



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

NINTH REPORT

OF

2008

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MEMBERS OF THE COMMITTEE

Senator the Hon C Ellison (Chair)

Senator M Bishop (Deputy Chair)

Senator D Cameron

Senator J Collins

Senator the Hon J Troeth

TERMS OF REFERENCE

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINTH REPORT OF 2008

The Committee presents its Ninth Report of 2008 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bill which contains provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

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

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

Introduction

The Committee dealt with this bill in *Alert Digest No. 7 of 2008*. The Attorney-General responded to the Committee's comments in a letter received on 5 September 2008. A copy of the letter is attached to this report.

Extract from Alert Digest No. 7 of 2008

Introduced into the House of Representatives on 25 June 2008
Portfolio: Attorney-General

Background

This bill amends the *Family Law Act 1975* to provide for opposite-sex and same-sex de facto couples to access the federal family law courts on property and maintenance matters. The bill relies on referrals by States to the Commonwealth in accordance with subsection 51(xxxvii) of the Constitution.

In addition, the bill provides for amendments relating to financial agreements between married couples and superannuation splitting, and for an amendment providing for certificates given in relation to family dispute resolution. It also makes consequential amendments relating to de facto financial matters to the *A New Tax System (Family Assistance) Act 1999*, the *Bankruptcy Act 1966*, the *Child Support (Assessment) Act 1989*, the *Child Support (Registration and Collection) Act 1988*, the *Federal Magistrates Act 1999*, the *First Home Saver Accounts Act 2008*, the *Income Tax Assessment Act 1997*, the *Proceeds of Crime Act 2002*, the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986*.

The bill also contains transitional provisions.

Inappropriate delegation of legislative power

Schedule 1, item 33

New sections 39C and 39D of the *Family Law Act 1975*, to be inserted by item 33 of Schedule 1, would permit the Governor-General, by Proclamation, to fix a day on and after which a de facto financial cause may not be commenced in the Supreme Court of the Northern Territory, or in courts of summary jurisdiction in various States or Territories. New section 39E of the same Act, also to be inserted by item 33 of Schedule 1, would permit the Governor-General, by Proclamation, to declare that a Proclamation under section 39C or 39D is revoked on and from a specified date.

It appears, both from subsequent provisions of the bill and from a perusal of the explanatory memorandum, that at least one reason for such a Proclamation would be if a State no longer referred its powers to legislate on such matters to the Commonwealth, or subsequently did refer such powers to the Commonwealth. The Committee notes, however, that the explanatory memorandum (paragraph 67) refers to these proposed sections, but does not indicate the reason for their inclusion in the bill. The Committee **seeks the Attorney-General's advice** about the reason for the conferral of this apparently unfettered discretion on the Governor-General.

Pending the Attorney-General's advice, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Attorney-General

The Committee seeks my advice about new sections 39C and 39D, as the provisions may be considered to inappropriately delegate legislative powers.

The Bill provides for a new federal financial settlement regime for de facto couples on relationship breakdown in States which have referred powers to the Commonwealth and in the Territories.

The Bill enables de facto couples in a referring State or in a Territory to commence de facto financial causes in the same courts in which married couples can commence matrimonial causes.

Aside from the federal family law courts, these courts include the Northern Territory Supreme Court, and courts of summary jurisdiction in referring States and in the Territories (see paragraphs 39B(1)(c) and (d)).

The Government intends that de facto couples should be able to access, for property settlement and spouse maintenance issues between them on relationship breakdown, the same courts as married couples on these issues.

New sections 39C and 39D permit the Governor-General to fix a day on and after which property settlement and spouse maintenance proceedings relating to de facto couples under the new regime may not be commenced in the Northern Territory Supreme Court, or in courts of summary jurisdiction in referring States or in the Territories.

These provisions reflect existing provisions in the Act relating to the jurisdiction of these courts in matrimonial causes between married couples (see, in relation to the Northern Territory Supreme Court, subsections 39(5) and 40(3) and, in relation to courts of summary jurisdiction, subsections 39(6) and 39(7) of the Act).

The provisions I have mentioned in relation to the Northern Territory Supreme Court (existing subsections 39(5) and 40(3), and proposed new paragraph 39B(1)(c) and new section 39C) are part of a scheme, dating from the original enactment of the Act in 1975. The scheme provides for the phased removal of jurisdiction of State and Territory Supreme Courts in matrimonial causes and related family law proceedings.

Proclamations ending the jurisdiction of most State and Territory Supreme Courts were made, under subsection 40(3) of the Act, in 1976 and 1983. The jurisdiction of the Northern Territory Supreme Court remains. New subsection 39C proposed by the Bill, together with subsection 40(3) of the Act, provides, in this regard, a contingency in the event that a permanent federal judicial presence is not able to be retained in the Northern Territory. Such a decision would be based on workload and the availability of judicial resources.

Of the provisions I have mentioned in relation to the courts of summary jurisdiction, existing subsections 39(6) and proposed new paragraph 39B(1)(d) permit proceedings to be commenced in State and Territory courts of summary jurisdiction in places where no federal judicial resources are available. The federal family law courts are not able to be readily accessed, particularly on urgent matters, in some rural and regional areas across Australia.

Proposed new section 39D, like existing subsection 39(7) in relation to matrimonial causes between married couples, allows for a time when it may not be necessary to rely on the general State or Territory court system because there is a sufficient spread of federal judicial resources across Australia.

The Committee thanks the Attorney-General for this response, and notes that it would have been helpful if this information had been included in the explanatory memorandum.

Senator Chris Ellison
Chair



ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

RECEIVED

5 SEP 2008

Senate Standing C'ttee
for the Scrutiny of Bills

08/14970; MC08/13511

Senator the Hon Christopher Ellison
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ellison

I refer to the comments of the Senate Standing Committee for the Scrutiny of Bills, in *Alert Digest No. 7 of 2008*, about new sections 39C and 39D of the *Family Law Act 1975* (the Act), proposed by Item 33 in Schedule 1 of the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008.

The Committee seeks my advice about new sections 39C and 39D, as the provisions may be considered to inappropriately delegate legislative powers.

The Bill provides for a new federal financial settlement regime for de facto couples on relationship breakdown in States which have referred powers to the Commonwealth and in the Territories.

The Bill enables de facto couples in a referring State or in a Territory to commence de facto financial causes in the same courts in which married couples can commence matrimonial causes.

Aside from the federal family law courts, these courts include the Northern Territory Supreme Court, and courts of summary jurisdiction in referring States and in the Territories (see paragraphs 39B(1)(c) and (d)).

The Government intends that de facto couples should be able to access, for property settlement and spouse maintenance issues between them on relationship breakdown, the same courts as married couples on these issues.

New sections 39C and 39D permit the Governor-General to fix a day on and after which property settlement and spouse maintenance proceedings relating to de facto couples under the new regime may not be commenced in the Northern Territory Supreme Court, or in courts of summary jurisdiction in referring States or in the Territories.

These provisions reflect existing provisions in the Act relating to the jurisdiction of these courts in matrimonial causes between married couples (see, in relation to the Northern Territory Supreme Court, subsections 39(5) and 40(3) and, in relation to courts of summary jurisdiction, subsections 39(6) and 39(7) of the Act).

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Of the provisions I have mentioned in relation to the courts of summary jurisdiction, existing subsections 39(6) and proposed new paragraph 39B(1)(d) permit proceedings to be commenced in State and Territory courts of summary jurisdiction in places where no federal judicial resources are available. The federal family law courts are not able to be readily accessed, particularly on urgent matters, in some rural and regional areas across Australia.

Proposed new section 39D, like existing subsection 39(7) in relation to matrimonial causes between married couples, allows for a time when it may not be necessary to rely on the general State or Territory court system because there is a sufficient spread of federal judicial resources across Australia.

The action officer for this matter in my Department is Mr Peter Meibusch who can be contacted on 02 6234 4817.

Yours sincerely

A handwritten signature in cursive script, appearing to read "Robert McClelland".

Robert McClelland

