can not agree away their obligations to maintain the other party, with the effect of increasing the burden on the social security system and is similar to the marriage maintenance provisions.

**Proposed section 90UJ** sets out the requirements for legally binding financial agreements. The agreement must:

- be signed by both parties
- not be terminated nor set aside by a court, and

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77. Explanatory Memorandum, p. 35.

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- contain an annexure with certificates indicating that each party has received independent legal advice as to the effect and to the advantages/disadvantages of the agreement.

After signing a financial agreement, the original must be given to one party and a copy of the agreement to the other party (**proposed paragraph 90UJ(1)(e)**). There is no requirement that the agreement be registered with the court.

A Part VIIIAB financial agreement ceases to be binding if, after making the agreement, the parties marry each other (**proposed subsection 90UJ(3)**).

**Proposed section 90UK** provides that upon death of a party to the agreement, the agreement will be binding on the legal personal representative of the deceased party.

**Proposed section 90UL** enables parties to vary or revoke a financial agreement by either including a provision to that effect in another agreement according to **proposed subsections 90UB(4), 90UC(4) or 90UD(4)** or by making a written termination agreement. To be legally binding a termination agreement must fulfil similar requirements to those set out in **proposed section 90UJ**. The provision has a similar effect to section 90H of Part VIIIAB.

**Proposed section 90UM** sets out the circumstances in which a Part VIIIAB financial agreement may be set aside by a court. The circumstances include where:

- the agreement was obtained by fraud
- a party entered into the agreement with the purpose of defrauding creditors, or with reckless disregard of the interests of creditors
- the agreement is void, voidable or unenforceable, or
- it is impracticable for the agreement, or part of it, to be carried out in the circumstances that have arisen since the agreement was entered into.

The court may also set aside an agreement in circumstances that have arisen since the agreement was entered into that are of an exceptional nature relating to the care, welfare and development of a child and in which the child or a party to the agreement would suffer hardship.

As the Explanatory Memorandum notes, the grounds are identical to the ones relating to setting aside a financial agreement between parties to a marriage (existing section 90K).

**Proposed section 90UN** provides that the principles of law and equity apply in determining whether a Part VIIIAB financial agreement is valid, enforceable or effective. It is the equivalent of section 90KA. It may provide a broader basis for making decisions.

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**Proposed section 90VA to VD** deal with proceeds of crime and forfeiture issues that might arise out of Part VIIIAB financial agreements. **Proposed section 90WA** provides exemption from duty for instruments executed under certain provisions in Part VIIIAB. They replicate equivalent provisions of Part VIII<sup>78</sup> with appropriate modifications.

### Superannuation

**Items 51 to 78** make amendments that provide for the extension of the application of Part VIIIAB to superannuation interests held by a party to a de facto relationship.

Superannuation is to be treated as property for the purposes of de facto financial causes (**items 3, 52 and 53**). Under **proposed subsection 90MC(2)** proceedings dealing with a superannuation interest of a party to a de facto relationship will be able to be instituted in the Family Court of Australia, the Federal Magistrates Court, the Supreme Court of the Northern Territory and courts of summary jurisdiction in participating jurisdictions. **Proposed section 90MHA** provides that a Part VIIIAB financial agreement may include an agreement that deals with superannuation interests of the parties as if those interests were property. The part of the agreement that deals with superannuation interests is to be referred to as a 'superannuation agreement'. It replicates section 90MH in similar terms in relation to superannuation agreements between parties to a marriage.

### Transitional provisions for Schedule 1

The transitional provisions are complex and difficult to understand without reference to the examples given under the provisions.

**Item 86** provides that the new Act will not apply to de facto relationships which broke down before commencement.

Judy Harrison argues that that this barrier is harsh given that the referring states, the territories and the Commonwealth agree that the family law system will be far more accessible and suitable for de facto relationship financial matters compared to the existing state and territory options. She recommends that the provisions be adjusted so that de facto couples may opt in to the new Act by mutual agreement when:

- whose relationship broke down before commencement, and
- whose maintenance or property matters have not been finalised by the making of a final order or agreement before commencement.<sup>79</sup>

**Items 87 and 88** make rules for pre-commencement financial agreements. These are financial agreements made before commencement of the new Act under laws of a state or

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78. Sections 90M-90P and section 90L respectively.

79. Judy Harrison, op. cit.

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territory that *is* a participating jurisdiction at commencement. They provide that federal law will apply to these agreements as if they were Part VIIIAB financial agreements.

**Division 4 (items 89 to 92)** deals with ‘pre-transition time’ financial agreements. These are financial agreements made before commencement of the new Act under laws of a state that *is not* a participating jurisdiction at commencement but *becomes* a participating jurisdiction at a later date.<sup>80</sup> These agreements will continue to be governed by state law unless they are transformed into Part VIIIAB financial agreements according to proposed section 90UE.<sup>81</sup>

The Law Society of New South Wales in its submission expressed concern that the aim of the transitional provisions appears to be to treat financial agreements made under state laws of participating jurisdictions before the introduction of this Bill as agreements made under the Bill. It claims that this does not recognise the fact that different provisions applied to these agreements and that there are different grounds for setting aside these agreements. The Law Society recommends that if these agreements are to be treated as Part VIIIAB agreements and therefore enforceable as such, then there should be a specific provision to ensure that a party will not be able to set aside the agreement simply because the legislation has changed.<sup>82</sup>

## Schedule 2—Consequential amendments relating to de facto financial matters

Schedule 2 contains consequential amendments to other related legislation that flow from the extensions of the Act to de facto financial matters.

In relation to bankruptcy, **items 4-18** amend the *Bankruptcy Act 1966* to ensure that the provisions dealing with both family law and bankruptcy matters are taken to include de facto financial matters as well as matrimonial financial proceedings. For example, **items 5, 6 and 7** insert **proposed subsection 35(1A)** in the Bankruptcy Act. The provision confers concurrent bankruptcy and family law jurisdiction on the Family Court of Australia in any matter arising out of the bankruptcy of a bankrupt party to a de facto relationship. It mirrors existing subsection 35(1) that provides similar jurisdiction in cases where a party to a marriage is bankrupt.

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80. These might be financial agreements made under South Australian de facto legislation assuming South Australia refers power to the Commonwealth after commencement.

81. See p. 27 of the Digest.

82. Law Society of New South Wales, op. cit.

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## Schedule 3—Amendments relating to financial agreements about marriage and other miscellaneous amendments

Schedule 3 of the Bill proposes amendments to the Act relating to the provisions concerning financial agreements between married couples, separation declarations and superannuation splitting.

### Concluding comments

The Bill is undoubtedly a significant piece of legislation with quite profound implications for couples, both opposite sex and same sex, living in de facto relationships.

At a technical level, the Bill is complex in its drafting style and both the Law Council of Australia and the New South Wales Law Society have called for a re-write of the complete Family Law Act to make it more comprehensible and user friendly.

The Bill appears to have bipartisan support within Parliament and yet it has also been the subject of quite divided debate within the wider community. Human rights organisations, gay and lesbian lobby groups and representative bodies of the legal profession support it for applying family law in a consistent and uniform way to de facto relationships across the country and for eliminating discrimination.<sup>83</sup> Groups identifying as being pro-heterosexual family have criticised it and see it as undermining the institution of marriage and the traditional family.<sup>84</sup>

The definition of ‘de facto relationship’, which is central to the Bill, raises a number of questions. One of these is the status accorded prescribed state and territory registered relationships. The Bill, due to apparent limitations imposed by the wording of the state referral legislation, treats these registered relationships as indicative, but not determinative of, the existence of a de facto relationship.

As former Family Court Chief Justice Alistair Nicholson has argued, such an approach

[...] is inappropriate as a matter of policy as those couples who have formalised their relationships have positively chosen not to simply be regarded as ‘de facto’ partners under [...] law.<sup>85</sup>

Given also the Attorney-General’s recent encouragement of state registration schemes, there would appear to be good reason for reopening SCAG discussions on this matter.<sup>86</sup> A

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83. See above at pp. 10–11.

84. See above at pp. 12–14.

85. Public letter from the Hon. Alastair Nicholson to the Federal Attorney-General dated 19 May 2008, quoted in *Women’s Legal Services Australia*, op. cit., p. 5.

86. See above at p. 9.

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broadening of the state referral legislation so that all state and territory registered couple relationships, including interdependent relationships, might have automatic access to the financial settlement regime under the Family Law Act may lead to a more equitable outcome.

Finally, the changes to be introduced by this Bill raise issues of resources for the Family Court. Allowing opposite sex and same sex de facto couples to access the Family Court for property and maintenance matters will substantially increase demand on the federal family law system. While new Magistrates are to be appointed, it might be asked whether the Government has allocated other appropriate resources to address the increase, to ensure that parties and practitioners do not face a 'blow out' in local registry waiting times for appointments with family court consultants, court dates and judicial decisions. The new Act is also likely to increase demand on community-based family dispute resolution services (FDR). As the Women's Legal Service Australia notes, Family Relationship Centres and other FDR providers must be adequately resourced to ensure that all parties can access dispute resolution and obtain the requisite FDR certificates in a timely way.<sup>87</sup>

The financial information in the Explanatory Memorandum warrants further consideration.

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87. Women's Legal Services Australia, op. cit., p. 6.

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