FAMILY COURT AMENDMENT BILL 2001

Consideration in Detail

Resumed from 25 October.

Clause 45: Part 5A inserted -

Debate was adjourned after the clause had been partly considered.

Mrs EDWARDES: We are currently on page 57 of the Bill. On the last occasion, an amendment was moved to proposed section 205ZD by adding subsection (3). The amendment related to spouses and previous spouses. I will make a few comments about the proposed section. Standing orders might prevent me from doing so; however, my remarks will be relevant, particularly to the Administration Act.

The issue relates to applications being made within one year. South Australia allows applications up to one year while other States allow two years. It would be assumed that applications for property settlements could be settled quickly, but that does not happen. Proposed subsection (2) allows for an application period to be extended if the court believes hardship would be caused to a de facto partner. In the case of married couples before the Family Court, it is more likely than not that the one-year period is extended. It is usually two or three years before an application is made. One case involved a period of 33 years as hardship would have been caused to the spouse. Applications for distribution of property will not be settled within a short period, as is suggested by the proposed subsection. It has implications for two-year de facto relationships and the effect on a marriage. It has consequences for the Administration Act, specifically the distribution of property under the Administration Act between a legal spouse and a de facto partner when the time frame is two years. I proposed to the Attorney General that in proposed section (3) he include the term "previous spouse". My proposal is not without warrant. It is not always the case that a legal spouse has finally determined a property settlement. A de facto partner may have an application that deals with the same level of property on which a legal spouse would have made an application. Even though a decree absolute may have been granted, a property settlement may not have been completed. By not accepting the amendment, the Attorney General is saying that a former spouse - even for only a short period - is nothing more than a third party who can be notified by the court that an application is on foot for property in which he or she may have an interest. A court will ask an applicant whether anyone else has an interest in a matter. The critical point always will be how it will be determined.

The inference is that although it may involve the same property, the legal spouse, albeit the former legal spouse, would have fewer rights than a de facto partner. That is our major concern about this legislation. Essentially, it will relegate a legal spouse to a lesser position than that of a de facto partner. The Attorney General attempted to move an amendment to accommodate legal spouses. However, with the ability to extend time limits beyond a year as a matter of course, the issue of former spouses will become a critical element, particularly in the light of further amendments to the Administration Act.

Mr McGinty: Is there an amendment to subclause (3)?

Mrs EDWARDES: Yes, it was moved by the Opposition, but the Government did not support it. I would be very happy to resubmit it!

Mr McGINTY: We have sought to provide a period of one year after the break-up of a de facto relationship for one of the partners to make an application for the division of property or for spousal maintenance because that provision applies to marriages. It is to ensure that a standard does not apply that is more beneficial to de facto partners than to legal spouses. Under the Family Law Act, which applies throughout the Commonwealth, an application must be made within 12 months, but there is provision to extend the period. As the member for Kingsley rightly said, given the nature of domestic breakdowns, generally speaking, the court will grant an application to extend the period in which a spouse can make an application for the division of property. We have sought to take the relevant provision in the Family Law Act and apply that to a de facto relationship so that, in the interests of a fairly simple procedure that is common to both marriages and de facto relationships, the same time will apply. If we try to impose different times problems will arise.

Similarly, we agreed with the provisions in the member's amendment that a legal spouse should be given notice of a property division application if a legal spouse has entered into a subsequent de facto relationship. A legal spouse would no doubt have an interest and an expectation that that would be done. However, once the marriage is legally dissolved, even though I appreciate the argument that some people may not have divided their property in accordance with the provisions of the Family Law Act, that would impose an unnecessary additional burden given that the rules require that notice be served on anyone else who has an interest in the property, which includes a former spouse.

As for a statutory requirement to provide notice of application for property division among de facto partners, that should not be taken any further than the legal spouse. As the member for Kingsley said, that has been debated.

Dr WOOLLARD: The Attorney General said that the period within which a partner can make an application to divide property will be one year because the Family Law Act provides for one year. When marriages break down women are often shell shocked and sometimes it takes a year or two to recover from that breakdown. It would be more appropriate to provide for two years in this Bill and consider changes to the Family Law Act later to provide for two years, rather than working to a precedent with which we may not agree.

Mr McGINTY: I am not denying the merit in the view advanced by the members for Alfred Cove and Kingsley. However, we have no power over the Family Law Act because it is a commonwealth Act. Only the Commonwealth has the power pursuant to the Constitution to legislate for marriages. This legislation is therefore necessarily constrained. If we wanted to grant a greater benefit to people living in de facto relationships than to people in marriages, we could include two years. However, I do not think members want that.

Dr Woollard: No.

Mr McGINTY: The State cannot legislate for marriages. The Commonwealth has legislated and prescribed a period of one year, with the capacity, in the case of hardship, to extend the time. One of the constraints throughout this legislation is that we cannot change the law as it relates to a marriage. It would be wrong to provide, as a matter of policy, more beneficial arrangements for de facto relationships than those that apply to marriages. We are, therefore, caught with including in this Bill the period that applies to marriage; that is, 12 months. It is not something we are debating from first principles. At one end we are stuck with that which applies to marriages. From my limited knowledge of these issues, one year is not a long time after the breakdown of a relationship. Even after the decree absolute has been granted, one year is not a long time after a marriage breakdown, particularly in the case of long-term marriages where middle-aged people are trying to readjust their lives to deal with their new set of circumstances. However, to prescribe anything other than that which is prescribed in this Bill would give a more beneficial arrangement to de facto partners than to married people whose relationship has broken down. I am sure that no-one wants to see that.

Mrs EDWARDES: I refer to proposed section 205ZE on the right of the de facto partner to be paid maintenance. It is not a very well-known clause. Some people have realised that this Bill essentially deals with property distribution between de facto relationships as described in the second reading speech by the Attorney General, and provides for the inequities that arise as a result of many cases going before the Supreme Court and many cases not doing so. This proposed section provides that a de facto partner is liable to maintain the other de facto partner, to the extent that the first-mentioned partner is reasonably able to do so, and only if that other person is unable to support herself or himself adequately whether -

(a) by reason of having the care and control of a child. . . who has not attained the age of 18 years;

At that age the parent may not be working, therefore, a parent would be looking after the child. To continue -

(b) by reason of age or physical or mental incapacity for appropriate gainful employment; or

(c) for any other adequate reason.

I was told that this is the same clause as the one in the Family Law Act. In a media conference the Law Society said that the level of spousal maintenance in Western Australia has taken the lead in Australia and is very open-ended. Proposed subsection (c) makes it open-ended. Will the Attorney General clarify that proposed subsection (c) is exactly the same as that which applies under the Family Law Act? If so, how has that been determined by the courts? What issues have the courts taken into account in determining any other "adequate reason"? Is the Law Society saying that Western Australia has widened the scope for de facto maintenance so that it is far greater than anywhere else in Australia?

Mr McGINTY: Under section 72 of the Family Law Act, spousal maintenance in respect of a marriage applies by way of the operation of a dual test. This proposed section is a direct reflection of that section of the Family Law Act. We are seeking to say that the same obligations to support the spouse arise in a de facto relationship as in a legal marriage. The member for Kingsley is correct in her observation that these provisions for spousal maintenance go further than the provisions in the other States, because they effect a direct equation with the provisions in the Family Law Act. The best that applies elsewhere is a limited form of spousal maintenance for a number of years; and generally speaking it links in with the dual test to which I referred earlier. I am advised that, in a practical sense, that dual test operates in the following way. First, according to the criteria that are spelt out in paragraphs (a) and (b), there must be a child who needs to be maintained, or there must be a demonstrable physical or mental incapacity on the part of the former partner that gives rise to an obligation to maintain that

person. Having satisfied the first test, the second test is that there must be a capacity to pay. I am advised that the provision of spousal maintenance is not the common experience. In the case of a marriage, often at the point of the division of property the court will take into account any ongoing obligations. For example, if the former spouse is unable to enter the work force because she is the mother of young children, she will be given a greater proportion of the property in recognition of future spousal maintenance that will be forgone. However, in the case of people who are better off and have an ongoing capacity to pay, an order may be made for spousal maintenance. It is not the norm for a spousal maintenance order to be made after the division of property has taken place. However, a spousal maintenance order may be made on a short-term basis until the division of property has been settled. The statutory provisions in respect of de facto couples in the other States reflect that practical arrangement. I am advised that none of the other States provides an unlimited right to spousal maintenance. The relevant legislation in New South Wales, Queensland and the Northern Territory provides that there is no general right to maintenance between the parties to a former relationship and any right to maintenance is limited to that provided by the legislation; and it usually relates to the care of a child of the relationship under the age of 18, or to cases in which the relationship has adversely affected the earning capacity of the partner. There is a limited right in some States and no right in others. We are proposing an unlimited right that in practice will not apply in the average case. The provision for spousal maintenance will apply on the same basis as in a marriage; that is, in the exceptional case, provision for ongoing spousal maintenance will be made after the property has been distributed.

Mrs EDWARDES: This is yet another clause that supports our view that the Attorney General is taking the position that a de facto relationship is a marriage-like relationship; and that is something we will dispute.

Mr McGinty: That is a fair summary of it.

Mrs EDWARDES: This proposed section, by seeking to pick up a section of the Family Law Act and apply it to de facto couples, will make this legislation far broader than the legislation in any other State. That raises the concern, which the Attorney has acknowledged, that all of a sudden at midnight on the day that this Act is proclaimed, the Family Court will be able to interfere in the lives of de facto couples. Although it has long been recognised that there is a need to give the parties to a long-term de facto relationship easier access to the courts in cases in which there are inequities in the distribution of property, that has never been regarded as an unlimited and open-ended right to maintenance. I have no doubt that the fact that the Family Court will have the right to interfere in the distribution of property will put fear into the minds of some de facto couples; and the fact that spousal maintenance will potentially be unlimited and broader than anywhere else in Australia will send real shivers up the spines of de facto couples.

One of our major concerns about this legislation is the lack of consultation with the people who may be affected by it. Those people have no knowledge of this legislation. The Attorney has mentioned that the Department of Justice will undertake a major education campaign to let people know about this legislation. However, that is back-to-front. The education campaign should have been conducted in advance so that people could have let the Attorney know how they feel about the Family Court suddenly having the right to interfere in their lives, and about whether they are happy for a de facto partner to be given the broad and open-ended maintenance that the Attorney is proposing in this legislation

Mr McGINTY: As the member for Kingsley has rightly said, the Department of Justice will be undertaking a publicity campaign to advise people of their rights under this legislation. I have taken the opportunity of briefing the practitioners who work in this area, and I attended the family law practitioners conference and spoke at some length about the ins and outs of this Bill, in order to make sure that the information was in the public arena, at least to the extent that the legal practitioners would know. Some publicity has surrounded this legislation to date, and even the most ardent critics of it relatively correctly describe it as seeking to equate a de facto relationship with a marriage in all instances. One might want to argue about that definition. However, anyone who then thought about what it meant would think that if a person was entitled to spousal maintenance in a marriage, a person should be entitled to it in a de facto relationship.

With respect to child maintenance, the same rules already apply to de facto relationships and marriages and those arrangements are already in place. While I do not expect that the publicity campaign run by the Department of Justice will be enormously expensive and everyone in the State will know all the intricate details of this legislation, I expect that the legislation will fill the gaps in the remaining areas in which de facto relationships are treated differently from marriages. Already there is equality of treatment for the children of a de facto relationship and those of a marriage. The Government is proposing that the division of property be treated essentially the same. There are some differences, of course, because a de facto relationship does not require a certificate stating that people are in a de facto relationship. People in a de facto relationship must satisfy certain preliminary tests including a longer period of living together than that required of a marriage. We will get the

message out to the public that relationships, whether they be marriages or de facto relationships, will have consequences flowing from them. We must get that message out to the public, and I am confident that the Government can do that. I accept the member for Kingsley's criticism that it should have happened the other way around. I guess that is true of almost every piece of legislation, because until the reality starts to dawn people do not focus. It is a bit like the federal election campaign; people are starting to focus now on what will happen on Saturday, whereas six months ago there was not the same level of interest.

Mrs Edwardes: Perhaps the Government started to focus at question time?

Mr McGINTY: What we are talking about is getting people - generally it is the male, although not exclusively - to accept their responsibilities for the fact that their partner has a disability, and for the consequences of having children. The Government is saying to people that in those circumstances they have an obligation. I would have thought, particularly when we talk about children, that a person responsible for impregnating his wife or de facto partner must then deal with the consequences while the children are young and need to be cared for. In the same way that child maintenance is already provided for, when dealing with a former partner, and with what is required in order to support her, there is nothing more in that than saying that the person has certain responsibilities to which he should measure up. It might send a shiver down the spines of some people; however, I do not have a difficulty telling people to measure up to their responsibilities.

Mrs EDWARDES: I also do not have a problem with telling people very clearly to measure up to their responsibilities. However, proposed section 205ZE states that a person does not have to have a child in order to be supported by his or her de facto partner if that person is unable to support him or herself. This proposed section allows for the maintenance of a de facto partner for any adequate reason and -

> by reason of age, or physical or mental incapacity for appropriate gainful employment;

This Bill states that the court must take into account the criterion that after two years a relationship can be considered a de facto relationship. Therefore, a relationship may be in place for the short period of two years when all of a sudden someone will have a potential liability for the unlimited maintenance of his or her de facto partner "for any other adequate reason". The Government has not explained to the House how the court will determine or the criteria the court will take into account when considering "any other adequate reason" apart from having a child and therefore not being able to work; apart from the reason of age and not being able to work; and apart from having a physical or mental incapacity and therefore not being able to work. What else can the court take into account particularly if we are talking about the commitment to a legal marriage whereby there is a commitment to the partner? De facto relationships do not require a piece of paper to prove they exist and yet all of a sudden there is a liability for maintenance. The Attorney General has been talking in terms of men and women. However, de facto relationships also include same-sex couples. I have no doubt that there is considerable disquiet among some same-sex couples - as demonstrated by a couple that I have spoken to - as to the almost unlimited extent of this maintenance and the fact that it may expose them to a long-term liability. This is despite the fact that the Attorney General has said that in practice this does not happen. The Attorney General has said that in a marriage that is taken into account in the property settlement, but that is in the event that there is property to be settled. We indicated previously that there might not be property to be settled between the two, three or four parties who are being endorsed by this legislation. There is concern among those people who understand that there will be an unlimited maintenance liability for the de facto partner.

Mr McGINTY: The test applied under section 72 of the Family Law Act is -

> … is unable to support herself or himself adequately.

The member for Kingsley asked what sort of circumstances may arise other than looking after a child of the de facto relationship or some sort of disability. The circumstances which might arise include having a commitment to look after an elderly relative or a child of another relationship. Circumstances of that nature might well come into play if the duties and obligations upon people mean that they are not able to adequately look after themselves.

Mrs Edwardes: That has nothing to do with the de facto partner at all.

Mr McGINTY: It might well be that someone is looking after his or her former partner's parents or elderly relatives, or something of that nature. I think that is a more persuasive case to fit into paragraph (c) of proposed section 205ZE and the definition it contains. The most common circumstances are the two that I mentioned - looking after a young child or suffering from a disability.

I will clarify the situation in the other States. There is no allowance for spousal maintenance in South Australia and Victoria; they are in a position similar to that in Western Australia. Queensland does not allow for partner

maintenance or spousal maintenance; however, it allows for the court to consider prospective maintenance in a property adjustment. Spousal maintenance cannot be awarded in Queensland, but it is something that can be factored into the division of the property of a de facto relationship. In a number of other States and Territories, there is a limited right to maintenance. In the Northern Territory, New South Wales, the Australian Capital Territory and Tasmania there is a limited right to maintenance for a restricted time, and that is reflected in the model Bill which has been drawn up by the Attorneys General from around Australia.

Mrs Edwardes: Those wonderful wise men and women who you are now not observing.

Mr McGINTY: I am sure the member for Kingsley was one of those making a contribution to the formation of the model Bill at an earlier stage. Western Australia will be the only State or Territory in Australia to draw a direct parallel with the provisions of the Family Law Act.

Spousal maintenance is also awarded as a payment made for a period while a person is retraining; for example, if a person is retraining to go back into the work force. A number of cases are referred to, such as Ramsey and Ramsey, in which the wife was awarded a lump sum of $7 500 for accommodation while she was retraining as a teacher. That was a 1978 decision. In the 1979 case of Patterson and Patterson, the wife was awarded three months maintenance to enable her to find work. The court accepted that it was unreasonable to expect her to continue to work at the same school as the husband. In Thomas and Thomas, the wife was awarded a car to enable her to attend university. That will give some idea of the sorts of payments that are made. Payments are usually made on a short-term basis. A long-term order would generally be made only if there were a disability and the party had significant assets and the capacity to pay. Otherwise, it would be taken into account in the property distribution.

Dr WOOLLARD: I listened to the member for Kingsley's comments. The phrase "for any other adequate reason" seems very broad. The Attorney General gave an example of a family relationship. Why does he not narrow new section 205ZE(c) to provide that a party should pay only if the other party must care for a family member associated with the de facto relationship? Can he make the provision tighter?

Mr McGINTY: There are two reasons for the drafting: first, we are seeking to replicate the provisions of the Family Law Act, which is a body of law that is well known and understood; and, second, we want to ensure that the court has discretion in appropriate cases. For instance, in one of the cases to which I referred, a woman was awarded a car to enable her to go to university, not to help her look after a child or parent of the relationship or something of that nature. Those sorts of awards could be justified in some circumstances. The more we seek to limit the provision beyond that which the established law already provides, the greater chance there will be that injustices will be perpetrated.

Mrs EDWARDES: Proposed section 205ZF on page 58 deals with maintenance orders, and outlines the matters to be taken into account by the court when considering the proper maintenance of a de facto partner. It refers to age, health, income, property, care of the child and the like. Proposed subsection (3)(d) states -

> commitments of each of the de facto partners that are necessary to enable the partner to support -
>
> (i) himself or herself; and
>
> (ii) a child or another person that the party has a duty to maintain;

That other person for whom there is a duty to maintain could include a former spouse. Again, the spouse becomes just another party - somebody who is flicked aside and forgotten during the consideration of a de facto relationship that has potentially been in existence for a mere two years. This provision reflects the consequences of this Bill. Marriage, family and legal spouses will not have the same level of importance and status as will de facto relationships. That is one of the major concerns about this legislation, and it arises at every step.

The parties might need to maintain other people. I am not saying that a spouse is the only person the party has duty to maintain. However, that is probably the norm. Given the concern in the community, I would have thought that the spouse would be awarded formal recognition; that the spouse would be given a title other than "another person". One of the issues is that the term "third party" does not recognise or understand spousal entitlements - that is, entitlements of the "formal" spouse. It is reiterated at almost every point in this legislation that the spouse is just another party to be considered only if necessary.

Mr McGINTY: Proposed section 205ZF(3)(d) provides that the obligation or duty to maintain a former married spouse will not be affected by subsequent maintenance of a de facto partner. The legislation expressly provides that - I use the typical arrangement - any obligation to pay spousal maintenance to a former wife will be taken into account when determining the man's liability to pay maintenance to a subsequent de facto. Therefore, there will not be any impact on or diminution of the maintenance that is paid to the former wife. The former wife or

married partner is protected by ensuring that the courts take her into account when determining any subsequent liability. Otherwise, we would have the situation in which the court makes an order to maintain a de facto partner that is so onerous that the man cannot meet his obligations to his former wife. That would not be desirable.

Mrs Edwardes: Why does the legislation not refer to the spouse or former spouse? Why does it say "another person"?

Mr McGINTY: The provision is based on section 75 of the Family Law Act, which already applies. Generally speaking, it relates to someone who has, in a marriage sense, been through the mill twice. Any obligation to maintain a former wife would be taken into account when an order is made for maintenance of the second wife. We have sought to replicate the federal provision. I do not know whether "duty" will be construed to relate to only a legal duty; that is, subject to an order of the Family Court. One can envisage a raft of duties that may arise, such as the care of elderly relatives. The terms "former wife" or "former spouse" could limit the range of people to whom a duty is owed.

Mrs Edwardes: You could also include "another party".

Mr McGINTY: The Family Law Act does not specifically recognise the former spouse. The wording in this provision is the same as that which is in the Family Law Act.

Mrs Edwardes: That is the point. The Family Law Act deals only with marriages. The Government is introducing a new element - de facto couples - into the Family Court. We are the only State to do so. It is convenient for the Government to allow de facto applications in the Family Court.

Mr McGINTY: No other state Constitution allows it.

Mrs Edwardes: This Bill consistently downgrades the status of the spouse. The role, powers and obligations of the Family Court under the Family Law Act relate only to spouses. This Government is introducing a new status of de facto relationships to the detriment of the legal spouse. That is the community's concern. The Government is downgrading the status and the role of the married person to that of just another person.

Mr McGINTY: This provision does not downplay the rights of a former spouse. This provision cannot and will not impact on the rights of a former spouse. The former spouse has certain rights under the Family Law Act, and this legislation cannot interfere with those. This provision provides that the requirements under the Family Law Act must be taken into consideration. We do not want to impose a burden that is so great that a person cannot honour his existing obligations.

Mrs Edwardes: What is in a word?

Mr McGINTY: I hope the member is not suggesting this is a semantic debate.

Mrs Edwardes: It is an important point.

Mr McGINTY: I understand the member's point of view. We need to prescribe rights, and that is what we are seeking to do with this legislation. The prescription of those rights needs some clarification because it will be relied on in the future. The rights and obligations must be clearly defined. The member wants to include particular reference to the spouse or former spouse of a marriage. In our view, clarity is better achieved by our drafting of the Bill, which is based on the provisions of the Family Law Act.

I move -

> Page 60, line 7 - To insert after "agreement" the words "or former financial agreement".

Amendment put and passed.

Mrs EDWARDES: I refer the Attorney General to proposed section 205ZM, which deals with the cessation of de facto maintenance orders. Essentially, this amendment and previous amendments have been mechanical and technical provisions that cover how the court can deal with particular orders. Proposed section 205ZM(3) states -

> An order with respect to the maintenance of a de facto partner ceases to have effect on the marriage of the person unless in special circumstances a court otherwise orders.

Could the Attorney General tell us the exact circumstances referred to in that proposed subsection? What would occur if a person who is paid maintenance entered into a de facto relationship? How would that impact upon the maintenance order?

Mr McGINTY: Proposed section 205ZM is a replication of section 82 of the Family Law Act. Currently, if a divorced person who is the beneficiary of a spousal maintenance order remarries, that has the effect of cancelling automatically the spousal maintenance order. We have used that provision so that where there is a spousal maintenance order in favour of a de facto partner, if the de facto partner legally remarries he or she ceases to receive the benefit of that order. In other words, the order comes to an end. The member for Kingsley's point is that it leaves open the problem that when the beneficiary of a spousal maintenance order enters into a de facto relationship, nothing in this Act provides that that will cause the maintenance order to cease. The reason for that is the certainty of marriage is evidenced by a marriage certificate and the registration of the marriage. When a couple marry, it is known that they are in that type of relationship. However, the threshold test for a de facto relationship is when a couple have been in a relationship for two years. There is a definitional problem as to when a de facto relationship should disentitle a maintenance order.

A woman who was the beneficiary of a spousal maintenance order and who was unable to maintain herself might enter into a de facto relationship and find that her economic circumstances have changed. The former spouse paying the maintenance could then go back to the Family Court and seek a cancellation or an adjustment of the obligation to pay spousal maintenance because the woman had entered into a de facto relationship. We could not legislate for that situation with the same certainty as we can with marriage because of the uncertainty that can surround the entry into a de facto relationship, particularly in its early stages. It would be possible to provide that once someone had been in a de facto relationship for two years that would have the effect of cancelling a maintenance order. I am sure that circumstances would arise well before the two years were up that would warrant the cancellation of that order if a former spouse were living in a new de facto relationship. If we made a provision, that might give rise to the presumption that the de facto couple must wait for two years. We have left that issue to be dealt with on application to the Family Court. If a former partner who received spousal maintenance entered into a de facto relationship, most people would go back to the Family Court and claim that he or she should no longer be obliged to maintain that former partner. It is not something that we could easily legislate for; therefore, we replicated the family law provisions. There is still provision to go back to the Family Court and argue that changed circumstances warrant the reconsideration or the cancellation of the spousal maintenance order. Nonetheless, I accept it is something that leaves this legislation less than crystal clear.

Mrs EDWARDES: The issue, of course, relates to the definition of de facto relationships. The legal profession is concerned that the definition is too wide. Lawyers have referred to the situation as being a lawyer's dream - not that they support that - because it will lead to a large number of applications to the court. They would prefer the definition to be far tighter in order to give a greater level of certainty. The current definition does not lead them to believe that there is a proper level of certainty, and they believe that the definition has been left open to interpretation.

For instance, when one partner who receives maintenance enters into a de facto relationship, when do they have a de facto relationship? It has been said that if a person finds himself in changed economic circumstances, that is likely to lead to the order being cancelled by the court. Of course, the issue the court must determine is whether the person's financial circumstances have changed. How will it determine the definition of a de facto relationship? Will it be limited to the definition of the relationship having lasted for two years? Is there then any certainty for either of those people? Essentially, it may not be the day-to-day matters that come before the court in which one party has substantial assets. This may very well be a provision that comes before the courts more frequently than it should.

Under proposed section 205ZM(4), it is the duty of the person for whose benefit the order was made to inform without delay the person liable to make payments under the order of the date of the marriage. Again, if people enter into de facto relationships, there is no obligation upon them to inform the court or the person who is making the payments that their economic circumstances have changed and that they no longer require the maintenance in order to support themselves. As such, de facto couples will not thank the Government for this, particularly when one looks at what is happening around Australia, as was outlined by the Attorney General; that is, when there is no right for maintenance, there is a limited right for maintenance or when maintenance is taken as payment in a property settlement. It is far broader in Western Australia than anywhere else in Australia. I do not think people will thank the Government for that in the future.

Mr McGINTY: The obligation to pay spousal maintenance arises from proposed section 205ZE, which in part states -

> . . . if, and only if, that other party is unable to support herself or himself . . .

It is not so much a question of -

Mrs Edwardes: It is not my de facto; it is my cleaning lady who comes in every week. The arguments that will arise from the definition of a de facto relationship will allow people to get around that. There is no finality to

this. Because we are not dealing with a marriage or a piece of paper, there is no finality for couples who find themselves in this situation.

Mr McGINTY: That is right. If people enter into a legal marriage, there is finality and certainty, and we can prescribe that in the legislation. Bearing in mind the myriad circumstances that can attend to a de facto relationship, that relationship is not capable of that sort of prescription. To say that subsequently entering into a de facto relationship should automatically result in that cancellation would depend on the nature of that relationship, and the person paying the spousal maintenance could make an application to reduce or cancel the order based upon the new circumstances of the spouse, which could very much go to the ability of the other party to support himself or herself. The test in a marriage - it is the test that would be applied in a de facto relationship - is interpreted in the 1981 case of Eliades v Eliades. The judge in that case said that the test of ability to support oneself is not identical to the test of whether one is in need, but means whether the applicant is in a position to finance himself or herself from his or her own resources; that is to say, the test is whether by reason of earning capacity, by reason of capital or other resources of income, which have accrued independently to the applicant, the applicant is in a position to look after herself. That is the way in which that has been interpreted by the courts. The same sort of test would be applied to a de facto relationship under this legislation and would be based on a marriage as in the Family Law Act.

Mrs EDWARDES: Division 3 on page 74 deals with financial agreements. I have previously expressed in this debate my concern with the legal status of financial agreements. Has the Attorney General followed that up and has he received any legal advice on the legal status of financial agreements? Proposed section 205ZP refers to financial agreements entered into before beginning a de facto relationship by couples who already have a financial agreement and by those who might like to enter into a financial agreement once this legislation is in place and who have not already done so. Given the concerns of members of the legal profession about their level of professional indemnity - it would be far too onerous for them - can the Attorney General provide an update on the legal status of financial agreements?

Mr McGINTY: The law council initially indicated its support for provisions relating to financial agreements going into the Family Law Act. Subsequently, it has revised that view. Currently, the view that it has expressed to its members is that this is simply a way of transferring the obligations of other people to a lawyer. It has advised its members not to sign a certificate that would attach to a financial agreement. As I understand it, that is the general view taken by most lawyers; that is, they do not want liability transferred to themselves in those circumstances.

I have been told that discussions, which are in abeyance during the federal election campaign, have been taking place between the legal profession and the Commonwealth Government, with a view to perhaps amending the Family Law Act. I do not know where that might end up. If amendments are made to the Family Law Act, we would seek to replicate those in this legislation in exactly the same way as amendments to the federal child support legislation are replicated in the state legislation. In future, any amendments dealing with de factos that are made to the Family Law Act will need to be replicated in the state legislation. It is an unsatisfactory arrangement at the moment, because of the legal profession's black ban on signing financial agreements. The signature of a lawyer is an essential element of financial agreements, whether they are entered into before, during or after a marriage or a de facto relationship. As such, they are not working in a marriage at the moment. That is being progressed. However, as I said in response to the member for Alfred Cove a few minutes ago, we are circumscribed in this debate by the existing provisions of the Family Law Act. Our ability to break out of that would mean that we would provide more beneficial circumstances or conditions to de facto relationships than we would to marriages. The last thing that we want to do is to promote a de facto relationship as being superior, easier or more beneficial in terms of the legal incidents that attach to it. We have sought to replicate the provisions of the Family Law Act as they relate to marriages in the knowledge, and perhaps even in the expectation or hope, that that might be amended in the not-too-distant future to add life to the financial agreements, which will become an increasing part of relationships, the regulation of property and the assets of relationships in the future.

Mrs EDWARDES: A couple of weeks ago I raised the issue of the education campaign that the Government will take out to the community, particularly to those upon whom this legislation will have the most impact if they were to enter into a financial agreement. What will the Government say if, for instance, the federal Government does not agree to an amendment to the Family Law Act to the signing-off provisions by the legal profession, which the legal profession believes has enormous repercussions? Essentially, any agreement that is entered into, and which is likely to be relied upon by either of those parties - that is, if they can find a lawyer to help them draft an agreement - will have no standing until it is certified. What will the Government tell de facto couples will be their obligations under a financial agreement? Have they been able to decide for themselves how they want the property distributed, or will the Family Court be able to easily set that aside? The concern of the legal

profession - there will always be concerns - is that no-one can look into a crystal ball and determine everything that is likely to happen in the future. To determine whether the agreement is adequate, issues such as whether the couple will have children, how long the relationship will continue, etc must be taken into account. That is why the legal profession regards the provisions of the Act as being particularly onerous on solicitors.

How will the Government tell people that, if they wish to determine matters for themselves - which is essentially what is being proposed, not only for marriage but also for de facto couples - they can now enter into a financial agreement themselves? They cannot be told that until this issue has been resolved. One of the points I raised two weeks ago was that the Government might like to defer the proclamation or the implementation of this legislation to allow those de facto couples to reach such an agreement. The very first piece of de facto legislation, passed by New South Wales, recommended a very simple financial agreement, which people could do themselves. Given the retrospective nature of this legislation, applying as it does to all the relationships that will still be in existence at the time this legislation is proclaimed, those couples who had not had the opportunity to enter into their own financial agreement face the likelihood of such an agreement being set aside by the court; those who had not been able to get a solicitor to assist them in drawing up an agreement will be left in a legal limbo. More to the point, there is almost a level of misrepresentation here - that they may enter into such an agreement, when in fact the agreement itself is not likely to have any standing.

Mr PENDAL: I wish to pursue what may be similar concerns to those of the member for Kingsley, which I raised in the course of both the second reading debate and the consideration in detail stage. I would like some clarification on some of the terms we are dealing with. We are told that a week is a long time in politics, and if that is true, then 12 days ago, when the House last dealt with this legislation, is like an eternity. I thought I had a clear understanding 12 days ago about financial agreements, but I am finding now that I have less of an understanding. My understanding, from the minister's second reading speech, was that, if a couple living in a de facto relationship chose to enter into a financial agreement, and had the financial agreement certified, that couple could effectively opt out of everything that this legislation involves. As one who opposes this legislation, I supported that notion, because, to repeat what I said in another place 10 or 12 years ago, it would make sense, if people were entering into de facto relationships, to enter into a simple partnership anyway. That was clear, even to people like me, a decade ago. A decade down the track - and I think these provisions were put into the federal statute only within the past 12 months - we have arrived at this notion of a financial agreement.

The Attorney General, I thought, made it clear to us in the second reading debate that couples could opt out of the provisions of this legislation by entering into their own financial agreements, then having them registered by the family solicitor. I want clarification on that matter, because it seems to me to relate at least partly to some of the concerns raised by the member for Kingsley. Depending on what is said by the Attorney General, I may wish to pursue a couple of further points of clarification.

Mr McGINTY: The member for South Perth is perfectly correct, so his memory is not fading with the years. What he referred to as having been mentioned in the second reading debate is correct. When the House was last debating this Bill, members focused on former financial agreements; that is, agreements in place at the date of proclamation of the legislation. That was the stage of the Bill the House was considering at that point. A former financial agreement is simply an agreement between the parties as to the disposition of their property in the event of a breakdown of their relationship. Such an agreement can be entered into before, during or after the relationship, and it has minimal procedural requirements attached to it. The issue the member for Kingsley is now raising refers to the future. After the Bill is passed, and becomes an Act, procedural requirements of the Act must be complied with in respect of a financial agreement. The key procedural requirement is revealed on pages 78 and 79 of the Bill, in proposed section 205ZU, which talks about when a financial agreement becomes binding, and spells out the requirements of such an agreement. The agreement must be signed by both parties. In particular, I refer to proposed paragraph (c), which refers to the issue raised now by the member for Kingsley - that, after this Act is proclaimed, a signed certificate from the lawyer providing the legal advice must be annexed to the agreement. At the moment lawyers have a black ban on doing that. By and large, they are refusing to do it, because it means liability is being transferred from the parties to the lawyers for being professionally negligent - for instance, for failing to ensure complete disclosure of every element of the assets owned, or something of that nature. If this Bill were to come into effect on 1 January - this is hypothetical, as I do not know when it will be proclaimed - any agreement signed between two parties up until 31 December is legally valid, even though it would not have a certificate from a lawyer attached to it. Any agreement signed after 1 January will require a lawyer's certificate to be considered valid. If a lawyer cannot be found who is prepared to sign the agreement, the agreement cannot be entered into. That is the problem the member for Kingsley is referring to. Discussions are taking place at the federal level, between the legal profession and the federal Attorney General, in an attempt to resolve that issue, such that financial agreements can come into play. That might result in amendments to the federal Act, which the Government would seek to replicate in Western

Australia. There is a bit of a glitch in the system, but the member for South Perth is perfectly correct in his broader understanding of the issue.

Mr PENDAL: I understood the member for Kingsley to be speaking in terms of the financial agreements which, even after being certified, could be set aside by the court. I think she used the word "intervened". I am seeking some guidance on whether, if it is accurate that the Family Court of Western Australia can intervene to set aside or vary a financial agreement, that can be said to be a process of opting out in the first place. My understanding from the second reading debate was that couples who did not wish to be covered by the provisions of this legislation could enter into their own financial agreement and have it certified by the lawyer. They would then be on their own, because they had maturely taken advice at law. If that is true, how can a system be put in place that would allow a court to intervene when a provision is made for opting out in the first place? It does not sound to me as if that opt-out procedure exists in the first place, and even if it does, I am not sure that a lot hangs on it. I keep coming back to the concern - my philosophy, if members like - that de facto relationships are the business of the people in those relationships. They should not be coming to me, as a member of the Legislature, to ask for those relationships to be entrenched at law. What is the solution? In my view, the solution has always been for de facto couples to enter into a legal agreement through a family lawyer. Lo and behold, a decade has gone by and that is what the Government is now suggesting. To some extent, that is what we should be doing, and no more. However, we are doing more than that, but I will not go down that path again. I am puzzled by the notion that a person can opt out of the provisions of this Bill by signing a financial agreement, only to learn at this late stage, if the member for Kingsley is correct, that the Family Court of Western Australia can intervene and vary those agreements. Is that correct? If so, what does that say about the so-called opting out provision?

Mr McGINTY: There are limited circumstances in which the court can strike down an agreement. When we last discussed this point, we used the example of a man who had $200 million and who set out in a prenuptial agreement that he would keep $199 million and his wife would be given $1 million. That might not be a fair division of the property, but if the parties had agreed to it - after they had received independent advice, had full knowledge and disclosure of the circumstances, and had the agreement certified by a lawyer - it could not be set aside. A plea of, "I do not think it is fair any more, Your Honour," is not acceptable. I refer the member for South Perth to pages 81 and 82 of the Bill. Proposed section 205ZX lists the circumstances in which a court can set aside a financial agreement. They are the reasons a court could strike down a contract, with one exception, which I will deal with in a minute.

Mr Pendal: Or any other court.

Mr McGINTY: Any court could strike down a normal contract on the grounds listed in that proposed section. Paragraph (a) allows for a contract to be set aside if it were obtained by fraud. Under paragraph (b), it would be if the agreement were void, voidable or unenforceable. Paragraph (c) basically relates to frustration of the contract because it is impracticable. I will come back to paragraph (d) in a minute. Paragraph (e) covers whether an agreement is unconscionable. Any contract entered into in any of those circumstances could be struck down - it would not be a valid contract. The one exception to this general rule is contained in paragraph (d), which is a justice-type provision that relates to a material change in circumstances. This relates only to a child born after a financial agreement is in place. If the child or a party to the agreement would suffer hardship because of the provisions of the agreement, the agreement could be set aside. I can envisage a child radically changing the circumstances of a relationship. What might have been fair in the absence of any children might become unfair once a child arrives on the scene. In those circumstances, and only in those circumstances, a court can vary an agreement or strike it down. In the normal run of events, two people can come together and sign a financial agreement. It is not a question of whether the judge thinks it is fair. If they go through the procedures and agree, the financial agreement becomes binding. That is the opting out provision. I am relaxed about that because it is what one would expect in the normal operation of contract law. It does not appear that it is up to the court's discretion to strike down an agreement. Even if it would have been better to arrange an agreement in another way, that is not the way it operates. There is a true opting out provision, provided certain safeguards are met.

Mr PENDAL: I thank the Attorney General for that information, which clarifies the point for me. I will retread briefly to ensure that I have understood what the Attorney General has said. I will then go on to another point raised briefly by the member for Kingsley today and by me some weeks ago, when we discussed the availability of public education or pamphlets on this issue. In response to an earlier question, the Attorney General said that there would be the potential, under the new system, for couples entering into a de facto relationship to opt out. Therefore, they would be free of the Family Court of Western Australia. The only times a financial agreement certified by a family lawyer would come under the purview of the Family Court of Western Australia would be if it were unconscionable or obtained under duress, or because of any other factor that makes a contract unlawful. I am now satisfied with that.

Mr McGinty: Plus the provision in relation to changed circumstances and a child.

Mr PENDAL: I understand that; it is specific. The Government needs to provide a message from this Parliament, because it is one thing to enact a law and another to apply, promote or not promote it, as the case may be. Perhaps the Attorney General could make a commitment to have his advisers, the ministry and the Family Court of Western Australia provide, by way of a ministerial statement, a considered proposition that could be taken into account in the production of literature for young couples in the future. It seems to me that a clear choice will be available, mainly for young, impressionable couples. They need to know that there are two routes down which they can pass. One route is that they can wander into a de facto relationship and not think about it too much. Once the magical two years has passed and they realise that they are in trouble after three, four or five years, they will come under this Act. Another viable option for them, which they could find out about by way of public education, would be to take advantage of the opting out provisions; that is, they would be free to enter into a financial agreement that could be certified. Provided that it ran the test of paragraphs (a) to (e) of proposed section 205ZX, it would stand the test of time. I hope the Attorney General and the House understand what I am driving at. It seems to me that a young couple could pass down one route and take no responsibility for their lifestyle, whereas if the couple went down the other, they would accept a heavy measure of responsibility for their lifestyle. We should perhaps be doing everything we can to keep people away from the judiciary, whether it is the Family, Magistrates, District or other courts. One reason is that once a person gets a toe in the door of a court, it will cost him money. There seems to be a lot going for it. The Government could take that message out of this Chamber. There seems to be a good opportunity to come back to the Parliament with a considered ministerial statement that would outline what is available by way of that second, opting out option. That would allow people to genuinely opt out of the system, but to still opt in to the responsibilities they embrace when they enter into non-marriage relationships.

Mr McGINTY: I am happy to give thought to promoting that as part of the education program and to give thought to a ministerial statement at the time of proclamation, provided the legislation is passed by the Parliament. We should make sure it is something people are very aware of and that they have options available to them. People have an option of whether they enter into a marriage or a de facto relationship. The opting out financial provision is available to both. I will take the member's point of view on board as I see it as being a very important part in alerting people to their liabilities for spousal maintenance and property division as a result of this legislation. People should be alerted to the options of how they organise their affairs. Happy litigants rarely exist. The more we can divert people toward alternative dispute resolution or better preventive measures to avoid ending up in court, the better off is society.

Mr PENDAL: I thank the Attorney General for that. I suspect that members on the other side of the House who have not expressed an opinion during this debate take the view that marriage is not only a serious matter, but it also reflects the widest view of our western culture. It is the preferred option for people to create families. That is not just me expressing a pious hope; it is reflected in the figures given by the Attorney General: 88 per cent of couples choose not to be in de facto relationships. The remaining 12 per cent choose to. Of those who choose to be in de facto relationships, many enter into formal marriage at a later stage of the relationship. It is a movable feast. It is a reflection of values, albeit a bit mixed up or secularised. It may be a funny way for society to run these days, but most people still reflect in their lifestyles the notion that a formal marriage is the best way to go. Having said that, there should be no reluctance by the Government or the officers of the Family Court to signal to young people, as they enter into a relationship, that there are serious things for them to consider. Most young people entering a de facto relationship do not consider such serious things. They may consider them as time goes by. After three or four years into a relationship, it may start to occur to them when they pay the rent or when they buy a new car. It will happen when they realise they are paying jointly, although it may be in the name of only one partner. It is a growing process.

We could ask the Government to put its money where its mouth is through an education program informing young people that a de facto relationship is not a marriage. They should be told that they do not have the protection at law as if they were entering into a marriage. They may want to be in a formal de facto relationship, in which case, they will get protection under the law that is about to be passed. They may wish to know about a third option, which is implicit in the second one. They can sign a financial agreement and have it certified. A court cannot dislodge the agreement other than if it is unconscionable, harsh, or falls within the categories listed at pages 81 and 82 of the Bill. It would send a very clear signal to people to be conscious of what they do. It would send a clear signal about what the Government believes to be the case - although I am a bit doubtful about it - and that it is not trying to promote de facto forms of relationship over and above formalised contractual marriages. A lot of good can come from this. It can be an indicative tool to young people during a period of their lives when they are not worrying too much about the intricacies and legalities of the relationship and are more inclined to get on with their new relationship. I commend these notions to the Attorney General as they can produce some positive results from the Bill.

Mrs EDWARDES: I support the comments made by the member for South Perth. We need more than just a ministerial statement on the eve of the proclamation. The education and awareness program that the Ministry of Justice will put in place must be for a period of some months before the proclamation. I want to know what length of time the Attorney General has in mind for the education and awareness program.

Three propositions exist. The first relates to an agreement entered into prior to proclamation of this legislation and made prior to the Family Law Act being changed. Do such agreements requires certification? Some de facto couples may have been in a relationship for many years and have an agreement. They believe that an agreement would protect them in civil courts on contractual matters. It would have been all that was available to them when they entered into an agreement. Now that there is a requirement for certification, what is the legal status of such agreements? What is the legal status of agreements entered into prior to proclamation but made after the enactment of the Family Law Act, and which require certification under that Act? Do such agreements have the same legal status as those entered into 10 years ago or is there a difference? At the moment, couples cannot get a lawyer to certify agreements. Couples may want to enter into an agreement and may have had one drawn up because, due to the education campaign, they decided that was what they wanted to do and they do not want the Family Court interfering in their lives. What is the legal status of such agreements? After the legislation is proclaimed, what is the legal status of any agreement entered into, given the fact that lawyers cannot certify such agreements? This is all before any potential changes to the Family Law Act and any further changes made through catch-up legislation by this Parliament. These are reasons that the Government may defer proclamation of the legislation, given the important status of financial agreements for de facto relationships. People in de facto relationships do not want the Family Court interfering in their lives. They often want to determine their own distribution of property, but cannot do so. There must be the ability for opt-out provisions to be effective. Education and awareness campaigns should be put in place but the legislation should not be proclaimed - given its retrospectivity - until such time as the issue of certification of financial agreements by lawyers has been resolved.

Mr McGINTY: The member for Kingsley outlined three circumstances that could occur. Firstly, if a financial agreement has been entered into and exists today and, secondly, if a financial agreement has been entered into between today and the date of proclamation, the same rules will apply; that is, no certification by a lawyer is required. An agreement must be entered into and signed by the parties. That will deal conclusively with any form of financial agreement. They will be legally enforceable.

Mrs Edwardes: Will the minister refer to the proposed section that provides for no requirement for a lawyer to certify an agreement?

Mr McGINTY: Under the definition of "former financial agreement" at page 51, that was amended and now provides that a former financial agreement means an agreement made before the commencement of this part between de facto partners with respect to any of the matters listed, and it lists a number of paragraphs. Proposed 205ZU, headed "When financial agreements are binding - FLAs.90G" at page 79 will be amended as follows -

> A former financial agreement is binding on the parties to the agreement if, and only if -
>
> (a) the agreement is signed by both parties; and
>
> (b) the agreement has not been terminated and has not been set aside by a court.

Mrs Edwardes: That will give credence to the very long education period and will allow people the opportunity to enter into agreements prior to proclamation, particularly if people cannot get certification.

Mr McGINTY: It is recognition that this legislation should not overturn contracts between people. It will be given full effect. I understand they are not all that common, although there will be a number of them.

Mrs Edwardes: I am sure that once people receive the pamphlet in the mail -

Mr McGINTY: They may become more common.

Mrs EDWARDES: Yes. Although they are not used as a matter of course, I am sure they will be used more, and I hope they will be. I agree with the member for South Perth that they should be encouraged. When the Administration Act is amended the message will be that people should not wait for the Administration Act to determine their affairs, but should make a will. In this situation they should not wait for the Family Court to interfere in their lives; they should draw up their own financial agreements.

The point I am making is that once this Bill is proclaimed, a lawyer will not certify an agreement; therefore, a spouse will be unable to enter into a financial agreement, as I understand the approach adopted by family legal practitioners. The proclamation of this Bill, therefore, should be deferred to allow people to determine their financial arrangements, which is effectively the aim around Australia.

Mr McGINTY: The third circumstance the member for Kingsley referred to was that a lawyer will not certify a financial agreement after the date of proclamation. That is a problem as things stand at the moment.

The Standing Committee of Attorneys General was due to meet in Perth last month. It was cancelled because of the inconsiderate action of John Howard in calling a federal election, and the collapse of Ansett Australia, which meant a number of people could not come here. In my mind, because of this legislation, it is assuming a greater level of importance in resolving the question with the Law Council of Australia about what is necessary to amend the federal Act. The Attorneys General from around Australia will reconvene here in Perth in February and this matter will be on the agenda. I hope we can press whoever is the federal Attorney General after Saturday to treat as a matter of priority the need to give people a measure of certainty that they can enter into a financial agreement and have a lawyer certify it.

I am told that in Canberra lawyers are certifying these agreements. In Western Australia we are not aware of any being certified by lawyers. That is not to say they do not exist.

Mrs Edwardes: It might be because of the legal indemnity scheme.

Mr McGINTY: That could be the reason; nonetheless, we are concerned only about the options that will be open to the people of Western Australia. The real problem is the effect of former financial agreements on the immediate future because they are in existence today or will be entered into over the next few months. I will give the matter priority. If the Bill is passed by the Parliament we must consider the proclamation date and the other issues referred to by the member for Kingsley.

Mrs Edwardes: How long do you expect the education process to take?

Mr McGINTY: The most honest answer I can give is that I do not know. A range of people have come to see me and asked me to get the legislation passed and proclaimed quickly because relationships are breaking down and they must hold them together or have them break down before the appointed date. I would not like to see this Bill delayed for a great length of time. The community is being made aware courtesy of this debate. We must send out the pamphlets and ensure that everyone is aware of the changed liabilities and obligations. I cannot be specific at this stage. We must wait and see what progress is made in the upper House. Given that Parliament will sit for only a few more weeks this year, if the Bill is not through the upper House by Christmas it will be well into next year. I move -

Page 75, line 15 - To insert after "subsection" the passage ", or former financial agreement,".

The amendment is self-explanatory.

Amendment put and passed.

Mr McGINTY: I move -

Page 76, line 20 - To delete "or".

This amendment is self explanatory.

Amendment put and passed.

Mr McGINTY: I move -

Page 76, line 22 - To insert after "(1)" the passage ", or a former financial agreement".

This amendment is of a drafting nature and is self explanatory.

Amendment put and passed.

Mr McGINTY: I move -

Page 77, line 18 - To delete "or".

Amendment put and passed.

Mr McGINTY: I move -

Page 77, line 20 - To insert after "205ZQ(1)" the passage ", or a former financial agreement".

Amendment put and passed.

Mr McGINTY: I move -

Page 78, line 22 - To insert after "**agreements**" the words "**and former financial agreements**".

Amendment put and passed.

Mr McGINTY: I move -

Page 79, after line 25 - To insert the following -

(2) A former financial agreement is binding on the parties to the agreement if, and only if -

(a) the agreement is signed by both parties; and

(b) the agreement has not been terminated and has not been set aside by a court.

This amendment will clarify the fact that financial agreements that are in existence at the date of proclamation need only be signed by both parties in order to have legal effect.

Amendment put and passed.

Mr McGINTY: I move -

Page 79, line 27 - To insert after "agreement" the passage ", or a former financial agreement,".

Amendment put and passed.

Mrs EDWARDES: We have been talking about the drawing up of financial agreements. Proposed section 205ZW deals with the termination of financial agreements and former financial agreements and provides that the parties to a financial agreement or a former financial agreement may terminate the agreement only by including a provision to that effect in another financial agreement, or by making a written agreement - a termination agreement - to that effect. Proposed subsection (2) provides that a termination agreement is binding on the parties only if, in paragraph (a), it has been signed by both parties to the agreement; and, in paragraph (b), independent advice has been obtained from a legal practitioner as to the effect of the agreement on the rights of that party; whether it is to the advantage, financially or otherwise, of that party to make the agreement; whether it is prudent for that party to make the agreement; and whether the provisions of the agreement are fair and reasonable. Proposed subsection (3) provides -

> A court may, on an application by a person who was a party to the financial agreement, or the former financial agreement, that has been terminated, or by any other interested person, make such order or orders . . . as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that agreement and any other interested persons.

Under what circumstances will a party be able to make such an application to the court? How will that apply?

Mr McGINTY: Proposed section 205ZW provides that a financial agreement may be terminated only by an agreement in writing that has been certified by a lawyer. That is contained in paragraphs (a) and (b) of proposed subsection (2). Proposed subsection (3) states -

> A court may, on an application by a person who was a party to the financial agreement, or the former financial agreement, that has been terminated -

and these are the key words -

> or by any other interested person, make such order or orders . . . as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that agreement and any other interested persons.

A person who was a party to an earlier financial agreement may find that his or her interests are jeopardised by a subsequent financial agreement, because that person will be a third party to that subsequent financial agreement. I am advised that this provision is designed to give a third party whose interests may be impinged upon by a subsequent financial agreement the right to say, "What about my interests?".

Sitting suspended from 6.00 to 7.00 pm

Mrs EDWARDES: I stand to allow the Attorney General to continue his remarks about proposed section 205ZW(3).

Mr McGINTY: Proposed section 205ZW(3) is taken straight from the commonwealth Family Law Act. That is the reasoning -

Mrs Edwardes: You cannot blame it for everything.

Mr McGINTY: The member did when she was in government.

It is unsatisfactory that I cannot give a more detailed explanation. I can indicate only that the provision gives third parties with an interest in property that might be the subject of a financial agreement or former financial agreement the power to protect their interests. I cannot take it much further than that.

Mrs EDWARDES: I understand the provision to mean that a party to an agreement - a de facto person - can make an application to the court. "Any other interested persons" means any other people with an interest in the property that is the subject of the terminated agreement. That could include the legal spouse.

Mr McGinty: Yes. It could include a child who has an equitable interest in the property through a will or some other arrangement.

Mrs EDWARDES: As the Attorney General said outside the Chamber, a person with an interest in property would want to protect that interest. That would be particularly so if, under the Bill as proposed, a de facto couple could after two years make an application for distribution of some aspects of that property.

Where does the spouse fit into a de facto couple's agreement about the break-up of the property? The spouse is the one who has been left behind. How does a legal spouse learn that a de facto couple has entered into a financial agreement involving property in which he or she has an interest? That probably will not matter until something happens to that property. Previous provisions of the Bill deal with applications relating to injunctions and other interlocutory procedures. If anything were to happen to the property, the spouse would have the ability to go to the court. The real issue is that of notification. The spouse has again been forgotten and left out of the picture. This is not a problem with marriages. It becomes a problem with the recognition this Bill gives to multiple relationships. As is the case elsewhere in the Bill, "any other interested persons" could include the spouse, or even the former spouse if a property settlement has not taken place. The spouse becomes one of the others. He or she is forgotten about and ignored by this legislation.

I am not sure what is the purpose of this proposed section and how it will be applied. It appears that everything that is made possible by this section is possible through other sections of the Bill.

Mr McGINTY: I have emphasised that this provision allows third parties to preserve their rights if they would be adversely affected by the termination of a financial agreement. The proposed section gives the court power to entertain an application by someone who was a party to a terminated financial agreement, or any other interested person; and to make such orders as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that agreement, or any other interested party. This provision is taken from the commonwealth legislation, and is designed to deal with the termination of a financial agreement that does not adequately preserve the equitable or legal interests of the parties.

This provision will give the court power to intervene in a situation in which a financial agreement is terminated and one party moves to sell the property. The primary function of the provision is to preserve or adjust the parties' rights under the agreement. The combination of third party interests and capacity to issue an order will preserve the rights under a terminated financial agreement. That seems to be the way in which the provision will operate. This issue will arise only after a financial agreement is terminated. The provision is therefore designed to preserve the rights of the former spouse or de facto partner who was a party to that financial agreement. I suspect that the provision will provide the court power to act in that way.

Other interested parties could include a family company, which is not an individual. This proposed section would give it rights. It seems to be a catch-all provision. The commentary on the financial agreements under the Family Law Act states that the issue of who is an interested person is likely to arise if the person tries to use a financial agreement to protect assets prior to one of the parties becoming bankrupt. We need some sort of overall power to deal with those situations.

Mrs EDWARDES: We have essentially come to the end of debate on clause 45. Prior to our moving and voting on clause 45, I point out that a number of issues of concern have been raised throughout the debate about its provisions. We will have the opportunity to debate some of those concerns upon recommittal of the Bill.

Clause, as amended, put and passed.

Clauses 46 to 73 put and passed.

Schedule 1 -

Mrs EDWARDES: This is a major part of the Family Court Amendment Bill. The fact that it is titled "Schedule 1 - Consequential and related amendments" does not reflect the importance of the schedule. The schedule deals with the Administration Act, which provides for the entitlements of an intestate. If someone dies without a will, automatic provisions come into play to deal with the distribution of the estate. There are a number of

propositions in the Act, such as 50 per cent going to the remaining spouse and 50 per cent being divided between the children. If there is no spouse, provision is made for other family members, including parents, brothers and sisters and the like. I do not propose to go through the Administration Act.

The schedule provides for a very simple distribution for people who are left behind after a spouse has passed away without leaving a will. Essentially, the amendments should provide for a similarly simple process for people in a de facto relationship; that is, a distribution of property which takes into account all the respective interests but which makes it certain. Although I did a little probate and a little family law in my time as a practising solicitor, the people to whom I have spoken about this schedule have had years of experience in both family and probate law. Their view is that the whole schedule should be withdrawn from the Bill at this time and sent back to the probate lawyers to be redrafted. The reason they say that is that it will not provide consistency in the administration, and it certainly will not provide certainty for people who might think that they have some certainty by virtue of this legislation. The lawyers believe that, apart from the rest of the Bill, schedule 1 will provide a great deal of income for them. I do not believe that the intention of the Attorney General is to look after lawyers as such. Indeed, I have no doubt that his intention was that the schedule provide some certainty and ease of access in the administration of an estate when partners in a de facto relationship find themselves in a similar relationship, and when a partner passes away intestate.

The Bill, as it is drafted, provides that the remaining de facto partner, or multiple de facto partners, would get the legal spouse's share. That is not very fair at all. The Attorney General's amendment, which is on the Notice Paper, provides that the 50 per cent that the legal spouse would get under the Administration Act would be split 50-50 between the spouse and the de facto. If there were more than one de facto partner, 50 per cent of the 50 per cent would be split equally between the de facto partners who are left behind. That is not very fair either. The Attorney General wants to provide something that is very simple and fair, and I have no doubt that that is what he is after.

Mr BARNETT: This is an incredibly important issue. It is not very fair if partners are to get 50 per cent of 50 per cent of 50 per cent. Can the member explain it?

Mrs EDWARDES: It is an issue of fairness. If two people have been married for 30 years, and they may or may not have been divorced - there has definitely been no property settlement - and one spouse has entered into a de facto relationship with another partner, and they have been together for only two years before the spouse dies without a will, the de facto partner of two years would get 50 per cent of the property of the wife of 30 years. The wife has contributed to the property for 30 years; not the de facto partner, who has been on the scene for only two years. Why should the de facto partner, who has been on the scene for two years, get 50 per cent of what the wife should get? It is still not fair. Let us turn it around. Let us say that two people have been married for only five years and one partner had a de facto relationship for 30 years. Again, it is not equitable for the de facto to get 50 per cent of what the wife would receive, because the wife has contributed to the assets of that estate for only five years; the rest has come from the de facto partner of 30 years. Again, it is not fair. In terms of equity, it is totally wrong. The fact that it was originally intended to leave the wife out of the picture altogether shows that the legislation was hastily drafted and the wife was forgotten. Given the ongoing debate in Victoria, I am surprised that the issue was not picked up earlier.

The definition of de facto relationship will ensure that lawyers live a long time in comfort. We have talked about the lack of certainty provided by that definition. It becomes even more uncertain when it is applied to the Administration Act, because there is only one de facto partner. Only one party will determine the evidence that is now known to be put before the court in establishing a de facto relationship and whether or not there should be a distribution under the Administration Act, according to the amendments that will be made by this Bill. As we pointed out in debate, there is no level of certainty on whether there is or has been a sexual relationship between the partners or whether they are living together, which is a major issue. The definition says that it is a relationship between two persons who live together; yet one of the items that the court takes into account, but which is not essential, is whether the partners are living together. That is a major issue to determine when there is only one surviving party. Other matters, such as rent and where the mail was sent could be raised, and issues that would be regarded as evidence that supports such a relationship could be highlighted. What if there is no such evidence, and the parties believed that this Bill protected them? It does not, because the way the definition has been drafted, and the way the Administration Act is currently drafted, picking up on that definition certainly does not provide that level of certainty. It is not just me who believes this. It is the legal profession - the people who have been practising in family and probate law for far longer than I have been a lawyer, and far longer than I have been in this House. The proposed changes to the Administration Act will not achieve what the Attorney General wishes. It is unfair in its distribution, and the definition is so loose when one surviving partner is

providing the evidence to the court, that it will create uncertainty when people believed that they had some certainty.

Mr McGINTY: I suspect that the House will be debating this schedule for some time, so I will take this opportunity to place on record the relevant provisions from the other States. This is a difficult area. It is seeking to make provision for de facto partners on the death of their partners so that they can inherit. It must be borne in mind that we are talking here only about those who die intestate. A will obviously takes care of the property. This issue has been confronted in each of the other States, and I will briefly mention the provisions that apply in other States. Nothing the Government is doing here is out of kilter with what has been determined as being necessary in the other States as part of their de facto legislation. The real question is, what happens when a marriage has existed, perhaps for a lengthy period - thirty years to take an extreme case - and then the husband runs off with a younger woman? The point made to me by the member for Alfred Cove was that the wife may be at home hoping the husband will come back and will not wind up the marriage or divide the property. The husband may have entered into a de facto relationship with a younger woman, and then may die after the relationship has existed for a period. At what stage should the new de facto partner inherit at the expense of the former wife? In New South Wales, under the Wills (Probate and Administration) Act, after the de facto relationship has been in existence for two years, the de facto partner inherits to the exclusion of the wife. In the Northern Territory, under the Administration and Probate Act, the period is also two years before the de facto partner inherits to the exclusion of the wife, even though the husband and wife may still be legally married. In South Australia, under the Administration and Probate Act 1919, the period is five years. In Queensland, under the Succession Act 1981, it is five years. In 2001, the Victorian Administration and Probate Act was amended to make provision for de facto relationships. The Victorian scheme provides that, when an intestate leaves both a spouse and a domestic partner, the entitlement to the partner's share of the intestate's residuary estate is to be determined in accordance with a sliding scale that provides for the domestic partner to receive between one-third, for less than four years, and the full amount for six years or more of the partner's share of the intestate's estate. That is a provision of very recent origin. The Australian Capital Territory works on a sliding scale of the duration of the relationship, which the Government is seeking to amend to insert into the Act here. After two years of a de facto relationship, both the legal wife and the de facto partner will share equally, but after five years the de facto partner will inherit to the exclusion of the legal wife. In New Zealand, under the Administration Act, the period is three years. There is a mixed bag of provisions for qualifying periods for inheritance for de facto partners, ranging from a minimum of two years, up to six years, according to the most recent legislation in Victoria. What is being proposed in this amendment is a sliding scale of between two and five years.

Dr WOOLLARD: I thank the Attorney General, because in the briefing, this was one of the main contentious issues in the Bill. A wife with four or six children might be left high and dry while a de facto partner of two years could end up with all the assets. I am pleased to see that the minister will be moving for the de facto partner to be entitled to one-half, while the spouse will be entitled to one-half, but I would like to see it go further. In the other States, sliding scales are talked about, and I believe the member for Kingsley is hoping to move an amendment under which the husband or wife - it may be the previous de facto - is automatically brought into any decision about financial remuneration. That person should be brought in, and, rather than the assets being divided 50-50, the court should make a settlement which depends on the length of time for which the couple were married or living in a de facto relationship, and the proportion of the assets which were accumulated during that period. I am pleased to see that we have come a little way, but this will disadvantage for two years either the wife of 20 years with four children, or the de facto partner of 20 years with four children, when the male partner decides to get married. Will the Attorney General explain why he has not inserted a sliding scale into this schedule that would take into account the factors of time and accumulated assets?

Mr McGINTY: In considering this issue, the Government was guided substantially by the provisions made in the other States, which I have already gone through. Initially, what was proposed could be seen to be at the harsh end of the scale, in terms of the case referred to by the member for Alfred Cove. After the discussions between my staff, the member for Alfred Cove and me, I could see a difficulty in that, after a mere two years, the de facto partner would inherit at the expense of a long-term legal wife who had not taken steps to wind up the relationship. The reason we have not sought to factor in other issues is that, with the exception of children, other States do not. Some States place weight on whether there are children of the relationship. However, the general effect of that is that if a de facto couple has children, that brings forward the entitlement of the de facto partner to inherit - I use that term loosely - at an earlier time and at the expense of the spouse. That could be written in, but it would generally be to the detriment of the spouse who survives the death of the former partner. I was not happy about that. However, I was not aware of the developments in Victoria at the time these amendments were drafted. Although it would not be acceptable to the member for Alfred Cove, the four to six-year sliding scale would go closer to offering greater protection to the person she described. I was made aware of that only today,

so I presume it is of recent origin. The Australian Capital Territory provision of a sliding scale of between two and five years accommodates that notion of a period in which there is a phasing out of the interests of one relationship and the phasing in of the interests of another relationship. That was the concept underpinning what the Government was seeking to do.

I will once again provide a stereotypical example. The proposed amendment to provide the two to five-year sliding scale would make it easier for a woman whose philandering husband ran off with a younger woman and set up a de facto relationship. That is the first point. The second point is that she could make an application under the Inheritance (Family and Dependants Provision) Act 1972. The issue is whether adequate provision was made for the wife from the estate, so it is the old provision, to use the term loosely, of challenging the will. Of course, we are dealing only with a situation in which there is no will. Even though her deceased spouse was living in a de facto relationship, the wife could go to court and ask for provision to be made for her. It might not be what she expected under the operation of the existing law in the State, but it would still give her a right to make a claim on his estate.

I appreciate that this point is not practical, but the other policy issue that underpins the operation of the Family Law Act 1975 is that when a relationship breaks down, it should be brought to a conclusion, the property divided and people allowed to get on with their lives. The former wife can always apply for a divorce and a division of the property. I appreciate that there will be circumstances in which people do not want to do that and they have been canvassed during this debate. The other provision or way in which this matter could be addressed is for a person to make a will. The man in the example I gave would need a will. He might change it to disinherit his legal wife in favour of his de facto partner. The problem is solved if a will has been made. Those provisions come into operation when there is no will.

Dr WOOLLARD: I thank the Attorney General for his comments, but I have a couple of queries about what he has said. His proposed amendment at page 101 after line 20 states -

(a) the de facto partner and the intestate lived as de facto partners for a period of at least 2 years -

Yet the Attorney General just spoke about a sliding scale of two to five years. I have missed the point at which the five years comes in. I believe that this Bill gives the wife the option to make a claim, but that the claim she can make is for only 50 per cent of the property. That is why I was trying to move an amendment to page 102 so that the sum of money be determined on the basis of the length of time of the relationship and the proportion of the assets. The relationship might not have produced children, but the couple could have been married and accumulated assets for 20 years. He might have gone to live with a de facto partner when he retired and the wife was left high and dry. Could the Attorney General explain where I have missed the reference to the two and five years, and whether the wife can put in a claim, under this legislation, for more than 50 per cent of the property if she feels she is entitled to more than that?

Mr McGINTY: At the bottom of page 9 of the Notice Paper, the last amendment standing in my name is to insert on page 101, after line 20 -

(2) If the intestate dies leaving a husband or wife and a de facto partner, then where -

(a) the de facto partner and the intestate lived as de facto partners for a period of at least 2 years immediately before the death of the intestate; and

(b) the intestate did not, during the whole or any part of that period, live as the husband or wife of the person to whom he or she was married,

the de facto partner shall be entitled to one-half of the intestate property to which the husband or wife would have been entitled in accordance with section 14 but for this subsection and the husband or wife shall be entitled to the other half of that property.

The second proposed amendment on page 10 of the Notice Paper - to page 101, line 25 - is to delete "2" and insert "5". The effect of that is in two parts: first, where a married person is living in a de facto relationship, the de facto partner is entitled to half the married person's property after two years. Secondly, after the de facto couple has been together for five years, the de facto partner is entitled to all the property under the operation of the Administration Act 1903. That is what is proposed with the amendments. It is done in two parts. That is how that comes about. I am told that in the same way that people who move into a de facto relationship might begin on an occasional basis, the same thing sometimes happens with the dissolution of a long-term marriage. It is not necessarily one cataclysmic event that causes people to part company, having been the best of friends the day before. A particular protection is built into this legislation. The provision, as amended, would read -

(2) If the intestate dies leaving a husband or wife and a de facto partner, then where . . .

(b) the intestate did not, during the whole or any part of that period, live as the husband or wife of the person to whom he or she was married, -

If the man returned briefly to the matrimonial home, that would be sufficient to negate the claim the de facto would have. I do not know what "briefly" means in that context. They must not live as husband or wife for any part of that time. It has just been suggested to me that a one-night stand would not constitute a reconstruction of the marriage, but something greater than that most probably would. I am not sure where it fits.

Mrs EDWARDES: The Attorney General has raised one of the key concerns of the Law Society of WA: the extra requirements under proposed section 15 of schedule 1 for inheritance by a de facto partner. When the definition of a de facto relationship was debated, the House looked at the uncertainty of people living together and the difficulties it presented. An amendment was moved but the Opposition believes the proposed section should be deleted. When one looks at the way proposed section 15 is drafted, it is seen to be a more critical issue. The requirement is that the surviving partner must have lived with the intestate partner at the time of death for the surviving partner to inherit. Many circumstances can come into existence: either of the partners could have been in a nursing home or working away from home.

Mr McGinty: That provision will be amended because of examples such as one partner being in a nursing home.

Mrs EDWARDES: In the forthcoming amendments to proposed section 15?

Mr McGinty: Yes.

Mrs EDWARDES: The third example is the one to which the Attorney General alluded briefly. It is when the intestate partner moves back to the matrimonial home for brief instances. The Attorney General suggested that a one-night stand would not break a de facto relationship of two years. The circumstances would be that a person has gone home had a brief interlude with his or her legal spouse, and returned to his or her de facto. The real issue is that the person who died intestate obviously cannot argue the matter before the court. The issue then is one of consistency. A person may go in and out of the matrimonial home from time to time because he has responsibility for caring for his children. The point is arguable, but the intestate partner is not there to argue the case. The question is the certainty of the de facto partner who remains and whether he or she can get the letters of administration. The legal profession says that a number of people will have to determine whether the intestate partner was in a de facto relationship. It highlights three: the probate registrar of the Supreme Court, the administrator who determines who is entitled to a distribution, and Supreme Court judges, to whom questions would need to be referred by the probate registrar or the administrator. It will not be a simple matter. Applications for letters of administration will be made more difficult. All members have had constituents approach them who have found themselves in a difficult situation because they have not been able to access money for day-to-day expenses. People will be put in potentially difficult situations. It will be timely and costly. The debate was begun with the proposition that unjust matters needed to be addressed, one of which is that de facto couples have to go to the Supreme Court. It is costly and expensive and justice is not always done. The legal profession says that it will be timely and costly, and people may not get justice in accordance with the facts of their situation because only one party is alive. That is one of the reasons that the legal profession says that the schedule should not be passed. It believes it should be removed and returned to the profession and the profession will fix it up.

Mr McGINTY: In debating this issue we must remember where we are coming from: the gross injustice inflicted on de facto couples. Under the current law, if someone lives in a de facto relationship and his or her partner dies intestate, the remaining partner gets nothing. It is worse than what we were discussing about the access that people have to the Supreme Court in its equitable jurisdiction when they argue the existence of a constructive or resulting trust. At least there is some possible legal remedy. Under the Administration Act, if a person's partner dies and he or she is not legally married, the remaining partner is disinherited. Other people will get the benefits that the surviving partner would reasonably expect to receive as result of living in the long-term de facto relationship. This is an attempt to give a de facto partner certain rights to property. No-one is arguing with the need to do that; it needs to be done. It is then a matter of looking at the impact on other people. Provision exists in the Administration Act for the division of property between married spouses in the event of the death of one of them. The Government will leave that provision intact but insert a provision for partners in de facto relationships. I do not think anybody would argue with that. In my view, it is a small part of the total argument that if a "cake" exists and a de facto partner is entitled to some priority in taking part of the cake, less will be left for a former partner who is still legally married, but in a relationship that is dead. In view of what we are talking about, that may not be the right way to put it. I am referring to marriages that, for all practical purposes, have come to an end but have not been terminated legally. Less will be left of the cake for people in that position. As a stereotypical example, such a woman can make an application under the Inheritance (Family and Dependants Provision) Act because the Family Law Act does not give rights to people whose partners die.

With the death of a partner - let us say the husband - the wife cannot use provisions of the Family Law Act because, at death, no powers exist with the Family Court to deal with such matters. People must refer to Acts such as the Inheritance (Family and Dependants Provision) Act and the Administration Act to determine relative entitlements. The general view is that de facto partners should be included. The only dispute between both sides of the House is the extent to which the inclusion of the de facto partner has a priority. Up to a period of two years a de facto partner has no priority or claim. Between two and five years, a de facto partner shares equally with the former partner - although still legally married. After five years, the de facto partner would take all benefits provided the marriage was not resumed during that period.

I made the point earlier that the range of circumstances that people confront in their relationships is incredibly diverse. Until now, the law has not recognised any claims by a partner from a de facto relationship on an estate when a partner dies intestate. The Government is changing that to allow people to make a claim. It is a matter of getting the right balance. What we will provide will sit in the mid range of what the other States are doing. Up to two years, surviving partners will have no claim. Between two and five years, claims will be split on a 50-50 basis. If someone has been in a de facto relationship for five years it is, by contemporary standards, a long-term relationship.

Mrs Edwardes: Maybe we should change the definition or criteria for de facto relationships.

Mr McGINTY: Maybe we should call it a very long-term relationship.

Mr Barnett: The Government would get a greater degree of support.

Mr McGINTY: If we changed the basic definition back? Yes, I am sure that is right.

Mrs EDWARDES: I am sure the Attorney General did not mean to not answer my question.

Mr McGinty: I ran out of time.

Mrs EDWARDES: I am happy to debate with him the distribution he is proposing as against the amendment I will propose, which I regard as a much fairer solution to the issue of whether people have been together for two, five or 10 years. The issue between legal spouses and de facto spouses should be determined according to the period he or she has lived with the intestate partner. That would make it fairer for someone in a short marriage and long-term de facto relationship or a long-term marriage and short-term de facto relationship, versus a time frame of two or five years. Who are we in Parliament to determine the inheritance to the wife or the de facto partner? We cannot anticipate the diverse issues that arise in relationships to which the Attorney General has referred, yet we are drawing a line in the sand to determine who, after a period, should get what. We do not have that right, particularly when it will create further injustices.

The Attorney General said that this amendment will correct injustice. The distribution of the inheritance is one aspect of the unfairness. The second is the uncertainty the legislation will create on inheritance. The third aspect is, as I indicated, the time frame before which a de facto partner can inherit, the cost and the time it will take to get letters of administration from the parties, about which the legal profession has some concern. Apart from the distribution, the Attorney General is also creating further injustices by not providing sufficient certainty to de facto couples. The Law Society says -

> Without more certainty, applications for letters of administration will be more difficult to process and will inevitably delay the commencement of administration. Administrators may also have difficulty determining the persons entitled to the estate and may need to apply more often to a judge for directions. This will substantially increase the time and expense involved in administering an estate.

I am highlighting another injustice surrounding the determination. We must bear in mind that we are dealing with the Administration Act and the intestate will not be available to confirm whether a de facto relationship existed.

Mr McGINTY: It is true that when an arbitrary formula applies, injustices will occur because of the diversity of relationships designed to fit within that formula. Under section 14 of the Administration Act dealing with entitlements on intestacy, a very rigid formula applies covering a range of circumstances, such as whether children are left but there is no husband or wife, or the husband survives with the children and other circumstances relating to brothers, sisters, parents and the like. It is an attempt to do what the person intestate should have done; that is, make a will. We are dealing only with people who do not have a will. If there is a will, no questions arise under the Administration Act.

We are concerned that we will have an arbitrary cut off. People have asked me to make this legislation retrospective because their relationship has recently ended. That would create more injustice for that person than a solution to solving the problem.

Mrs Edwardes: I am not encouraging the Attorney General!

Mr McGINTY: I thank the member for that. Whether the Bill is proclaimed on 1 January, 1 July or 1 December, injustices will occur because people will fall either side of the date. I appreciate that injustices will arise. However, that is due to the Administration Act of 1903 because it seeks to provide a strict formula for the division of property when someone has failed to make provision in a will. A very good example was Robert Holmes a Court, who died without leaving a will. An empire as complex and as large as his caused obvious problems. The estate was divided between his wife and children by virtue of the Administration Act.

Mrs Edwardes: Imagine if he had been in a de facto relationship for five years. That is an example that shows clearly how unfair the arbitrary line will be. Whether a person has millions of dollars or $75 000 shows the inequity.

Mr McGINTY: Had he had a relationship of between two and five years, the division of the estate to provide the children with an interest would have been more interesting. All those issues arise.

Mrs Edwardes interjected.

Mr McGINTY: I met last week with members of the Law Society, including some probate lawyers, who discussed a number of concerns. We did our best to answer them.

Mrs Edwardes: They are very serious and experienced people.

Mr McGINTY: Probate people tend to be serious by their nature. I appreciate that it is a significant change in the way in which they, as the practitioners in this area, will apply the law. I also appreciate that they are conservative, and do not like change. However, everyone acknowledges that there must be a change to provide entitlements for de facto couples. All we are arguing about is the formula. I am sure that as people settle into the new legislation, delays, additional costs and uncertainties will occur until case law settles those issues. Although some measure of unfairness and injustice will flow from a set formula that will not perfectly cover all circumstances, it is insufficient injustice to warrant excluding de facto partners altogether. We must remember that we will be dealing with a marriage that has finished, but is within the period that the wife has a right to claim.

Mrs Edwardes: The probate lawyers and the family court lawyers are not taking a moral position on this.

Mr McGINTY: Some are.

Mrs Edwardes: The ones I have spoken to have clearly steered away from the moral issue.

Mr McGINTY: I had to deal with one at the family law practitioner's conference who was taking very much a moral and not particularly intelligent view. I did not say that because he took a moral view. It was more an emotional than an analytical view.

Mrs EDWARDES: The lawyers to whom I have spoken have not taken a moral position. They have stayed away from government policy and a moral stance. Indeed, they recognise that for a long time, de facto relationships have suffered inequities that must be addressed.

Irrespective of that, they are saying that de facto partners may believe that this legislation will provide them with a right to inherit. However, the drafting of the legislation could lead to confusion about what they could inherit. They and/or their partners will be covered by the legislation. We hear people often say that they will get around to a will some day. However, they do not get around to it before their partner passes away.

The point I have been making is that the definition of "de facto relationship" is too loose, and even though it is proposed to be amended to mean a couple who are living together at the time of death, it still does not cover all the situations that may exist. The Attorney has talked about the diversity of relationships, and has said that we cannot cover everything and he does not have a crystal ball. However, the lawyers are saying that the Attorney does not have it right and the Supreme Court will have before it action after action in an endeavour to sort out what the crystal ball is saying. That will take time and cost money, and that may be unfair to the remaining de facto partner, because the money may be in an account that is totally in the name of the intestate, with no access by the remaining partner. If we put the legal spouse aside and take just that scenario, the Attorney has a potential problem. The lawyers - not just me - are saying that whether it be two years or five years, there is still too much uncertainty. People may believe they have an ability to inherit, but the lawyers are saying that is not necessarily the case.

The letter from the Law Society of Western Australia also refers to the prejudice to a husband or wife who has been in a long marriage with the intestate, particularly in the case of a spouse who is still responsible for the children of the marriage. The Attorney has said that such a spouse has a right to claim under the inheritance Act. However, such a spouse may have a greater problem than the person who was living with the deceased at the date of death. If the Attorney is determining that a sliding scale of two to five years is the appropriate period, then the court may take that into account as the appropriate length of time as determined by this Parliament. A spouse of an intestate would have been entitled to apply for a division of property in the Family Court during the intestate's lifetime. Therefore, the Attorney is creating further injustices in respect of the spouse. There is also an injustice in respect of the remaining de facto partner. The lawyers are saying that the drafting of this legislation has too many holes, and it will cost money to take these cases to the Supreme Court. I have no doubt that the lawyers will be happy to have their pockets lined, but that is not the point and it is not what the Attorney wishes to achieve.

Dr WOOLLARD: I am pleased that the period will now be five years, because, as we discussed previously, two years after the death of their partner some women are still very emotionally distressed and not in a position to force the issue with regard to property. However, I ask the Attorney to consider the scenario of a 20-year marriage, in which both partners have been working and the money is in the husband's name, and at the age of 45 or 50 the husband goes through a midlife crisis and takes off with a younger woman, does not work any longer and perhaps goes to Bali to live for the next five years. In that case, the division of property will still be 50-50, yet the wife has contributed to her husband's career and perhaps has given up her own career to raise a family. Is it fair that that wife will receive only 50 per cent of those assets?

Mr McGINTY: One of the things that has added to perhaps a lack of clarity in these provisions is our decision to try to make it fairer by having a sliding scale of between two and five years. For the purposes of the Administration Act, it is obviously far simpler to have a cut-off point. The lawyers to whom the member for Kingsley referred have said that the sliding scale is one of the issues that adds a measure of uncertainty to this arrangement. However, I believe it is fairer to have that sliding scale, so that in the case of the sudden death of one de facto partner, the other partner cannot take all after two years but there is a phasing out of one relationship and a phasing in of another in terms of entitlement. There may well be a better formula - and I guess that is what the members for Alfred Cove and Kingsley have been saying - based on such things as contribution to the joint property of the relationship and length of the relationship. However, if what we are prescribing here is made more uncertain by the introduction of a phasing-in formula, and we introduce the notion that a value must be placed on the homemaker's contribution towards the joint assets of the estate, if she had a tycoon husband, to take the other extreme, we will make it so general that we may as well just tell the judge to divide up the estate as he thinks fair. For the past 98 years, that has not been the way the Administration Act has worked. A formula has been laid down in order to give people a measure of certainty about the way in which the Act operates. To try to put a value on different contributions, and to have a sliding scale with regard to time, certainly can work, and that is what we have moved towards, but with a finite cut-off point.

We are dealing with a marriage that has finished, and with the entitlement of the former spouse to inherit part of the estate. Obviously, if, as is normally the case, the property is in joint names, it is not a problem. We are dealing with cases in which the property is in the name of one person, and that person has not made a will. We are dealing with a situation in which adequate provision was not made during the life of the person, and I am thinking particularly of the family home; however, the same applies to bank accounts and things of that nature. I am not making any moral judgment about people who do not put properties or bank accounts in joint names. People can conduct their affairs however they like. In some cases the joint property of the relationship is held by companies or trusts. If we tried to deal with every situation with which we might be confronted, we would end up writing a book and would still not satisfactorily cover every situation in what everyone would regard as a just way.

We are pitching ourselves in the middle of the yardsticks that apply in the other States. The Victorian provision, which arguably makes a de facto wait the longest before he or she can take the property to the exclusion of the former spouse, is at one extreme. The other extreme is that the de facto can take all after two years. We have pitched ourselves about midstream, arguably at the upper or more conservative limit, by saying that the de facto cannot take all until after five years. Victoria is the only State that waits longer. The Australian Capital Territory is the only other place that waits an equal amount of time. Most of the others are pitched at the two or three-year limit. South Australia is five years as well.

In using the other States as a yardstick - generally that is a fairly reasonable way to view these things - I do not think that the Government is doing anything that will cause problems for the probate lawyers, because they will need to look only to what has happened in the other States. The Government is pitching itself at the conservative end of what has happened in the other States.

Dr WOOLLARD: My proposed amendment to page 102, after line 32 seeks to insert the following -

> The court may vary an entitlement under subsection (2) or (4), and in any such variation will take into account -
>
> (a) the length of time for which; and
>
> (b) the proportion of the assets which were accumulated during the periods . . .

Is it the Attorney General's understanding that this would happen in any case? It is my understanding that the provisions of this clause would not normally be invoked, but that it would leave the door open for someone who wished to challenge the 50-50 ruling.

Mr McGINTY: I will deal with that amendment in detail when we come to it, rather than do it at this stage. The criticism that is made is lack of certainty, and that would obviously inject the greatest lack of certainty into the equation. I will deal with that later in the debate, rather than provide a definitive answer now. I move -

> Page 101, after line 5 - To insert the following -
>
> (2) Section 13(1) is amended by deleting "section 14" and inserting instead –
>
> " sections 14 and 15 ".

Section 13(1) of the Administration Act currently provides that -

> Where, after the coming into operation of section 4 of the *Administration Act Amendment Act* 1976, any person dies intestate . . .

It continues -

> . . . persons who are entitled thereto under section 14.

It states that people are entitled to share real and personal estate in the case of intestacy. Section 14 deals with entitlements on intestacy and although it makes provision for the husband and wife, it makes no provision for de facto partners. Fortunately, there is no section 15. Therefore, immediately after the section that deals with the entitlement of people in a marriage or in a family arrangement, the Government will insert in the vacant section 15 a provision for de facto partners. There will be two sections in the Administration Act; section 14 which provides for the entitlements of the husband, wife and family; and section 15 which will provide for de factos. That is what we are now inserting into the Bill.

Mrs Edwardes: Therefore, the amendment is to section 13; what does section 13 deal with?

Mr McGINTY: Section 13(1) provides that -

> Where, after the coming into operation of section 4 of the *Administration Act Amendment Act* 1976, any person dies intestate as to all or any of his property, the administrator, or in case of partial intestacy, the executor or administrator with the will annexed, shall, subject to sections 9, 10 and 10A, hold the real and personal estate to which the intestacy applies, and which vests in him under section 8, on trust for the persons who are entitled thereto under section 14.

Sections 14 and 15 will cover marriage arrangements and de facto arrangements in two separate sections in the Administration Act.

Amendment put and passed.

Mr McGINTY: I move -

> Page 101, after line 8 - To insert the following -
>
> (3) Section 14(6) is repealed and the following subsection is inserted instead -
>
> " (6) If -
>
> (a) a surviving husband or wife of the intestate is not entitled to the whole of the intestate property in accordance with this section and section 15; and
>
> (b) there is an interest within the meaning of clause 1(1)(b) of the Fourth Schedule,
>
> then that Schedule applies with respect to that interest.

Mrs EDWARDES: I would appreciate it if the Attorney General could have a little patience and interpret that amendment as I do not have a copy of the Administration Act with me.

Mr McGINTY: The fourth schedule of the Administration Act deals with the rights of the surviving spouse of the intestate with respect to the matrimonial home. We will be amending that by referring to the matrimonial home as a dwelling house. Section 1(b) provides -

> the whole or part of the intestate property consists of an interest in a dwelling house that, at the date of the death of the deceased person, was ordinarily used by the surviving husband or wife as his or her ordinary place of residence -

Provision is made to buy out that share. We are basically giving to a de facto person the same rights as a married person to buy out the share in the family home.

Amendment put and passed.

Mr McGINTY: I move -

> Page 101, line 13 - To delete "and no issue".

Mrs EDWARDES: I ask the Attorney General to explain what it will mean to delete the words " and no issue". Proposed section 15(1) states that if the intestate has left a de facto partner but no husband or wife and no issue, then where the de facto partner and the intestate have lived together in a de facto relationship for a period of at least two years, the de facto partner shall be entitled to the section for which the husband or wife would have been entitled. I am wondering why the Government has removed the words "and no issue" as that does not appear to make sense with respect to the rest of the proposed section. The children's entitlement is prescribed under section 14 of the Administration Act. This proposed section refers to someone who dies and leaves a de facto partner, but no husband or wife. The provision currently states "and no issue". In this case, the partner would get what a wife or husband would have inherited. What share would the issue get? Previously the estate would have gone to them and the parents. Why are the words to be removed?

Mr McGINTY: I thank the member for Kingsley for some forbearance. This area is reasonably complicated for people not well versed in it. The Administration Act makes provision for children, whether they be - to use the old language - illegitimate or of a marriage. Children, or issue as they are quaintly referred to, are provided for under the existing provisions of section 14 of the Administration Act. We are seeking to not give any entitlements to children of a de facto relationship because they already have an entitlement under the Administration Act. We are seeking to give a de facto partner an entitlement. It is irrelevant whether that partner has children because the children are already provided for. Therefore, the words are unnecessary. The children are adequately catered for by existing provisions. This provision does not seek to replicate the fairly complex arrangements of section 14 of the Administration Act, which continues for six pages. The table in section 14 of the Act sets out who is entitled to what in a variety of circumstances, and includes illegitimate children. We are seeking, through proposed section 15, to extend an entitlement to the de facto partner. The existence of children is not a relevant factor.

Mrs EDWARDES: I thought I had an inkling about the meaning of the amendment. The words "and no issue" include exnuptial children, as well as those of the marriage. The Government is not seeking to disinherit them.

Mr McGinty: No. The amendment does not seek to take away anything to which the children are currently entitled.

Mrs EDWARDES: Do the words add anything?

Mr McGINTY: During the early drafting of this provision we looked at the Australian Capital Territory and New South Wales legislation. The ACT model makes provision for children to be a factor in determining the period for which a partner is entitled to claim. New South Wales also takes children into account. The presence of children brings forward the period in which a partner is eligible to claim. The partner is entitled to claim if the de facto relationship has existed for two years or there are children from that relationship. The presence of children does away with the two-year requirement. We discarded that idea in favour of the sliding scale of two to five years that will give rise to the entitlement of a de facto partner to the exclusion of the former married spouse. The term "and no issue" is redundant. We are not disentitling anyone.

Amendment put and passed.

Mr McGINTY: I move -

> Page 101, lines 14 and 15 - To delete "together in a de facto relationship" and substitute "as de facto partners".

The reason is to provide greater certainty and conform to the definition of de facto partners.

Mrs EDWARDES: The definition of a de facto partner under proposed section 205W is -

. . . a person who lives, or has lived, in a de facto relationship.

The definition of de facto relationship is set out in proposed section 205V. I am not sure what the Attorney General will achieve by this amendment. The uncertainty the legal profession has highlighted will not be removed by virtue of changing the definition. One definition picks up the other.

Mr McGINTY: This deals, as much as anything else, with the nursing home situation to which the member referred earlier, whereby the couple were not living together as de facto partners at the date of death, but they were living as de facto partners. Removing "together" goes back to the original definition, and avoids confounding the problem in that unusual circumstance.

Amendment put and passed.

Mr McGINTY: I move -

Page 101, after line 20 - To insert -

(2) If the intestate dies leaving a husband or wife and a de facto partner, then where -

(a) the de facto partner and the intestate lived as de facto partners for a period of at least 2 years immediately before the death of the intestate; and

(b) the intestate did not, during the whole or any part of that period, live as the husband or wife of the person to whom he or she was married,

the de facto partner shall be entitled, to one-half of the intestate property to which the husband or wife would have been entitled in accordance with section 14 but for this subsection and the husband or wife shall be entitled to the other half of that property.

This brings us to the nub of the matter, and we have spent some time discussing it. This amendment inserts into the Act the sliding scale to which I have referred. We have already had a significant debate about that.

Dr WOOLLARD: I am confused by the term "sliding scale". Victoria and the Australian Capital Territory use a graduated scheme whereby entitlement depends on the length of the new relationship. This is a sliding scale for two to five years. I thought that the amendment would state "at least 5 years immediately". Will the partner get 40 per cent of the assets after two years and 100 per cent after five years? What does the Attorney General mean by the term "sliding scale"? Does he mean a graduated scheme or does it relate to the length of separation from the first partner and the assets that partner receives?

Mr McGINTY: I use the term "sliding scale" loosely. It is more like a stepping scale. There is nothing sliding about it. If the partner dies less than two years after he enters into a de facto relationship, the other partner has no entitlement under the Administration Act. If he dies after he has been in a de facto relationship for two years, the other partner is entitled to 50 per cent of his estate, and after five years she is entitled to 100 per cent. It does not slide between that 50 and 100 per cent. If a partner dies between two and five years after the commencement of the relationship, the other partner is entitled to 50 per cent of the estate. The legal wife in the stereotypical case is entitled to the other half. Once the relationship has lasted five years, the legal wife is disentitled.

Mrs EDWARDES: This is where the Parliament disinherits the wife. That is what this proposed section does. A partner in a de facto relationship that has lasted between two and five years will receive 50 per cent of the estate. It does not matter that that relationship has existed for between two and five years and the marriage has been in existence for 30 years. The duration of the marriage is far greater than the period for which the de facto partner has had a relationship with the intestate. It is unfair to disinherit the remaining spouse who has not yet gone through the Family Court and achieved a property settlement. The Parliament is being asked to disinherit the wife or husband. He or she will get nothing after five years. Is that fair? I do not believe that it is. I do not believe that anybody in the community would believe that it is fair for this Parliament to disinherit the wife totally after five years of separation.

We can use the example in reverse. What if the de facto relationship had lasted for 30 years and the marriage had lasted for five years? Under this amendment, the de facto would get it all. Parliament is being asked to consider that the relevant period of a de facto relationship of two to five years is equivalent to receiving 50 per cent of the intestate's property. That is totally unfair. We will continue to make a point about this Parliament being asked to disinherit the spouse, whether it be the husband or wife, in favour of a de facto partner because the husband or wife who has entered into a de facto partnership has died without a will.

This amendment goes totally against the previous sections we have dealt with relating to property settlement. If, for instance, an application under the previous section were made for a property settlement, the period of the relationship is not taken into account. One must have a de facto relationship for only two years. There is no

time frame whatsoever for a husband or wife upon their separation to seek to have their marriage dissolved. The only time frame after that is one year for an application for a property settlement after decree absolute, which, as I pointed out today, can be extended for up to 33 years. Using the typical example to which the Attorney General referred, if a bloke died without a will, all of that which was seemingly fair an hour ago would be pushed out the window. It does not make sense to me.

Dr WOOLLARD: I am interested to hear the Attorney General's response to the member for Kingsley's comments.

Mr McGINTY: One must appreciate that we are dealing with a marriage that has finished and has been finished for a good number of years.

Mr Johnson: Two to five years is not "a good number".

Mr McGINTY: We are talking about a marriage that has finished for more than five years before the spouse is disinherited.

Mrs Edwardes: What about the property settlement that took up to 33 years?

Mr McGINTY: What about it?

Mrs Edwardes: Previously, because of hardship provisions, an application for a property settlement could be extended. The longest case for a property settlement in Western Australia has been 33 years. No hardship is being referred to here under the amendments to the Administration Act.

Mr McGINTY: There never has been.

Mrs Edwardes: Nor have de facto relationships ever been recognised in this way by this Parliament.

Mr McGINTY: Regarding the hardship situation, it is best to make an application under the Inheritance Act to make sure that adequate provision is made.

Mrs Edwardes: We have debated the injustices that can occur through time and cost. That is the reason for this amendment - time and cost.

Mr McGINTY: We have also dealt with only the typical case in which the male has the property in his name, leaves for a younger woman, then dies and leaves his still legally married former wife out in the cold. He could disinherit his wife by making a will, in which case her only recourse would be to use the provisions under the Inheritance Act to try to make adequate provision.

Mrs Edwardes: The difference is that he, not the Parliament, would disinherit her.

Mr McGINTY: By not making a will or property settlement and not getting divorced, he would effectively disinherit her. All of those options are available to people to deal with these matters. We are dealing only with the situation in which people sit on their hands and do nothing in full knowledge of what the law is. That is the situation with which we are left. To do otherwise would cause a significant injustice to a de facto partner who has lived for a reasonable length of time, even a long period, with his or her partner.

Members must bear in mind that, in most cases, we are dealing with a bit of money in a bank account, superannuation, a house and a car. If the property happened to be in the wife's name, the death of her husband would mean that she would benefit enormously because there would be no provision for him to make a claim for her on part of the marriage distribution, although I appreciate that would be in a small minority of situations. Nonetheless, the scheme of the Administration Act is a set formula. That will give rise to a variety of outcomes, some of which will benefit people more so than justice might deserve. The other way to approach this issue is to throw the way that property is distributed to the Family Court or a tribunal, to do what it thinks is just. To have such a radical change would pose more problems than our proposal.

Dr WOOLLARD: As the wording stands, I cannot support the amendment because I do not believe it is fair, whether it be a married woman of 20 years and a two-year de facto relationship or a de facto relationship of 20 years and a married woman of two years. An amendment must be inserted in this Bill to give some allowance to the time of a relationship and the assets accumulated during that time.

Amendment put and passed.

Mr McGINTY: I move -

> Page 101, lines 23 and 24 - To delete "together in a de facto relationship" and substitute "as de facto partners".
>
> Page 101, line 25 - To delete "2" and substitute "5".

We have covered that in the debate and members are aware of that.

Amendments put and passed.

Mr McGINTY: I move -

Page 101, line 28 - To delete "with" and substitute "as the husband or wife of".

The importance of this amendment is to provide some protection to the former wife so that if, in the typical case, a philandering husband returns to the matrimonial home and lives again as the husband after he had entered into a de facto relationship, it would disentitle the former de facto partner from claiming property in the event of his death.

Mrs EDWARDES: The amendment goes some way towards addressing some of the concerns that have been raised by the legal profession and that we have raised previously where one or other of the partners might go back to the matrimonial home for whatever reason. Therefore, it ensures that the remaining spouse is protected at that time. However, it does not go all the way in answering the concerns that have been raised by the legal profession about the uncertainty that will exist, and that will stay in existence, about whether a de facto partner can or cannot inherit. The concern is that de facto partners might think that the legislation will protect them, but it will not. My advice to everybody is that they ensure they have a will.

Amendment put and passed.

Mrs EDWARDES: I move -

Page 101, lines 30 to 32 - To delete the lines and substitute the following -

then,

(c) where a property settlement has been awarded under the *Family Law Act 1975* and has been completed, the de facto partner shall be entitled, in accordance with section 14, to the intestate property to which the husband or wife would have been entitled but for this section;

(d) in any other case, the husband or wife and the de facto partner shall be entitled, in accordance with section 14, to the intestate property to which the husband or wife would have been entitled but for this subsection in proportion between them to the number of whole years that they lived with the intestate.

Essentially, this amendment will pick up the injustices that we have been talking about; that is, when there has been a long-term relationship on either side and a subsequent short-term relationship on the other side, the proportion of the estate that the partner will receive will be in accordance with the number of whole years that that partner lived with the intestate. It gets around what the Attorney General was saying; that is, people will not have to go back to the court to have it determined. The same people who determine the letters of administration will determine the distribution. Any uncertainty about de facto relationships will be in existence in any event, let alone any uncertainty about the period of time. If there is uncertainty about determining the period that either party lived with the intestate, there will certainly be uncertainty about getting the letters of administration, irrespective of what will be the provision for distribution.

This amendment will provide a much fairer distribution of the estate. It comes down not to contribution, but to an arbitrary line, which is what the Attorney General has put forward. It does not provide for any disinheritance. It allows this Parliament to determine that if a marriage has been in existence for 30 years, and a de facto relationship has been in existence for two years, the partners would take a proportion equal to the time that they lived with the intestate. If a de facto relationship was in existence for 15 or 20 years, and a marriage was in existence for only five years, again, the partners would take a proportion equal to the period that they lived with the intestate. There cannot be anything fairer than that if we are talking about interest between parties. If there is a second de facto partner - the amendment provides for that a little further on - the amendment will allow the period that the partner lived with the intestate also to be taken into account. The fact that this Parliament wants to disinherits the wife by 50 per cent after two years and by 100 per cent after five years must be met with some level of commonsense. I suggest that the amendment I have moved is a measure of that commonsense.

Mr McGINTY: Whichever way we go on this, we need a formula to make provision for a distribution of property between the former married partner and the subsequent de facto partner. One way to do that has been provided in the Bill; that is, when there has been no property order under the Family Law Act, there is a formula that will divide the property according to the length of the relevant relationships. If people have been married for 10 years and have lived in a de facto relationship for 10 years, it would be a 50-50 split. Generally speaking,

a person will make a will that makes provision for his or her family, whatever form that family might take, whether it be a de facto arrangement, exnuptial children or a wife or husband and children of that marriage. It is increasingly likely that when a person makes a will, he or she will make an additional provision - perhaps even a disproportionate one - for those people who are near and dear to that person at the time of making the will, perhaps at the end of that person's life. By introducing the time-in-relationship-based formula, we might be frustrating what that person would have done had he or she made a will in any event. However, that criticism can be made of any formula that is used.

I have tried to guide the way in which we have approached this issue to the way in which other jurisdictions in Australia have approached it; that is the best guide. I am not particularly fussed what that formula is, provided we do not step too radically outside of that which applies elsewhere in the country. I take considerable comfort in the fact that what our formula provides is in the middle, or even marginally at the conservative end, of that which applies in each of the other States. It is true to say that in most of the rest of Australia, the de facto partner will take a proportion, to the exclusion of the wife, at an earlier time than would a partner in Western Australia if this law, as it has now been proposed, is passed. We have been more conservative in the schedule, unlike in other clauses of the Bill, rather than just opt for a two-year cut-off point, which was the original proposal prior to our receiving that feedback.

I cannot agree with the amendment that has been proposed. Had that occurred in a number of other States, I would feel more comfortable with moving down that line. The concession that we have made, which has introduced a bit of uncertainty by having the step-scale of between two and five years, is as far as we can concede on this issue.

Mrs EDWARDES: I know the Attorney General to be a fair person, and I know he would also like to go down in history as a law reformer. He is an independent thinker. He is concerned with Western Australia, not with what occurs in Victoria, South Australia, New South Wales, Queensland, the Australian Capital Territory or the Northern Territory. I know this to be true, because in previous clauses he has gone outside of what is happening elsewhere for Western Australia. He has decided, on the basis of fairness, that if a de facto partner has been left behind and cannot look after himself or herself, the de facto partner who is leaving that relationship needs to provide maintenance for the remaining partner. Unlike elsewhere in Australia, Western Australia will have unlimited, open-ended maintenance for de facto partners on the dissolution of their relationship. I know that the Attorney General will go outside the mark when he believes it is fair to do so. I will try to convince him that I do not care what happens elsewhere, and I know that he does not care either. He is interested only in what happens in Western Australia. He said that when he was talking about the financial agreements. It does not matter what happens in the ACT; we must look after the people who live in this State. The people who live in this State are saying that they do not care what happens elsewhere in Australia either. They deem it unfair that a wife should be disinherited totally after five years if she has not gone through a property settlement. What if she has gone through a property settlement? The Attorney General's clause does not deal with that issue. Is that fair? That is not fair either. The Attorney General previously referred to the de facto victim. The amendment that I have moved would provide that if a spouse - I am talking about a former spouse if there has been a decree absolute - has had a property settlement, that is the end of the matter; the de facto partner would take the share that would be provided under the Administration Act.

The House has talked about the inequities suffered by de facto partners in the past, and in the case of multiple de facto relationships, there will also be a potential inequity, despite the fact that they have no rights at the moment. The Government is providing further inequities to address an inequity. If a property settlement has not taken place, there is no need for an arbitrary line. All that must be put forward in the application for letters of administration, is the fact that the spouse was married for a certain period - we have been talking about 30 years - and the de facto relationship has been in existence, based on evidence such as rental records, for five or 10 years. Therefore, the administrator can easily determine the distribution of the estate. It does not require a further adjudication by a judge or a court. In a number of different ways, it is a much fairer proposal than the one proposed by the Government, and it ensures that, where there has been no property settlement, both the spouse and the de facto partner share according to the time within which they lived with the intestate. If a property settlement has taken place, again, the amendment I am putting forward is much fairer. Under the Government's proposal, the time is not taken into account. The de facto partner could be unfairly treated by this Parliament.

Mr McGINTY: It is probably as well that the House examine what we are really dealing with here. I will refer to some statistics from the publication "Marriages and Divorces in Australia", dated 25 September 2001, and published by the Australian Bureau of Statistics. Forty-six per cent of marriages end in divorce. It is nudging the halfway mark. The median duration of marriage - the interval between the date of marriage and the date the divorce - is now 11.6 years. Of the relationships that end in separation - I am reading from a chart so this may

not be accurate, but it is near enough - 35 per cent have lasted for less than four years. Of those people who separate, 23 per cent have been married for between five and nine years. They are the big ticket numbers - 35 and 23 per cent, or well over half of all marriages -

Mrs Edwardes: Does it talk about when they get their property settlements?

Mr McGINTY: No, it does not, but I am trying to make this point, because a number of examples have been used during the debate. Those marriages that break up after 30 years or more amount to about three per cent of the total.

Mrs Edwardes: What is the number of marriages?

Mr McGINTY: I do not have a figure for the number of marriages, but that is the figure over time. Three per cent is still a significant number of people, but percentage-wise, it is very small. The vast majority of marriages that finish break up in under 10 years. That is the message from those figures. The member for Kingsley is arguing for a formula based on relative length of time of marriages versus de facto relationships, and the case of someone who has been married for 30 years and then lived in a de facto relationship for two is the extreme case. There is a reasonably compelling argument, but that is a small proportion of the people who find themselves in this situation; most are under 10 years. The way a de facto relationship is pitched is that the partner receives half the property after two years, and all of it after five years. This is pitched at that middle area, where most marriages end up in any event. The answer to the question that was posed - and I find some discomfort with the current provisions of the Administration Act which provide a rigid formula, and we are perpetuating that in relation to de facto relationships - is that in that situation injustices and irregularities can emerge. The real solution is to persuade the Commonwealth to use the marriage power to extend beyond death, and to make provision within the Family Law Act for distribution of property at the death of one of the partners. This would substantially solve this problem. Until that is done, and perhaps a general jurisdiction given to the court in respect of marriages, we are left with the situation that the Administration Act has been laying down a formula for 98 years, with all its attendant problems. I do not think this debate is the occasion on which the House should be throwing out that formula, and going to some broadly-based equity provision, until such time as it is done with respect to marriages in the Family Law Act. When that is done, the Government will then replicate those provisions in the state Act. That is my view on how this matter should be resolved.

Dr WOOLLARD: The Bill does propose a formula. It has been set at 50 per cent of the assets after two years, and 100 per cent after five years. I wonder, in relation to this Bill, and the legislation the Attorney General has quoted from the other States, how many men were on the committees that drew up this formula, and whether these formulas would have been very different had those committees included a majority of women. This whole Bill is very much a women's issue. I would like to have heard comments on this Bill from the ministers and the backbenchers on the government side. Had they the opportunity, they would have supported equality for married women, or those who had lived for long periods in de facto relationships.

I agree with the member for Kingsley that, instead of looking at the other States, Western Australia should be the trendsetter, and establish a vision for the future. This Government has already done that, when it stopped logging the old-growth forest, whereas other Labor Governments, such as that in Tasmania, are still logging old-growth forest. I would like to see this section referred to a committee or, if this clause is lost, I would like the Attorney General to consider carefully the amendment I have proposed for page 102, after line 32. The door should be left open for women from long marriages or de facto relationships to stake a claim, rather than be tied by the 50 per cent deal.

Mr JOHNSON: I support the amendment put forward by the member for Kingsley. The object is fairness, and hers is the fairest solution I have heard so far this evening in relation to this Bill. As my colleague the member for Kingsley said, just because other parts of Australia have different formulas, does not mean they have got it right. As my colleague said, I assume that the Attorney General would now like to lead Australia with decent legislation that is fair and equitable. That was the sort of person I thought the Attorney General to be.

Mr McGinty: And you were dead right.

Mr JOHNSON: I am beginning to wonder. If the Attorney General accepted this amendment, that might continue to be my opinion of him, but were he to flatly refuse to accept it, he would go down in my estimation. What my colleague the member for Kingsley is saying is fair and equitable. An example is that of a person who has been married for 20 years and whose husband - it is often the husband in these cases, but not always - has set up home with a de facto. From what the Attorney General put forward in previous amendments, I understand that if the couple had been together for just over two years when the man died intestate, the de facto would receive a sliding scale of between 50 per cent and 100 per cent of the man's property. The de facto would

receive 100 per cent if they had been together for more than five years. That is what I understand the case to be. The wife would get nothing.

Mr McGinty: After five years.

Mr JOHNSON: After five years! I cannot understand how the Attorney General could possibly consider it to be not fair and equitable for the wife to get a proportion of the property if she were married to the man for 20 years. The fairest way would be to divide the property on a proportional basis between the wife and the de facto based on the length of time they spent with him. If the wife gave 20 years to that man and the de facto gave only five, it is surely not fair and equitable to divide the property on a 50-50 basis between the wife and the de facto. I cannot, for one moment, understand how the Attorney General can say that is fair and equitable. I thought the whole purpose of this legislation was to make it fairer for people in de facto relationships so that they do not have to go to the expense of going to the Supreme Court to try to sort out property and financial divisions. For goodness sake, we have come a heck of a long way from that starting point. We are now disadvantaging people who have been married. In the majority of cases, this would disadvantage the wife. We are showing her such a disadvantage that I think the Attorney General has let the pendulum swing from the right to the left. I thought he would look for somewhere in the middle, so that marriage counted for something in this world today. If a wife has given 20 years to a marriage - it is often the best 20 years of a woman's life - does the Attorney General think it fair that the husband has a mid-life crisis and has a ding-dong with someone who is normally a bit younger than him?

Mr McGinty: I don't know what a ding-dong is.

Mr JOHNSON: I think the Attorney General does know what it is. He has been around long enough to know what a ding-dong is.

Mr McGinty: Come on, tell us.

Mr JOHNSON: The Attorney General has been around long enough to know what a ding-dong is. It happens when some men go through a mid-life crisis.

Mr Barnett: You can talk about it with your background in the British conservative movement!

Mr JOHNSON: Absolutely! Maybe some of my former colleagues could, but there are some over here as well. With all seriousness, I believe -

Mr McGinty: Does anyone have an orange?

Mr JOHNSON: No, there are no oranges involved. Let us refer to a de facto relationship. The Attorney General knows what I mean. The husband starts a de facto relationship, often with a woman who is up to 10 or 20 years younger than he is. I totally agree with my colleague the member for Kingsley that it is not fair and equitable to give the de facto partner 100 per cent of the man's property once she has been with him one day longer than five years. The other question I would like to ask the Attorney General is whether that period of two to five years must be cumulative? What happens if there is a break-up between the de facto couple after a year, but they get back together again after nine months? I have not seen that part. Is it for a -

Mr Barnett: Or he could have two de facto relationships.

Mr JOHNSON: I have said that there could be more. There could be three if he turns the other way as well. Is that five-year period cumulative or if, after a period, that relationship breaks up for 12 months and they then get back together for some reason, is the whole of that period, including the time they did not live together, part of the two to five years?

Mr McGINTY: The typical case involves a man. If he returned to the family home and lived even briefly with the woman to whom he is still legally married, that would oust any claim his de facto might have on his estate. If the marriage is rejuvenated or reactivated -

Mr Johnson: Say that happens but after six months he has had enough, is lured away, and goes back to the de facto -

Mr McGINTY: Time starts to run again.

Mr Johnson: Are the first 12 months prior to his going back to his wife for six months counted? Is that added to the total period?

Mr McGINTY: No. An express provision disentitles a de facto when the husband or wife takes up again with his or her husband or wife. The comment was made earlier that something more than a one-night stand would be

necessary to constitute the resumption of the relationship as husband and wife. That would negate any time he had spent with the de facto.

Mr Johnson: That is fair enough. The most important point concerns fairness and equity, which the member for Kingsley put forward in her amendment. How can the Attorney General justify rejecting that amendment on the ground of fairness?

Mr McGINTY: The trials and tribulations of a de facto relationship might mean that it would occasionally break off. A lot would depend on the length of any break and whether they were continuing to live as husband and wife in a marriage-like relationship. A break in that relationship would not automatically disentitle the parties. The Family Court would want to consider that closely to determine what constitutes a minimum two-year de facto relationship. There is some leeway to recognise that people will not necessarily be together all the time, as indeed husbands and wives are not necessarily together for a variety of reasons. It might be that the husband is working away; it might be a temporary -

Mr Johnson: Yes, but they are married.

Mr McGINTY: Yes; however, all I am saying is that temporary separations would not necessarily be regarded as fatal to a claim that a couple lived in a de facto relationship for two years or more. That deals, as best as I can, with the issue the member raised about the interruption of a relationship or a person's returning to the family home. In terms of the fairness of the issue, if we were to remodel our laws dealing with the inheritance of property of people who die intestate and such matters, one could consider a variety of models to determine how property is to be distributed. The current arrangements have been in place for a significant period. I notice that the legislation was enacted in 1903. I understand that a fairly rigid formula has been applied since that time, regardless of the nature of the marriage, to the distribution of property between children, spouses and other relatives. No other State has adopted the formula proposed by the member for Kingsley, but that does not mean it was not a good idea. I can see some merit in it. I certainly do not dismiss it as proposition without merit. It is a radical departure from the rigidity and certainty that the Act has traditionally provided. Members should bear in mind that we are dealing only with people who die intestate.

Mr Johnson: What you are saying is that if a husband is involved in a de facto relationship for one day more than five years and then dies intestate, the wife, who was married to the man for 20 years, gets nothing. There is no fairness in that whatsoever.

Mr McGINTY: I made the point in relation to an earlier debate that the original Bill proposed a period of two years before a wife would be disinherited. I appreciate the input from a number of members of the Opposition who have suggested that is a bit rugged. We have adopted the provisions of the ACT. A wife in the situation described by the member would not be disinherited. She could make an application under the Inheritance (Family and Dependants Provision) Act if her husband failed to make adequate provision for her. She would still be able to make an application to the court to have a determination made. The ultimate solution is for people to make a will. If a will exists, it will override this provision as we are dealing only with intestate people.

Mrs EDWARDES: I have not heard anything from the Attorney General that dissuades me from proceeding with this amendment. He recognises the merits of the proposal but is unwilling to accept it for two reasons. One is that it has not happened elsewhere. We are in the Western Australian Parliament and I am not a member of any other Parliament. We should be looking after Western Australians and not worrying about what is happening elsewhere. He also said that we should look at the whole of the Administration Act - tip it upside down and change it. That is a different argument. If that is what the Attorney General wishes to do, he is at liberty to do it whenever he wants.

Inheritance provisions under the Administration Act, as they relate to the amendments proposed, are totally unfair. The statistics referred to by the Attorney General only reinforce the fairness of the amendment I am proposing. The mean period of a marriage is 11.5 years. When compared to a de facto relationship of between two and five years, it is still unfair. When considering three per cent over 30 years, it is highly unfair to the three per cent. I do not know how many hundreds of marriages that figure relates to, but three per cent is a considerable number of people who, under the amendment I am putting forward - when there has been no property settlement - would have an opportunity to achieve an equitable share of an estate. As such, the statistics put forward only reinforce the fairness of my proposition.

Mr McGINTY: I must correct something I said earlier about the number of marriages that end in divorce. The Australian Bureau of Statistics publication I referred to states that, on its usual basis of calculation, 46 per cent of marriages are likely to end in divorce. The publication also looked at another measure of the likelihood of divorce. It determined that if a newly born group of babies were exposed to the 1997-99 rates, 32 per cent of their marriages would end in divorce. It is a different measure. I am not sure which is the more accurate. One

measure suggests 32 per cent and the other 46 per cent. For the sake of completeness, I should draw that to the attention of the Chamber. I wanted to clarify my earlier comments in case members thought I was not painting the full picture.

We have had a significant debate on the formula for the distribution of an estate between a legal wife who, in a practical sense, is no longer the wife of the deceased, and a de facto partner. The Government believes it has made a significant concession by applying a stepped scale of between two and five years. It is more accommodating than the provisions in the original legislation. The member for Kingsley made a point about certainty. The probate lawyers from the Law Society of WA want certainty. I have no doubt that a greater measure of certainty would exist by having an absolute cut-off point in terms of years, whether it be two or five years. Before that the surviving partner would get nothing, and after that, the surviving partner would get everything. That is a greater certainty. The stepped arrangement between two and five years introduces an element of uncertainty. The proportion of time spent in a relationship is the more uncertain. I am not unsympathetic to the views that have been put. It may well be that, in the context of marriages and de facto relationships, it is time to review the formula contained in the Administration Act with a view to dealing with it more comprehensively than we are able to at present. We are currently seeking only to extend a certain entitlement to de facto partners.

Amendment put and a division taken with the following result -

Ayes (16)

Mr Barnett	Mrs Edwardes	Mr Johnson	Mr Waldron
Mr Birney	Mr Edwards	Mr Masters	Ms Sue Walker
Dr Constable	Mrs Hodson-Thomas	Mr Pendal	Dr Woollard
Mr Day	Mr House	Mr Sweetman	Mr Bradshaw *(Teller)*

Noes (25)

Mr Andrews	Mr Hill	Mr McGowan	Mr Templeman
Mr Bowler	Mr Hyde	Ms McHale	Mr Watson
Mr Brown	Mr Kobelke	Mr McRae	Mr Whitely
Mr Carpenter	Mr Kucera	Ms Martin	Ms Quirk *(Teller)*
Mr Dean	Mr Logan	Mr O'Gorman	
Mr D'Orazio	Ms MacTiernan	Ms Radisich	
Dr Edwards	Mr McGinty	Mrs Roberts	

Pairs

Mr Trenorden	Dr Gallop
Mr Ainsworth	Mr Ripper

Amendment thus negatived.

Mr McGINTY: I move -

Page 102, lines 1 to 15 - To delete the lines.

Mrs Edwardes: I was waiting for the Attorney General to please explain himself.

Mr McGINTY: We discussed this matter previously so I thought there was no need to repeat myself. We are seeking to delete the provision we discussed previously, concerning the possibility of an intestate leaving a de facto partner and issue, but no husband or wife. We have adopted a sliding scale of two to five years, given that we are making provision for the de facto's partner. This deals with the situation in which only the children, and not the partner, are left from the relationship. That is now redundant because they are covered in the earlier provisions of the Administration Act.

Amendment put and passed.

Mrs EDWARDES: I move -

Page 102, lines 16 to 19 - To delete the lines.

The proposed section covers the recognition of multiple relationships. Under this proposed section, if a de facto partner is entitled to property and the intestate leaves more than one de facto partner, the de facto partners are entitled to that property in equal shares. The Attorney General will move to insert after the word "partner" at

line 18, the words "so entitled". This links in with the clause that the Attorney General has previously amended in terms of the sliding time-frame scale of two to five years. What will the other de facto partner receive? Where and how is that entitlement determined?

The DEPUTY SPEAKER: The next two amendments will require a test vote to ensure members have an opportunity to move their respective amendments. As the member for Kingsley rightly pointed out, the Attorney General intends to insert after "partner" the words "so entitled". It is, therefore, my intention to propose that part of the member for Kingsley's amendment be agreed to up to the point at which the Attorney General's amendment is proposed to be inserted. If the member for Kingsley's amendment is successful, I will immediately put the remainder of her amendment. If it is not successful, I will call on the Attorney General to move his amendment.

Mr McGINTY: In answer to the question asked by the member for Kingsley, where an estate is to be shared 50-50 between a former wife and a de facto partner, but there is more than one de facto partner, the de facto partner's 50 per cent would be shared between the de facto partners. That would not reduce the former wife's share. Two de facto partners would each receive 25 per cent to total 50 per cent, and the former married partner would receive 50 per cent. It would not be shared between the three of them equally.

Mrs EDWARDES: If there were only two de facto partners, essentially the 100 per cent would be shared 50-50 between the de facto partners irrespective of the time that either of them had spent with the intestate. The two years would be still the qualifying period. At the end of the day that shows the inequity, when we draw an arbitrary line rather than deal with it in a more commonsense way.

Mr McGINTY: Hypothetically, the spouse of a two-year marriage, following a 20-year marriage to another spouse, would take because that person was a subsequent partner. After a de facto relationship that has lasted for five years, the de factos would take, to the exclusion of the former wife. Things change and a de facto relationship with one partner can end and another one can start. The new de facto would take to the exclusion of the earlier de facto because there is a one-year time frame. If no claim is made, which is the case with a marriage -

Mrs Edwardes: Don't forget the hardship provision.

Mr McGINTY: One would be hard pressed to claim great hardship five to 10 years after a de facto relationship. It is understandable in a long-term marriage when the wife might be wistfully waiting for the wayward husband to return.

Mrs Edwardes: There could be a long-term and subsequent short-term relationship.

Mr McGINTY: We are dealing essentially with current de facto relationships.

Mrs Edwardes: We are talking about multiple relationships at the time.

Amendment put and negatived.

Mr McGINTY: I move -

Page 102, line 18 - To insert after "partner", the words "so entitled".

Amendment put and passed.

Mrs EDWARDES: A consolidated set of amendments has been circulated to members. Can the Attorney identify the amendments that he intends to recommit?

Mr McGINTY: The next two amendments on the sheet that has been circulated but not on the Notice Paper are in my name. Both of those amendments are to page 102. The first amendment is lines 27 to 29, to delete the lines; and the second amendment is to line 30, to delete (b). I will not proceed with those amendments at this stage, but we have discussed a procedure to recommit the Bill for reconsideration at the conclusion of the consideration in detail stage, and I will be moving those amendments at that time.

Dr WOOLLARD: I move -

Page 102, after line 32 - To insert the following -

(7) The court may vary an entitlement under subsection (2) or (4), and in any such variation will take into account -

(a) the length of time for which; and

(b) the proportion of the assets which were accumulated during the periods,

the intestate lived with the husband or wife and de facto respectively.

We have had a lot of discussion about this matter. I do not believe the Bill gives adequate support to a woman who has been in a long-term de facto relationship, and the male then goes through a midlife crisis and takes off with someone else and gets married; or to a woman who has been happily married for 15 or 20 years, and the husband has a midlife crisis and takes off and lives with a de facto. I believe this amendment will take into account the length of time of either the de facto or marriage relationship, and the assets that were accumulated during the time the two partners lived together.

Mr McGINTY: We have had considerable debate about the formula that will be applied to distribute the estate of a person in a de facto relationship who dies intestate. What is proposed in this amendment will give the court the power to apply a general rule and to then vary that general rule by taking into account the length of time for which the intestate lived with the husband or wife, or the de facto, and also to factor in the proportion of the assets that were accumulated during the periods of the respective relationships. This proposition has merit, as did the amendment moved by the member for Kingsley, which proposed a formula based on the proportion of time that was spent in each relationship. This amendment takes that one step further by saying that the court should also have the power to vary the standard rule to take into account the assets that were accumulated during the respective relationships. This amendment is a fundamental change to the way in which the Administration Act has been applied for a long time and is a lot broader than giving an entitlement to de factos in cases in which presently there is no entitlement. Perhaps this is a matter with which the Law Society and the probate lawyers to whom we referred earlier can occupy their minds.

Mrs Edwardes: I think this legislation will give them enough to do.

Mr McGINTY: I think this matter can be looked at more appropriately in other ways, rather than in the form of this amendment. We do not want to change the formula as fundamentally as has been suggested - and I do not deny the merit of each of those suggestions. In fact, I have a real problem with the rigidity of the current formula. However, in the other States that have had to grapple with this issue - the most recent being the Victorian Parliament - no-one has moved to the sort of formula that the members for Kingsley and Alfred Cove are talking about. I do not deny the member for Alfred Cove's argument. However, that is possibly a question that affects things far larger than the entitlement of de factos, which is what this legislation is dealing with.

Dr WOOLLARD: How does the Attorney believe this issue can be picked up to give support to women in these sorts of relationships?

Mr McGINTY: The member for Kingsley has made the point that the Law Society has expressed some reservations about this provision. That is driven by a range of lawyers who work in this area, some who deal almost exclusively with probate and others who deal more generally with family law. The member for Kingsley and I have met with those lawyers and discussed these issues. The Law Reform Commission, the probate lawyers in the Law Society and a range of other groups could kick this matter along and consider the formula to be applied under the Administration Act. I am not saying that I will refer to the Law Reform Commission, but there are a variety of options. It might well be that members of the Law Society who practise in this area should take up the issue, apply their minds to it and make suggestions based on their experience - perhaps not of the other States, but certainly from elsewhere in the world - that might provide a more equitable basis for doing these type of things. The formula proposed by the members for Alfred Cove and Kingsley may be the best way to tackle it. I am receptive to probate lawyers raising this matter. Perhaps they do not want to do it. Perhaps they are doing what lawyers have a tendency to sometimes do; that is, sitting back and picking holes in what other people do rather than coming up with constructive suggestions of their own. Maybe the ball can be thrown back in their court.

Dr WOOLLARD: If the matter did go to the Law Society or the Law Reform Commission, would their recommendations come back to Parliament for the purpose of making amendments to this Bill, or would they be implemented in the courts?

Mr McGINTY: Sometimes things are acted on quickly and other times they are not. In the 30 years that the Law Reform Commission has been in existence in this State, it has dealt with issues exactly like this. It has put together learned reports that have gathered dust. The most recent and substantive report of the Law Reform Commission dealt with reform of the civil and criminal justice system. We have embraced those reforms and will drive many changes to the civil and criminal justice system of Western Australia because we believe it is a good blueprint for reform of the legal system in this State.

I cannot give the member a commitment that the commission's recommendations would be implemented. In the light of this debate, it would be necessary to bring back a Bill that would amend the Administration Act; it would not amend this Act. However, we are dealing with the Administration Act as part of this Bill so it would require

an amendment to the provisions in toto of the Administration Act. What might or might not become of that would remain to be seen. If the best legal brains put their constructive minds to it, I am sure that we could improve the Administration Act as it currently stands.

Dr WOOLLARD: It has taken a long time to put together this Bill to give support to de facto couples; therefore, it does not have 100 per cent support. What would be the time frame before this issue would be tidied up in a manner that the Attorney General, Parliament and the community would be happy with?

Mr McGINTY: That is a very difficult question to answer because it involves a federal dimension because it touches on marriage. The marriage power under the commonwealth Constitution is invested exclusively in the Commonwealth. Therefore, if we are talking about vesting a court with jurisdiction, it could be necessary to deal with the distribution of property arising out of the ending of a marriage. I make that point to demonstrate that it is not an uncomplicated issue because it concerns the federal dimension. What is the correct formula? How is it most equitably done? Should we do away with a rigid formula and give a court a broader discretion? All those questions are posed and, because of those factors, I cannot provide the member for Alfred Cove with a time frame. If there were a magic wand or a simple solution, we most probably would have incorporated it in this legislation.

Amendment put and negatived.

Mr McGINTY: I move -

Page 103, after line 4 - To insert the following -

(4) Section 139(1)(a) is amended by deleting "person;" and inserting instead -

" person or a person who was living as a de facto partner of the deceased person immediately before the deceased person's death; "

(5) The heading to the Fourth Schedule is amended by deleting "of spouse of intestate as respects to the matrimonial home" and inserting instead -

" **in respect of dwelling houses** "

(6) Clause 1(1)(a) of the Fourth Schedule is deleted.

(7) Clause 1(1)(c) of the Fourth Schedule is amended by deleting "the Table" and inserting instead -

" sections 14 and 15 ".

This is essentially a tidying-up operation that affects a number of fairly minor changes to the Bill as it stands. In particular, it is a change to part VI, miscellaneous, of the Administration Act. The first amendment would include the entitlement of a de facto partner. A similar provision would be made to the subsequent subsections. The amendments are essentially of a minor tidying-up nature.

Amendment put and passed.

Mrs EDWARDES: A number of concerns have been raised as a result of the legal profession considering this schedule. They believe that schedule 1 should be withdrawn and given back to them to redraft. Firstly, they are concerned about the issue of cost and the timeliness of getting letters of administration when a person dies intestate rather than probate. They believe that the way schedule 1 has been drafted leaves a level of uncertainty. If it is linked with the definitions of de facto relationship, that only adds to the level of uncertainty. De facto couples may believe that they have entitlements and that the legislation protects them; however, that is not necessarily the case.

Another issue is the wife's level of disinheritance. We have had extensive debate on the wife's disinheritance. As such, the proposal that has been put forward is totally unfair. Again, we do not support the way in which the Bill deals with marriage and the legal spouse. Amendments have been put forward which would treat the legal spouse in a much more just and equitable way. However, those amendments have not been accepted by the Attorney General. We will be voting against the schedule. We believe that it has been badly thought through. The members of the legal profession, particularly those who are involved in probate and family law, believe that it needs to be looked at again. They would like to have a go at the schedule. Given that our amendments have not been agreed to, we certainly will not support the schedule.

Dr WOOLLARD: I was following the debate up to the amendment to insert subclauses (4) to (7) on page 103. Now we seem to have returned to schedule 1. Will the new clauses not be moved?

The ACTING SPEAKER (Mr Andrews): That will be covered in the recommittal. The member will have the opportunity to speak on that shortly.

Dr WOOLLARD: Before we move to the recommittal, I bring to the Attorney General's attention the references to de facto relationships and de facto partner in proposed section 13A of the Interpretation Act. I would like another bite at the cherry. It says that a reference in a written law to a de facto relationship shall be construed as a reference to a relationship other than a legal marriage. The Australian Capital Territory's Administration and Probate Act 1929, consolidated to 21 December 2000, states -

> ***eligible partner***, in relation to an intestate, means a person other than the intestate's legal spouse who -
>
> (a) whether or not of the same gender as the intestate - was living with the intestate immediately prior to the death of the intestate as a member of a couple on a genuine domestic basis; and
>
> (b) either -
>
> (i) had lived with the intestate . . .

It goes on. Returning to the Bill now before the Parliament, will the Attorney General consider that proposed section 13A(1) state that a reference in a written law to a de facto relationship shall be construed as a reference to a relationship, other than a legal marriage, between two eligible partners who live together in a relationship with the following factors, which may or may not be indicators of a de facto relationship, and then it would list paragraphs (a) to (h) of the proposed section?

Mr McGINTY: As I understand the point being made by the member for Alfred Cove, that is an issue that we will deal with during the recommittal, which we are about to do. That will give the member the opportunity to move her amendment to clause 45 and to deal with the definition of spouse, which was the issue raised by the member for Kingsley. Unless I have misunderstood the point that the member raised, it might be appropriate to complete the consideration of the schedule and then recommit, so that we can deal with those issues in detail.

Dr Woollard: Can we discuss that again?

The ACTING SPEAKER: We cannot go back per se. I will put the question that the schedule, as amended, be agreed to. I suggest that the member for Alfred Cove then raise her point.

Schedule, as amended, put and a division taken with the following result -

Ayes (26)

Mr Bowler	Mr Hill	Mr McGowan	Mrs Roberts
Mr Brown	Mr Hyde	Ms McHale	Mr Templeman
Mr Carpenter	Mr Kobelke	Mr McRae	Mr Watson
Mr Dean	Mr Kucera	Ms Martin	Mr Whitely
Mr D'Orazio	Mr Logan	Mr O'Gorman	Ms Quirk *(Teller)*
Dr Edwards	Ms MacTiernan	Mr Quigley	
Ms Guise	Mr McGinty	Ms Radisich	

Noes (17)

Mr Barnett	Mr Edwardes	Mr Masters	Dr Woollard
Mr Barron-Sullivan	Mr Edwards	Mr Pendal	Mr Bradshaw *(Teller)*
Mr Birney	Mrs Hodson-Thomas	Mr Sweetman	
Dr Constable	Mr House	Mr Waldron	
Mr Day	Mr Johnson	Ms Sue Walker	

Pairs

Mr Ripper	Mr Trenorden
Dr Gallop	Mr Ainsworth

Schedule, as amended, thus passed.

Title put and passed.

Recommittal

On motion by Mr McGinty (Attorney General), resolved -

That the Bill be recommitted for the purpose of reconsidering clauses 29 and 45 and schedule 1.

Consideration in Detail

Clause 29: Section 5 amended -

Mr McGINTY: I move -

Page 40, lines 21 to 26 - To delete the lines.

This amendment deletes the definition of a de facto relationship, because it is intended, and it is more appropriate, to place that in the Interpretation Act, rather than this Bill. The Government is not changing the substance of the definition; it is simply proposing to delete the definition from this Bill, and in a subsequent amendment will seek to insert that definition in the Interpretation Act.

Mrs EDWARDES: This proposal is brand new, and is being brought forward to the House today. The Government is proposing to take the definitions of a de facto relationship and a de facto partner from the Family Court Amendment Bill, and to put those amendments into the Interpretation Act. If a whole series of amendments to respective legislation arise out of the green book, this makes it easier for drafting, but I suggest that the Opposition has major concerns about the definition of de facto relationships in any event, as it applies to the Family Court Amendment Bill. I cannot say that this will be the appropriate definition to incorporate in any other written law, before it comes before this House. The Opposition will not support these amendments being included in the Interpretation Act to become the appropriate definitions for ever and a day.

Mr McGINTY: When Parliament was last debating these matters a considerable period was spent debating the meaning of "spouse", and of "a de facto relationship". As was pointed out, the definitions have their origins in the best legal brains in the country coming up with a model definition, through the Standing Committee of Attorneys General. This Parliament has debated at great length and resolved the appropriate definition to be attributed to a de facto relationship and a spouse. The Government thinks it is better for that definition to appear in the Act to which one would look to interpret statutes, namely the Interpretation Act, rather than in this legislation, and subsequently also be defined in the other Act. Over time that could possibly lead to conflicting definitions. All this amendment does is seek to remove the definition of a de facto relationship from this legislation, and to insert it where it should logically appear, which is in the Interpretation Act.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 45: Part 5A inserted -

Mr McGINTY: I move -

Page 51, lines 11 and 12 - To delete the lines.

The effect of this is simply to delete the reference to de facto partner, for exactly the same reasons as the amendment that has just been carried in relation to de facto relationships. The amendment is supported by the same arguments I have just advanced.

Amendment put and passed.

Dr WOOLLARD: The last time the House discussed proposed section 205U(2)(b) the Attorney General was going to seek some advice in relation to this clause. I ask if he will give the House the benefit of this advice, before I move my amendment.

Mr McGINTY: The amendment proposed by the member for Alfred Cove has the effect of deleting a clause which currently requires that de facto partners seeking to take advantage of this part of the legislation must be over the age of 18 years, unless there are exceptional circumstances. On the advice I have received, the effect of the deletion proposed by the member for Alfred Cove would be to give greater scope for applying to use this provision for younger people. If the member for Alfred Cove was successful in her deletion, anyone, of whatever age, living in a de facto relationship, could apply to take advantage of this part. The other issue raised was in relation to same-sex partners. The Government has sought to provide that the de facto partners must be 18 years of age, or there must be exceptional circumstances. It does not relate to same-sex partners any more than to other arrangements. It simply seeks to provide that people under the age of 18 years, who might be living in a de facto relationship, should not use this provision unless there are exceptional circumstances, such as the de facto partners having a child. The advice I have is that deleting this provision would be counterproductive to the view that the member is trying to advance.

Dr WOOLLARD: The equality Bill and the age of consent for heterosexual and homosexual couples have not yet been discussed in this Parliament. Proposed section 205U(2)(b) states -

> . . . unless both de facto partners have attained at least 16 years of age -

My understanding of that paragraph is that one partner could be a 16-year-old schoolgirl or schoolboy and the other partner could be a 60-year-old man or woman. This paragraph should not be in the Bill because Parliament has not yet discussed or made a decision on the equality Bill.

Mr McGINTY: That is a fair comment. That is why we have inserted proposed subsection (3), which states -

> This Part does not authorise anything that would otherwise be unlawful.

A homosexual relationship in which the partners are under the age of 21 is currently an unlawful activity and proposed subsection (2)(b) would not authorise that unlawful activity. The simple deletion of this provision would extend the range of people who could apply for the benefit of that provision. The provision seeks to limit its application, in succinct terms, to people aged over 18. If that age limitation were deleted, anyone under the age of 18 could seek to use the provision. The issue of the current illegal status of homosexual relationships is picked up by proposed subsection (3). The current age of consent for homosexual relationships is 21, and for heterosexual relationships it is 16. This provision deals only with the distribution of property and questions of maintenance on the breakdown of a relationship of at least two years standing. The Government has sought to limit its availability to people over the age of 18. Debate has taken place on the other side of the Chamber on the issue of the homosexual age of consent. There is some support for the notion for it to be 18 years and some for the notion of leaving it at 21 years. We are not dealing with that debate now. That debate will be with us in the not too distant future and we will deal with it then. This does not, in any way, sanction anything that is unlawful. That is the purpose of proposed subsection (3), which would otherwise be unnecessary.

Mrs EDWARDES: It does, however, make a presumption. Although it might not, by virtue of proposed subsection (3), sanction anything that is unlawful, it makes a presumption about the ages of people who are able to apply to the court. It is illegal, under the Criminal Code, for a person under the age of 21 to commit a homosexual act. Members know that relationships are complex. A lot of hurt is involved in the breakdown of any relationship. An example is the breakdown of a same-sex relationship in which one partner is under the age of 21. That person might not wish to go to the police. However, if an application were made to the Family Court, it would be required to refer that matter or bring it to the attention of the appropriate authorities. If, as the Attorney General said, the proposed amendment widens the scope of those who could bring the application before the court, what would the Family Court do? It would not involve many people. Who would fit beneath the two-year time frame already provided? The Attorney General's argument about widening the scope of the provision does not hold much water. That essentially makes a presumption, which the Opposition does not support.

Mr McGINTY: I am happy to delete paragraph (b), but I am not sure that it would advance the interests put forward. It would open up the possibility of 14 and 15-year-old kids making an application to the Family Court.

Mrs Edwardes: Who have been living in a de facto relationship for two years, since the age of 11 or 12?

Mr McGINTY: Certain cultural issues arise from that. It is theoretically possible. I do not want to delay the House more than need be tonight. If members want to delete the paragraph, I am happy to support its deletion, but there is a downside to the amendment in that it will open up applications being made by people under the age of 18. The purpose of this proposed section is to prevent applications from people under the age of 18. The effect of the deletion will be to open up the Family Court to people under the age of 18 whose de facto relationships have broken down. It is not a matter of enormous import. To my way of thinking, its removal will do no violence to the Bill. There will not be a great number of applications from people who would otherwise not satisfy the test. If members want to delete the paragraph - I do not know whether the amendment has been formally moved - the Government will not resist it.

Mr PENDAL: I was among those members who were concerned about this paragraph during an earlier stage of the consideration in detail. I do not know if my suspicions were running away with me. However, when the Attorney General offered to delete the paragraph, I started to reassess my position. I do not want to be unduly kind to the Attorney General, but if members get my meaning, I reassessed my position when that occurred. Two things have been suggested to me through this discussion, and I would like one piece of reassurance. I would be happy for the proposed section to remain as it is for two reasons. First, because proposed subsection (3) makes clear that proposed subsection 2(b) does not make anything that is currently unlawful legal. Members are saying that there is an issue concerning the homosexual age of consent. The second point is the one on which I would like reassurance. I understand that although the Attorney General has made it absolutely and

unambiguously clear that this provision is not intended to pre-empt or prescribe the lowering of the homosexual age of consent, would a court not be required to consider that under the terms of the Interpretation Act 1984; that is, the assurance of what is meant by the Parliament on this clause? If I am right in that and that assurance can be given, a court cannot do what I feared it might have done. It cannot do what I feared it might have done in the face of the Attorney General giving the Parliament the assurance of what is intended by the clause. It is reinforced by proposed subsection 205U(3), which does not authorise anything that would otherwise be unlawful. Having been very concerned about the impact of the clause earlier in the consideration in detail, I wanted to see it removed. For the reasons I have given, I am inclined to see it left as is. That being the case, the amendment should not be moved.

Mr McGINTY: The legislation will not have any impact on the age of consent for homosexual acts. The provisions of the Criminal Code are express: homosexual acts are unlawful under the age of 21 years. The Government will bring legislation forward in the future that will deal with the issue. It will be dealt with on its merits. By including paragraph (b) the legislation will not have any impact by way of interpretation, inference or implied repeal on the age of consent or add legitimacy to what are currently unlawful homosexual acts.

Dr WOOLLARD: I move -

> Page 52, lines 20 to 26 - To delete the lines.

Discussions of other parts of the Bill have given definitions of a de facto relationship as being either heterosexual, gay or lesbian. I am unhappy with this clause. As I said before, I believe in equality. It should be 18 years of age for all - not schoolchildren, either boys or girls. I am concerned at the wording of the clause.

Mr McGINTY: Before we vote, I reiterate that my earlier offer was based on the other side of the Chamber having an almost unanimous view. As is the nature of Independent members, they do not appear to agree with each other. I seek some indication of what is the view of the other side of the Chamber.

Mr PENDAL: I support the member for Alfred Cove. It appears to be the general view expressed by the member for Kingsley. As the amendment has been moved, I intend to support it. If a division is held, I will vote in favour of deleting the lines.

Amendment put and passed.

Mr McGINTY: I move -

> Page 53, lines 1 to 28 - To delete the lines.

The Chamber has deleted from the Bill the reference to a de facto relationship. It has also deleted reference to a de facto partner. This amendment seeks to delete the definition of a de facto relationship. As members can see on page 53 of the Bill, it is a matter we have already debated at considerable length -

> A de facto relationship is a relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship.

The criteria are listed on page 53 of the Bill. It is the intention to delete the lines and reinsert them into the Interpretation Act by means of a subsequent amendment. It is important that members are aware of the intention.

Mrs EDWARDES: The Chamber has debated at some length the meaning of de facto relationships and the words "2 persons who live together in a marriage-like relationship." The Opposition has stated at some length that it does not believe that de facto relationships are marriage-like. If members read the Marriage Act and look for the words prescribed to be referred to by those who formalise marriages, they will see that marriage is a very solemn statement. I have a copy of the Marriage Act, extracts of which I will bring to the attention of the Chamber before we complete this reconsideration. A marriage is a formal and solemn occasion. Before they marry people, celebrants are required to go through what marriage is all about. It is more than just a commitment between two people; it is a solemn commitment between a man and a woman. The Marriage Act makes sure that people understand what they are doing when they formally enter into a marriage. A marriage-like relationship is not one that is being referred to in a de facto relationship. De facto heterosexual couples can choose to get married. De facto homosexual couples cannot choose to get married. Under our current laws, young de facto couples who have no children do not believe they are in marriage-like relationships.

I referred previously to Australian Bureau of Statistics figures. Homosexual couples do not believe their relationships are marriage-like. The Opposition believes the wrong words are being used in the legislation. The definitions between proposed subsections (1) and (2) are inconsistent. Proposed subsection (1) refers to two people who live together but proposed subsection (2) refers to indicators of whether a de facto relationship exists between two persons. The amendment refers to the nature and extent of common residence. It was an essential

element: we are talking about a de facto relationship as being a relationship between two persons who live together, yet it is not an essential criterion. It is an inconsistency and a contradiction in terms. It is something that the legal profession is concerned about. They believe that proposed paragraph (b) should be deleted. The Opposition has major concerns with this definition. If we have concerns as it relates to other provisions in this Bill, how can we be sure it will be the relevant definition of a de facto relationship in any other written law? What would happen under the Family Court Act to the definition of a de facto relationship under section 5? Will it be inserted in the Interpretation Act? It has not been deleted in this amendment.

Mr McGinty: Which section is that?

Mrs EDWARDES: In section 5 of the Family Court Act it is defined as the relationship between a man and a woman who live with each other as spouses on a genuine domestic basis, although not legally married to one another. It sounds like a good definition. I do not know why the Attorney General did not use it before. He is moving the definition from this Bill to the Family Court Act, but another definition of a de facto relationship in the Interpretation Act will take precedence. The other definition is now being taken out of the part to which it related. It was all right when it was in that part because everybody knew what it related to. Now it will go into the Interpretation Act, which has legal precedence over the Family Court Act.

Mr McGINTY: In many senses we have already had this debate. The member for Kingsley referred to the current definition of a de facto relationship in the Family Court Act; that is, that a de facto relationship means the relationship between a man and a woman who live with each other as spouses on a genuine domestic basis, although not legally married to each other. We have deleted that in some of the earlier debates by virtue of this Bill, and inserted the definition on page 40 that provides that -

> Section 5 is amended by deleting the definition of "de facto relationship" and inserting the following definition -

I appreciate that members opposite are not happy with the definition of a de facto relationship, particularly concerning same-sex relationships and the term "the marriage-like relationship". Having given it detailed and exhaustive consideration, this House voted to accept the new definition of a de facto relationship as picking up those two matters that members opposite find disagreeable. We could debate that matter again. The only question is whether the agreed definition, which was amended during the consideration in detail stage, should be properly considered in the Interpretation Act or in this Bill. This amendment deletes it from the Bill. We will come in a few minutes to its reinsertion in the Interpretation Act.

Dr WOOLLARD: I appreciate that we may have another opportunity to discuss this. When we discussed the definition of a de facto relationship, I suggested that "marriage-like" be deleted and replaced by the words "interdependent relationship". Earlier this evening I suggested that, based on the Australian Capital Territory legislation, we use the words "eligible partner". Did the Attorney General give consideration during the recess to words other than "marriage-like", which could be inserted in the definition of a de facto relationship?

Mr McGINTY: Yes, I did. I could not come up with a better set of words that would more accurately relay the legal intention of what is proposed. "Marriage-like" is a well defined term by the judiciary, and people know what it means. We spent many hours discussing a number of terms including interdependency and domestic relationships. That debate led me to the same conclusion as the discussion since then; that is, we have used the best available definition and that which was recommended by the Standing Committee of Attorneys General.

Mrs EDWARDES: I have located the section of the Marriage Act to which I referred earlier. I would like to bring to the attention of the House section 46 of the Marriage Act, which is headed "Certain authorised celebrants to explain nature of marriage relationship" and reads -

> . . . before a marriage is solemnized by or in the presence of an authorized celebrant, not being a minister of religion of a recognized denomination, the authorized celebrant shall say to the parties, in the presence of the witnesses, the words:
>
> "I am duly authorized by law to solemnize marriages according to law.
>
> "Before you are joined in marriage in my presence and in the presence of these witnesses, I am to remind you of the solemn and binding nature of the relationship into which you are now about to enter.
>
> "Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life."

The Attorney General will understand why we believe the definition that is being used here for de facto relationships that refers to two persons who live together in a marriage-like relationship is offended in a number of ways by those words in the Marriage Act.

Amendment put and passed.

Mr McGINTY: I move -

Page 54, lines 1 to 6 - To delete the lines.

This fits into the same category as the other amendments, as it relates to the meaning of a de facto partner. In the same way that we have already deleted the definition of a de facto relationship and the de facto partner definition, we now seek to delete the reference to the meaning of de facto partner with the intention that is a matter more appropriately provided for elsewhere.

Amendment put and passed.

Clause 45, as further amended, put and passed.

Schedule 1 -

Mr McGINTY: I move -

Page 102, lines 27 to 29 - To delete the lines.

The import of this amendment is to delete from the Administration Act the same definitions that we have just deleted from the Family Court Amendment Bill. I have foreshadowed that it is then intended to insert these definitions into the Interpretation Act. We will then move to the next amendment, which is to take these definitions out of the Stamp Act, with a view to inserting them into the Interpretation Act.

Ms SUE WALKER: I wish to clarify a matter with regard to schedule 1 that I have been talking about with a few people. Is it correct that with regard to proposed section 15(2) of schedule 1, if the husband were to leave and the trial were to extend over the two-year period but the wife could not settle, the legislation would kick in and the de facto would get the 50 per cent? Does the Attorney understand what I am saying?

Mr McGinty: Yes.

Mrs Edwardes: Do you mean if the trial were on foot and the husband were to die, would it terminate the proceedings?

Ms SUE WALKER: It is not even that. If the trial was ongoing, the wife would have to protect herself against the fact that if the trial were to go outside the two-year period and the husband were to die, she would lose any right to that property. That is what concerns me. There should be a safety clause if legal proceedings are pending and the property settlement has not been finalised, because otherwise the wife would be in trouble if the husband were to die. This would apply to only a small number of women, but if I were one of those women, I would be concerned. It would be fair to say that some husbands, because it is usually husbands, or wives -

Mr House: Might try to die!

Ms SUE WALKER: No. It is usually the wives who try to die. Some husbands will try to protract the trial so that the de facto will get the 50 per cent and not the wife, and that concerns me. I am not trying to delay the Bill. This might happen even with a five-year period. There should be a safety clause in the case of a property settlement.

Mr McGINTY: I am advised that, generally speaking, if a partner is dead, proceedings cannot be initiated in the Family Court. However, if an application is on foot and the former husband dies, to use that as an example, the Family Court has jurisdiction to continue to determine the matter as between the husband and wife and to issue orders to that effect. The provisions of the Administration Act would come into force if the husband were to die without a will. If someone wanted to prolong the proceedings in order to entitle a de facto and disentitle a former spouse, all that person would need to do is make a will to disentitle the former spouse in any event, because under the Administration Act we are talking only about people who die intestate. There are a variety of ways of handling it.

Ms Sue Walker: Under the Administration Act it is not possible write out without strong reason a former partner or someone who is entitled to make application to that estate under the Act.

Mr McGINTY: The member might be thinking of the Inheritance (Family and Dependants Provision) Act. The Administration Act deals simply with intestates.

Mrs Edwardes: An application can still be made under the inheritance Act.

Mr McGINTY: If the husband made a will leaving everything to the new partner and excluding the former wife, she could make an application under the inheritance Act to provide for her and her children.

The member's point is valid. My advisers tell me that if on the death of the husband, the de facto partner went to court and sought a share of the estate while the other matter was on foot, the administration of the financial agreement would be held up until the Family Court determined the first claim. I think that, in those circumstances, the marriage property distribution would be determined first, and there would be no prejudice to the wife caught in those protracted proceedings.

Ms Sue Walker: You say that you think that is the case, but I would like to know for sure.

Mr McGINTY: I am told that is right.

Amendment put and passed.

Mr McGINTY: I move -

Page 102, line 30 - To delete "(b)"

Amendment put and passed.

Mr McGINTY: I move -

Page 103, after line 4 - To insert the following new clause -

2. *Interpretation Act 1984* amended.

(1) The amendments in this clause are to the *Interpretation Act 1984**.

[* *Reprinted as at 1 January 1999.*

For subsequent amendments see 2000 Index to Legislation of Western Australia, Table 1, p.216]

(2) Section 5 is amended by inserting in the appropriate alphabetical positions the following definitions -

"de facto partner" and **"de facto relationship"**, have the meanings given in section 13A;

"spouse", in relation to a person, means a person who is lawfully married to that person;

(3) After section 13 the following section is inserted -

13A. References to de facto relationships and de facto partner

(1) A reference in a written law to a de facto relationship shall be construed as a reference to a relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship.

(2) The following factors are indicators of whether or not a de facto relationship exists between 2 persons, but are not essential -

(a) the length of the relationship between them;

(b) the nature and extent of common residence;

(c) whether there is, or has been, a sexual relationship between them;

(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 (including property they own individually);

(f) the degree of mutual commitment by them to a shared life;

(g) whether they care for and support children;

(h) the reputation, and public aspects, of the relationship between them.

(3) It does not matter whether -

(a) the persons are different sexes or the same sex; or

(b) either of the persons is legally married to someone else or in another de facto relationship.

(4) A reference in a written law to a de facto partner shall be construed as a reference to a person who lives, or has lived, in a de facto relationship.

(5) The de facto partner of a person (the **"the first person"**) is the person who lives, or lived, in the de facto relationship with the first person.

This is the essence of what we have sought to do with the recommittal of schedule 1; that is, to insert into the Interpretation Act those amendments we have deleted from the Family Court Amendment Bill which would have applied to the Family Court Act, the Administration Act and the Stamp Act. In all relevant senses, this amendment contains the provisions that were deleted, and we have debated them at length. We are seeking to position them in the correct legislation.

Mrs EDWARDES: I again put on the record that the Opposition is concerned with the definition of a de facto relationship and how it relates to the Family Court Amendment Bill. We cannot be assured that the definition of de facto relationship will be appropriate in any other written law. We do not support the inclusion of the Attorney General's amendment. As an aside, and following on from the member for Nedlands, I again reiterate the unfairness of the distribution of assets under the Administration Act. If a man dies and the letters of administration are held up, the property settlement would be determined after the intestate died and then the letters of administration would distribute the property according to the description outlined in the Bill. As a result, the Family Court would already have determined the property settlement, and the wife would get a share. That is one of the reasons the amendment that we put forward was far more appropriate, fair and just.

Amendment put and a division taken with the following result -

Ayes (25)

Mr Bowler	Mr Hyde	Ms McHale	Mr Templeman
Mr Carpenter	Mr Kobelke	Mr McRae	Mr Watson
Mr Dean	Mr Kucera	Ms Martin	Mr Whitely
Mr D'Orazio	Mr Logan	Mr O'Gorman	Ms Quirk *(Teller)*
Dr Edwards	Ms MacTiernan	Mr Quigley	
Ms Guise	Mr McGinty	Ms Radisich	
Mr Hill	Mr McGowan	Mrs Roberts	

Noes (17)

Mr Barnett	Mrs Edwardes	Mr Masters	Dr Woollard
Mr Barron-Sullivan	Mr Edwards	Mr Pendal	Mr Bradshaw *(Teller)*
Mr Birney	Mrs Hodson-Thomas	Mr Sweetman	
Dr Constable	Mr House	Mr Waldron	
Mr Day	Mr Johnson	Ms Walker	

Amendment thus passed.

Mr McGINTY: I move -

Page 103, clause 2, line 12 - To delete "definitions" and substitute "definition".

The reason is obvious. We have one definition rather than many.

Amendment put and passed.

Mr McGINTY: I move -

Page 103 - To delete lines 14 and 15.

The amendment is to delete the definition of "de facto partner" from the Stamp Act, which I foreshadowed earlier, since we have now reinserted it in the Interpretation Act. The amendment is to achieve that particular end.

Amendment put and passed.

Mr McGINTY: I move -

> Page 103, lines 17 and 18 - To delete "within the meaning of section 205V of the Family Court Act 1997".

The effect of this amendment is to leave a definition of de facto relationship, which will now read -

> **"de facto relationship"** means a de facto relationship which the Commissioner is satisfied comes within section 205ZB(1)(a), (b) or (c) of that Act;

That is necessary by a combination of this amendment and the next. It is a rather cumbersome way of presenting it.

Mrs Edwardes: Will you tell me the section of the Family Court Act?

Mr McGINTY: If I may explain the total impact of these two amendments in combination; it is to change the definition as proposed in the Stamp Act of a de facto relationship, by deleting the words "within the meaning of section 205V of the Family Court Act 1997", because that definition has been deleted. It would then read -

> **"de facto relationship"** means a de facto relationship which the Commissioner -

That is the Commissioner of State Revenue -

> is satisfied comes within section 205ZB(1)(a), (b) or (c) of the *Family Court Act 1997*.

Proposed section 205ZB, which is on page 55 of the Bill, deals with the essential criteria that give the court jurisdiction to deal with a de facto relationship; that is, whether there has been a relationship of two years duration, whether there is a child of the relationship and whether there have been substantial contributions. It is not a definition of a de facto relationship, but they are the three matters that activate the court's jurisdiction. For the purposes of the Stamp Act, a de facto relationship is one that the commissioner determines meets those criteria. The two amendments are just tidying up amendments to accommodate the deletion of that definition.

Amendment put and passed.

Mr McGINTY: I move -

> Page 103, lines 19 and 20 - To delete "that Act" and substitute "the *Family Court Act 1997*".

Amendment put and passed.

Schedule, as further amended, put and passed.

Title -

Mr McGINTY: I move -

> That the title of the Bill be amended to read "An Act to amend the *Family Court Act 1997*, the *Administration Act 1903*, the *Stamp Act 1921* and the *Interpretation Act 1984*."

Amendment put and passed.

Title, as amended, put and passed.