

# **ADDITIONAL REMARKS OF SENATORS BARNETT, TROOD AND FISHER**

1.1 The Coalition Senators support recommendations 1 to 5 of this report but wish to make two additional recommendations in relation to this Bill.

## **Amendment to Item 21 of Schedule 1 to insert new section 4AA**

1.2 Paragraph 4AA(5)(b) in the Bill currently provides:

A de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship.

1.3 A person cannot be part of 'a couple living together on a genuine domestic basis' with more than one person at a time unless the Parliament wants to endorse de facto polygamy. It would be hard to describe the parties as a 'couple' when there are other de facto partners in residence.

## **Recommendation 1**

**1.4 The Coalition Senators recommend that the words “or in another de facto relationship” in paragraph 4AA(5)(b) of the Bill be omitted.**

## **Amendment to Item 50 of Schedule 1 to insert new Section 90SB**

1.5 The text of the proposed section 90SB reads as follows:

### **90SB When this Division applies – Length of relationship etc.**

A court may make an order under section 90SE, 90SG or 90SM, or a declaration under section 90SL, in relation to a de facto relationship only if the court is satisfied:

- (a) that the period, or the total of the periods, of the de facto relationship is at least 2 years; or
- (b) that there is a child of the de facto relationship; or
- (c) that:
  - (i) the party to the de facto relationship who applies for the order or declaration made substantial contributions of a kind mentioned in paragraph 90SM(4)(a), (b) or (c); and
  - (ii) a failure to make the order or declaration would result in serious injustice to the applicant; or
- (d) that the relationship is or was registered under a prescribed law of a State or Territory.

1.6 People enter de facto relationships for a range of reasons. Often, they do so as the next stage from commencing a sexual relationship, when it no longer makes sense to pay two lots of rent. Sometimes too, they enter into de facto relationships following divorce because they don't want the obligations and incidents of marriage. When there are no children of the relationship, treating them as independent, autonomous adults who can look after themselves and make their own way financially in the world, fits with their expectations and intentions, however long the relationship lasts.

1.7 This legislation could lead to the break-up of functioning childless de facto relationships before two years have elapsed if the parties do not want the incidents and obligations of marriage, cannot agree on a binding financial agreement or cannot afford to get one. It is therefore legislation which destabilises family life. It also further undermines the significance and distinctiveness of marriage which has consistently been shown to be the most stable and enduring form of heterosexual union. A further reason for these amendments is that it is unfair to impose upon people the obligations of marriage when they have not chosen it for themselves.

1.8 Nonetheless, there is a need to provide people who enter de facto relationships with appropriate protection, especially where there are children of the relationship, and it is legitimate to treat them as if they were married if they have registered their relationship after being given information about the legal consequences of so doing.

1.9 Couples in same-sex relationships have the same status as heterosexual de factos, under these proposed amendments. They are thus non-discriminatory, and same-sex couples who register their relationships can have all the incidents and obligations of marriage. It is their choice, a choice which is not really given to either heterosexual or homosexual people under this Bill, except through the expensive and convoluted pathway of negotiating a binding financial agreement with independent legal advice on both sides.

## **Recommendation 2**

**1.10 The Coalition Senators recommend that the proposed section 90SB be omitted, and substituted with the following:**

**90SB When this Division applies – that there is a child etc.**

**(1) A court may make an order under section 90SE or 90SG, in relation to a de facto relationship, only if the court is satisfied:**

**(a) that there is a child of the de facto relationship; or**

**(b) that the relationship is or was registered under a prescribed law of a State or Territory.**

**(2) A court may make a declaration under section 90SL if it is satisfied that the applicant or respondent was in a de facto relationship with another party to the proceedings.**

**(3) A court may make an order under section 90SM, in relation to a de facto relationship only if the court is satisfied:**

**(a) that there is a child of the de facto relationship; or**

**(b) that:**

**(i) the party to the de facto relationship who applies for the order made substantial contributions of a kind mentioned in paragraph 90SM(4)(a), (b) or (c); and**

**(ii) a failure to make the order would result in serious injustice to the applicant; or**

**(c) that the relationship is or was registered under a prescribed law of a State or Territory.**

**(4) If the court has power to make an order under section 90SM by reason only of the fact that the party to the de facto relationship who applies for the order made substantial contributions of a kind mentioned in paragraph 90SM(4)(a), (b) or (c), then the court is limited in its considerations under section 90SM, to paragraphs 90SM(4)(a), (b) or (c).**

1.11 The effect of these amendments will be as follows:

(i) Declarations of legal and equitable interests: Anyone who is in a de facto relationship ought to be able to get a declaration of legal or equitable title by application of the general law. There is no reason to limit declaratory relief, as this Bill currently does, to people who have been in relationships for two years or have a child or satisfy one of the other conditions.

(ii) Property alteration and 'spousal maintenance': the court will have the power to divide the parties' property and to award 'spousal maintenance' in the same way as if they were married, if:

- there is a child of the de facto relationship; or
- the relationship is or was registered under a prescribed law of a State or Territory.

1.12 In situations where one of the parties has made substantial contributions, including contributions as a homemaker, then this would be an additional ground for the court to exercise its powers to take account of their contributions, even when there are no children of the relationship. However, the powers of the court would be limited to the fair recognition of contributions. Thus the court would have power to make whatever orders are just and equitable on the basis of the parties' respective contributions, even when their relationship is unregistered or they do not have a child of the relationship if, for example:

- the woman has made substantial contributions as a homemaker, looking after the children of the male partner; or
- the man has made substantial contributions to the woman's home by engaging in renovations.

1.13 These provisions therefore provide full protection to people who have made substantial contributions that would otherwise not be recognised.

Senator Guy Barnett

Senator Mary Jo Fisher

Senator Russell Trood

Deputy Chair