FAMILY COURT AMENDMENT BILL 2001

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 45: Part 5A inserted -

Debate was adjourned after Dr Woollard had moved the following amendment -

Page 53, line 4 - To delete "marriage-like".

Mr McGINTY: At the luncheon suspension, we left the question of whether the definition of a de facto relationship could be amended to use words other than "a marriage-like" relationship. It is the Government's view that if someone offered words other than "marriage-like", which would not have the effect of narrowing or expanding the scope of the legislation, we would happily include those words. We understand that some members object to having words in the legislation that draw a link with a legal marriage. We are concerned that simply to delete the words "marriage-like" would leave every relationship in which two persons live together covered by this legislation, which is not our intention.

The word "interdependent" would suffer the same defect of including relationships that are not what would popularly be understood to be de facto relationships in the sense of being marriage like. The other possibility was to include the word "couples" rather than "a marriage-like relationship". A "couple" has a certain meaning in the public vernacular. However, I am concerned that although it is used in some other States, it could broaden the scope of this legislation. Although I have used my best endeavours to find an accommodation, perhaps with more time an amalgam of proposed subsections (1) and (2) of proposed section 205V might have provided that accommodation. However, we are unable to come up with a form of words that achieves that now.

An instructive judgment spoke about the diversity of those relationships. In 1983, in the case of Lynham v Director-General of Social Security, Justice Fitzgerald stated -

> What must be looked at is the composite picture. Any attempt to isolate individual factors and to attribute to them relative degrees of materiality or importance involves a denial of common experience and will almost inevitably be productive of error. The endless scope for differences in human attitudes and activities means that there will be an almost infinite variety of combinations of circumstances which may fall for consideration.

That is the problem I have. We will oppose the amendment moved by the member for Alfred Cove. However, all is not necessarily lost. If members wish to continue to apply their minds to this clause, this legislation must still go to the upper House. Although I do not want to pass the buck to its members, at the moment I cannot think of a better way to do it. As the Bill progresses through Parliament, I will be open to further suggestions. At this stage, I can do no more than that.

Dr WOOLLARD: I will give members the definition of "interdependency" from the Migration Act 1958 which states -

> ***interdependency relationship*** means a relationship:
>
> (a) between 2 persons who are not:
>
> (i) spouses, or other relatives, of each other under any of the regulations; or
>
> (ii) members of the same family unit under any of the regulations otherwise than because of an agreement to marry; and
>
> (b) that is acknowledged by both; and
>
> (c) that involves:
>
> (i) residing together; and
>
> (ii) being closely interdependent; and
>
> (iii) having a continuing commitment to mutual emotional and financial support;

This definition of the word "interdependent" covers what the Attorney General sought to use in this legislation. I ask the Attorney General to consider this definition and explain why it is not acceptable.

Mr McGINTY: I cannot add much more to what I have already said.

Amendment put, and a division taken, with the following result -

Ayes (14)

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

Noes (24)

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

Pair

Mr Trenorden	Dr Gallop

Independents

Dr Constable	Mr Graham

Amendment thus negatived.

Dr WOOLLARD: Because the House has determined that "marriage-like" cannot be removed from proposed section 205V(1), which refers to the definition of a de facto relationship, it is therefore not possible to have those words replaced with "interdependent relationship", therefore, I ask the Attorney General to further consider the wording of this clause in the passage of this Bill through the upper House.

Mr McGINTY: It is my desire with this Bill to minimise the conflict points. I see this as a wording question, while others, particularly members opposite see it as being highly symbolic and, more than that, they do not want to see that equation drawn in the language used in the statute. I can appreciate that opinion while not agreeing with it. If someone can come up with a way to express a similar notion, without broadening or narrowing the scope of the legislation in words that are more acceptable, I am more than happy to do that. However, I cannot do it now. The offer is open that if that can be done while the Bill is passing through Parliament, I am happy to include an amendment to give effect to that wording, if it can be found.

Mrs EDWARDES: I move -

> Page 53, line 6 - To insert after "but" the passage ", other than paragraph (c),".

Proposed section 205V(2) follows on from the first clause, which we have just been discussing, and says -

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

The critical element is "are not essential". By inserting "other than paragraph (c)" I am making proposed paragraph (c) an essential indicator of whether there is a de facto relationship. Proposed paragraph (c) states -

> whether there is a sexual relationship . . .

I will move a following amendment that inserts the words "or has been" after the word "is" in proposed paragraph (c). It is a critical point if the number of parties who will have the ability to make an application against this point are to be limited. It is my belief, and that of many members of the legal profession, that this definition is far too loose, far too wide and far too uncertain. If the Attorney General is endeavouring to give some certainty to those people whom he wishes to have access under this Bill before the House, a couple of things should be done. The first is to ensure whether at some time there had been a sexual relationship between the two persons. That must be an essential item.

In my second reading response, I mentioned Professor John Wade, who is a leading lawyer on de facto relationships law. He has indicated that it would be very hard to characterise a relationship as marriage-like if, as an essential element, the couple did not have to prove that there was a sexual relationship between them. He indicated that at some stage of the relationship - it need not be when the applications are made - it should be established that a sexual relationship existed between the parties. If the Attorney General wants to ensure that the parties he is talking about are covered by this Bill - that is, two people living in a marriage-like relationship, although we do not support the terminology "marriage-like" - he must ensure that proposed paragraph (c) is an

essential element; that comes from the experts in this field of law. We are aware that that opens it up to some scrutiny in the courts. As indicated in my contribution to the second reading debate, some lawyers have been prudish about how they would go about the questioning the evidence in this area. Professor John Wade advised the then De Facto Relationship Legal Service in New South Wales to not be prudish about it and to include it and be specific in the affidavits. If lawyers want to determine what the relationship is all about, and that it is a genuine de facto relationship, there must be an element of a sexual relationship at some time between the parties and that fact must be incorporated in an affidavit so as to leave no doubt . If all the other elements have been proved and if proposed paragraph (c) is not an essential element, the Attorney General is opening it wide to include a widowed brother and sister, whom I mentioned before, and that broader basis of domestic relationship incorporating every other single factor. Therefore, proposed paragraph (c) must be an essential element and not just an indicator that may or may not be proved about whether a de facto relationship exists.

Mr McGINTY: It is possible to have a marriage in which sexual relations are not a part; for example, with men who might suffer impotency and people who might be severely disabled following an accident. It is conceivable that a sexual relationship, assuming that means sexual intercourse, may not be part of a marriage or a de facto relationship.

Mrs Edwardes: It may not be sexual intercourse. We are talking about a sexual relationship.

Mr McGINTY: As one very prominent world leader said, "I did not have sexual relations with that woman." He certainly had a definition of what sexual relations were, which would be -

Mrs Edwardes: I do not think you should use him as an example, although I know he was on your side of the fence.

Mr McGINTY: It is an important element in determining whether there is a de facto relationship. However, as soon as it is made into an absolute requirement, it gives rise to some difficulties in a very small number of cases. Normally, the absence of a sexual relationship would be prima facie evidence that there was no de facto relationship. I can think of other cases in which the nature of the sexual relationship would not involve sexual intercourse and we then start to get into those arguments. The member is essentially moving two amendments to proposed paragraph (c). However, we are in a position, notwithstanding some misgivings by my advisers on this matter, to agree to the second of those that will ensure it is emphasised as being a part of the relationship at some time, which is an important component. We can indicate consent to that amendment but to make any of these criteria an absolute requirement might deny what is an otherwise legitimate claim in a small number of cases. For that reason, we would not support it.

Mrs EDWARDES: The Attorney General would be aware that the courts read *Hansard* to interpret the legislation. To ensure that the legislation will not be used in a wider manner, could the Attorney General expand on his thoughts about the exceptions to the norm? Some of the case law that I have read often refers to the fact that there may not only be a sexual relationship, but also at some time there may have been a romantic link between the two persons involved. The instances that the Attorney General mentioned of disability, inability and the like, may provide an "out" for couples who, for some reason, may not be in a position to provide evidence that there had been a sexual relationship or for those who could easily provide evidence of a strong link in the relationship with all the other criteria, but that was the one that was not able to be proved. Will the Attorney General put something on the record, so that courts will know in the future what the Parliament's intention was with the legislation?

Mr McGINTY: I am more than happy to do that because clearly a degree of intimacy, or some sort of loving relationship, is an essential component of what we are talking about.

Mrs Edwardes: Not just like the brother and sister-type relationship.

Mr McGINTY: No. As one would expect in a marriage or a de facto relationship, there would clearly be that level of intimacy. A whole host of other adjectives involving trust and respect could be used to describe it, all of which go to the nature of the relationship, which in the overwhelming bulk of cases would be reflected in sexual relations between the couple. I do not want to be prescriptive of the form that sexual relationship might take. However, some people might not have sex because of inability, accident, disability, or perhaps even in some circumstances cultural reasons. I watched a late-night SBS movie the other night, and in that movie there were certain cultural reasons that people did not have sex, but, nonetheless, they were married. Whether it was just a bit of Hollywood or reality, one can envisage situations in which that might occur. However, I do not regard myself as having sufficient expertise in those matters to be able to comment any further.

Amendment put and negatived.

Mrs EDWARDES: I move -

Page 53, line 9 - To delete the line.

The line that I seek to delete is one of the indicators of whether a de facto relationship exists between two persons, but is not an essential indicator. The words I seek to delete are "whether they are living together". Proposed section 205V(1) refers to a de facto relationship as a relationship between two persons who live together. Therefore, it is totally inconsistent to link an indicator that is not essential with what is contained in proposed subsection (1). This is one of the major concerns of the legal profession, particularly when interpreting the amendments to the Administration Act, with which we are still to deal. I know that the Attorney General has an amendment that attempts to address some of the concerns; for example, whether people were living together at the time of the application. The Attorney's amendment refers to "common residence", which is used in legislation elsewhere in Australia. If the wording is to the effect that when two persons live together, common residence is established, or is one of the elements to be established, that would cover the situation in which somebody may be working or travelling overseas for six months, or has been in hospital for six months. However, if, all of a sudden, that is added as an indicator, which is not essential, that is inconsistent with proposed subsection (1), and that leads to the uncertainty that will be created about who may or may not be living in a de facto relationship.

The best advice that I have from family law practitioners and from the Law Society of Western Australia is that this proposed paragraph should be totally deleted. It is not needed as an indicator. It is already included in proposed subsection (1). Although the Attorney General has picked up some of the points that the legal profession raised with him, he has not addressed the level of uncertainty that will be created with the contradiction in the two proposed subsections.

Mr McGINTY: The issue here is that the provisions in this Bill were taken from the model Bill. I agree with the view expressed by the member for Kingsley that it was really a nonsense, having said that the broad definition of a de facto relationship is a relationship between two persons who live together in a marriage-type relationship, to then have a non-compulsory indicator of whether they were living together. Therefore, that should be deleted. We are on common ground there.

As the member has rightly indicated, the extent to which the persons live together will vary. In a conventional marriage, a fly in, fly out worker might live with his wife for one week in four. Is that living together?

Mr Masters: And live with his girlfriend for the other three weeks.

Mr McGINTY: I suspect that is living together. One can see a graduated scale from that to a person who might live with someone on only weekends. It starts to become a bit tenuous. However, the Government could happily support the member's amendment, and she could have another win. Then my amendment will come into play as well.

The ACTING SPEAKER (Mr McRae): While we are dealing with that, I should point out that I intend to undertake a test vote; that is, we will test the will of the House. So that both members' amendments, in which there is a degree of overlap, can be heard, we will test up to the point of the member for Kingsley's amendment, which forms the first part of the Attorney General's amendment.

Mr McGINTY: Yes.

The ACTING SPEAKER: Depending on the outcome of that, we will proceed either to the Attorney General's substantive amendment or to the second part of his amendment.

Mr McGINTY: Will the Acting Speaker be more specific?

The ACTING SPEAKER: The first part of the Attorney General's amendment, and all of the member for Kingsley's amendment, will be put to the vote. Therefore, the question will be that the words to be deleted be deleted.

Mr McGINTY: If that is carried, will the second part of my amendment then be put?

The ACTING SPEAKER: Yes.

Mr McGINTY: The reason that I do not think these words should be simply deleted, with nothing put in their place, is that when the Parliaments of New South Wales and Victoria looked at this same question of whether they should implement the model Bill, they saw the same problem that the member and the Government have identified. The words the Government is now proposing are the words that those Parliaments included in place of those in the model Bill.

Mrs Edwardes: So it is not always right.

Mr McGINTY: In this case, it is demonstrably wrong. The wording must be changed. However, some weight must be placed on the nature and extent to which people are living together, with an absolute requirement that they be living together. If they live together rarely, that matter should come into play.

Another issue on this matter was raised by the Law Society. Its letter to me of 27 August stated -

> In all cases, for the de facto partner to inherit, he or she must be living with the intestate at the intestate's death. Sometimes, however, de facto partners are forced to live apart. For instance, one might have to be admitted to a nursing home or a hospice, due to frailty or ill health. This is particularly more likely to happen immediately before death. Consideration should be given to treating a couple separated by illness as still living together.

Even though this is relevant to the later part of the Bill that deals with the Administration Act and the questions of inheritance, it still raises the same issue. If a person had been living with somebody for 20 years and the last two years of that person's life was spent in a nursing home when the parties were in fact living apart, if it were a more absolute requirement, that could be held to disentitle people. One can envisage those sorts of situations. It is the nature and extent to which people have lived together that becomes important. That is why I support the insertion of the words.

The ACTING SPEAKER: The mechanism for dealing with this degree of overlap between the two amendments on the Notice Paper is that the first question I will put, as a test question, is on page 53, line 9, to delete the line.

Mr McGinty: Mr Acting Speaker, I thought you said you would move that the words be deleted, and that if the amendment were carried, you would then put the question that the words to be inserted be inserted.

The ACTING SPEAKER (Mr McRae): That is right. I did not give members the rest of the advice that I should have done before putting that question. At the moment, we are testing whether paragraph (b) of proposed section 205V(2) will remain. If paragraph (b) is deleted, it will take out the whole line and there will not be an opportunity to insert a substitute. The real test is whether members want to delete paragraph (b) as a starting point -

Mr McGinty: That was not my understanding of your earlier advice.

The ACTING SPEAKER: I misled members to some extent. I will put that question again.

Amendment put and negatived.

Mr McGINTY: I move -

> Page 53, line 9 - To delete the words "whether they are living together" and substitute the following -
>
> the nature and extent of common residence

Amendment put and passed.

Mrs EDWARDES: I move -

> Page 53, line 10 - To insert after "is" the words "or has been".

This amendment relates to paragraph (c) of proposed section 205V(2). If amended, that paragraph would read "whether there is or has been a sexual relationship between them". This point was discussed during the debate and the point was raised that there might have been a sexual relationship between two people at some point, but no longer. As such, the amendment should be accepted so that it may still constitute a relationship between them.

Amendment put and passed.

Mrs EDWARDES: I move -

> Page 53, lines 23 to 28 - To delete the lines.

This amendment covers the whole of proposed subsection (3), which deals with the fact that under the meaning of de facto relationship, it does not matter whether the couple is of different sexes or the same sex, or that the person is legally married to someone else or in another de facto relationship. The concern of the Opposition was outlined previously in the debate. The first concern involves the use of the term "marriage-like". The member for Perth indicated today that although he accepted the terminology of marriage-like, not all homosexual couples believe that they are married. Some obviously go through that process and continue to fight for the right to be considered in that way, but we are dealing with the Family Court. The Family Court was not established to deal with de facto relationships, let alone those of same-sex couples.

One of the worst aspects of this proposed subsection is that it endorses multiple relationships, essentially giving them legal status. Not only can a couple be legally married, but also a person in that relationship can have one or

two de facto partners. In fact, a person can have three, four or five de facto partners. There is no restriction on multiple relationships. I do not believe that, as a Parliament, we should encourage that type of behaviour and give it some form of legal status. I am concerned about a couple of aspects of this provision. The biggest concern is with the acceptance of multiple relationships. That may already be occurring. The Attorney General said the other day that we are looking after the victim - the person who does not know about the person on the side. However, I still have a major problem with the Parliament endorsing multiple relationships. Again, this involves the issue of bringing it into the Family Court. By bringing it under the Family Court, the Parliament will potentially endorse inconsistent relationships. If we were dealing with partnerships and joint ventures in a purely contractual way and in another jurisdiction, it would not be such an issue, but by bringing it under the Family Court, it is given a special status. That is not something this Parliament should adopt.

Mr PENDAL: I support the member's comments. The reality is that people who, for example, are in same-sex relationships already have the ability to protect property or other rights. They have probably had the ability to do that since time immemorial. I imagine some of the more prudent of them have done that. Two males who live together in that kind of relationship may want some form of property or other protection. That is available at law. We have also heard that financial agreements are available for de facto couples. The facility has always been there. However, on this occasion, what we are being asked to endorse brings to mind the word I used in the second reading debate - it is a surreptitious way of saying that we will give some status to these relationships that has some parity with formal, registered marriages. I said during the course of the second reading debate - I also heard other members say it - that I do not have any difficulty with two people, homosexual or not, who want to protect their property rights. However, it is the decision, the Rubicon, that will cost the Government by saying that not only will we offer a sort of parity, but also we will offer it under the laws that flow on from our marriage laws. I am the first to concede that the Attorney General has repeated time and again that we are not dealing with marriage law, but with the failure of marriage law, or that we are not really dealing with de facto law, but with its failure. We are not really dealing with a same-sex couple law, but with any failure of those relationships. There is the rub and objection. Even in a liberal democracy the majority can be wrong, but we are not. By the Attorney General's own admission, we are talking about less than 12 per cent of de facto relationships, many of which progressively move onto a formal, registered marriage. However, the problem is with the words in proposed section 205V(3)(a), that it does not matter whether -

> the persons are different sexes or the same sex;

That is an argument that people on this side could turn back at the Government. We could say that maybe it does matter. These people have the facility at law to look after themselves. In most cases, they choose not to do that. Some people choose to register a partnership agreement. The formal financial agreements are no more sophisticated than that. I was surprised to learn from the Attorney General earlier today that all that is envisaged for these agreements is the flow-on from what is provided under the federal law. The financial agreement is no more or less sophisticated than an agreement reached in front of the family solicitor and certified by him. It is not even registered in the court. It cannot be more simple than that. One of the falsities that has come through in this debate, particularly in parts of the second reading debate, is the suggestion that by our forcing people back to the Supreme Court, we will force them into trauma. Do members know anyone who has been to the Supreme Court without trauma? It was also put that we will impose significant legal costs on people if we force them to go to the Supreme Court or the District Court. I know a few people who have been to the Family Court and who have been taken to the cleaners by their lawyers, who have become rich on the proceeds. Those things are extraneous.

Mrs EDWARDES: I would like to hear more of the member for South Perth's remarks.

Mr PENDAL: In a social sense I have difficulty with this, but I accept the notion that if two people in a liberal democracy want to live in a de facto or same-sex relationship, it is their business. I have no difficulty with those people wanting their property or other rights protected. That is equality in the eyes of the law. However, that equality exists now. Why do they come to the Parliament and ask me, as a legislator, to do the thing that they are not prepared to do? It is very interesting. It is called passing the buck. It is about people not wanting to confront something in their own lives. Many people move from a de facto relationship into a formal marriage. In their eyes, it is a transitionary thing. I see, therefore, that the transition to a formal and registered marriage is logical. I for one will never agree to the application of such a provision to same-sex couples. Although I am prepared to concede their right under law to be protected by simple agreements in the way I have outlined, I will never concede, based on my understanding and knowledge, that they have the right to have that relationship registered or approved in such a way as to be what we call a marriage. Therein lies the whole, the heart, the centre; the genesis of this debate. We should be dealing with this issue outside the Family Court Act. I put forward such a suggestion at some stage during the debate, probably when talking about the other relations Act. However, we should not deal with this in a form that gives some support or comfort to that referred to in

proposed subsection (3)(a) on page 53 as somehow capable of being given the status of a formal marriage. For that reason, I support the amendment of the member for Kingsley.

Mr JOHNSON: I endorse all that my colleagues the member for Kingsley and the member for South Perth have said. I go a little further. I totally agree with the member for South Perth that these provisions should not be in the Family Court Act. I said during the second reading debate that the Family Court is for a family - a married couple with children. I accept that term could apply to a de facto couple with children. A family exists only if children are involved. It does not comprise solely a man and a woman. I certainly do not believe that two people of the same sex who decide to live together and share a life could be described as a family. I do not believe that is the area for them. My colleague the member for Kingsley said that this part of this clause almost encourages extra relationships because more than one de facto relationship can be included in this. I agree. We could go further. The situation could arise whereby someone has two or three de facto relationships on the go and suddenly decides to try something else as well. He could end up with a same-sex relationship. It is described in this Bill as a de facto relationship. Where on earth will we go when someone has a few de facto partners of different sexes? The mind boggles.

Mr Marlborough: The member for Nedlands is contemplating that! You've already got three, and now you want another. That is four days of the week covered. What about the other three days?

Mr JOHNSON: Some people are busy in this area. The member for Peel laughs and jokes, but it is serious. I know many people who take this as an affront to their moral and religious beliefs. They are particularly offended by the notion that same-sex couples should be included in the Family Court Act.

Mr Carpenter: What if they have children? Surely they should be considered a family because they children.

Mr JOHNSON: They are not a family in the normal sense, but if children are involved, they automatically have access to the Family Court. However, that is predominantly because of the children. I accept that. I spent many years trying to protect children in many different ways. One day I will tell the House how I tried to do that. My concern with this area is children. I do not necessarily agree with same-sex couples, particularly two homosexual men, raising children. That is alien to my beliefs and the way of life people should have. Such children would suffer. I can see that to some extent there would be less risk if it were two lesbians who decided to raise a child. I think that it is natural with women - they have that maternal instinct. It is not necessarily the same for men. Some members may disagree with me, especially the member for Perth. At the end of the day, I am saying what I, and the majority of people, think.

Mr Hyde: It is not a majority.

Mr JOHNSON: Of course it is a majority. The member for Perth should do some surveys. I assure him it is the vast majority of people -

Mr Hyde: We have. It was called the election on 10 February.

Mr JOHNSON: Everything is a mandate from that day in February.

Mr Hyde: You try your best to discredit this, but nobody has fallen for it.

Mr JOHNSON: I did not discredit many people during that election. The Labor Party tried to do that to me, and I will raise that in this House one day.

Mr Carpenter: Don't you remember my debate with the former member for Joondalup on ABC radio? He ran this issue in his electorate during the campaign, and he was thrashed.

Mr JOHNSON: That was a matter for the member for Joondalup. The current member for Joondalup won that seat on One Nation preferences.

Mr Pendal interjected.

Mr JOHNSON: I agree. I wholeheartedly agree with the comments of my colleagues the member for Kingsley and member for South Perth. The amendment put forward by the member for Kingsley should be agreed to.

Mr McGINTY: This amendment will have the effect of defeating one of the stated policy objectives of this legislation; that is, to extend to all relationships, whether they be same sex or opposite sex, the access to justice. I appreciate that some people do not like the fact that people in a same-sex relationship will come into the Family Court to effect a division of property when that relationship breaks down. It was a clearly stated part of the Government's policy in this area. This clause defines a de facto relationship, which gives effect to that policy.

The second part, however, is worthy of debate. That is not to say that the other matter was not worthy of debate, but it was a clearly announced policy area and we are not likely to change our minds in the middle of the debate

to jettison a key part of the Bill. The second matter is a more concerning area and deals with people in multiple relationships. The first part of the definition in proposed subsection (3)(b) is unobjectionable; that is, in determining whether there is a de facto relationship, it does not matter whether either of the persons is legally married to someone else. It is not uncommon for a person who is legally married, in the sense that he or she has not been divorced but whose marriage is, for all practical purposes, dead, to move into a de facto relationship. One would want those people to be offered the protections afforded by this legislation.

The substantial area of objection comes from the second part of proposed subsection (3)(b), which states that it does not matter whether either of those persons is also in another de facto relationship at the same time. Members addressed the question of bigamy, polygamy and the like earlier in the debate. Obviously, this clause deals with that issue. We are simply taking a pragmatic view. I suspect that normally the woman will be the victim. A man might be in two de facto relationships at the same time, one of which is in Kalgoorlie and the other in Perth, on a fly in, fly out basis. If one or both of those relationships finished, it would be harsh on the woman in Kalgoorlie if the woman in Perth took precedence in a property claim. We come at it from the point of view that people may not like it and it may not be a matter of public policy that should be encouraged, and I would probably agree with those sentiments. However, it is another thing altogether to say that one of the people who was living in a genuine de facto relationship should be disentitled because - the member for Kingsley used the delightful term - a philandering male has another de facto on the side. It is not fair to the women to say that one of them will be entitled and the other will be disentitled. It is a pragmatic view of accepting the reality that these things do occur, hopefully not very commonly, and ensuring that the people who are the victims of it - I use that term loosely - are not disentitled.

Amendment put and negatived.

Mrs EDWARDES: I move -

Page 55, after line 3 - To insert the following -

205YA. Paramount

This Division does not apply unless there has been unfairness in the financial dealings between domestic partners such that both have contributed to the gaining of income or acquisition of property by the partnership or one of them, whether by -

(a) financial contribution directly or indirectly;

(b) work;

(c) contribution to the household and its operation in the capacity of a homemaker; or

(d) raising of children,

and the failure to alter property interests or make provision for maintenance would be unjust or inequitable.

This is an amendment paramount. Members can see that I was quite ingenious in tightening the proposed section. It clearly identifies that the new part to be inserted in the Family Court Act will deal with property interests. I used the words "domestic partners" in the amendment on the basis that the Attorney General would accept my previous amendment; therefore, if he were to accept this paramount amendment, we would change those words to "de facto". Essentially, it will apply when both partners have contributed to the gaining of some income or to the acquisition of property. It also deals with whether the contributions have been indirect financial contributions, a contribution to work such as a market garden, a contribution to the household and its operations in the capacity of a homemaker, and/or the raising of children. All those inequities have arisen in many legal cases in the past and have not been able to be taken into account in a satisfactory way to ensure that it was fair and just between the parties when both have contributed, but only one benefits. This amendment seeks to insert a paramount new section to ensure that the division deals with the distribution of property and/or financial interests between the two parties. It is not intended to apply in a broader manner than that under the Family Court Act.

Mr McGINTY: The Government does not accept the amendment moved by the member for Kingsley for a very simple reason. When the court looks at the distribution of property, it seeks to confine the factors that may be considered to those of contribution and does not look at need. That is the essence of the amendment as I read it. For instance, it will look at the question of spousal maintenance in the context of either a marriage or a de facto relationship, as it will be under this legislation.

Mrs Edwardes: Maintenance is in the amendment, and the failure to alter such property interests and/or make provision for maintenance will be inequitable.

Mr McGINTY: Yes. Let us put the issue of children to one side, because that is covered by a different arrangement. Spousal maintenance is usually based on a combination of need on the part of the person and capacity, which is a different notion from that of contribution. Paragraphs (a) to (d) of the amendment refer to the partners' contribution to the relationship or to the joint property of that relationship, whether by way of a homemaking role, financial contribution or whatever, and I acknowledge that. However, when it comes to awarding maintenance, the Family Court currently does not have any regard for contribution. However, it does take need into account. For instance, a woman who is left with young children will obviously have a demonstrated need for some time to come, particularly if she has left the work force or is a person with a disability. In many cases, after the family property has been divided, the man will have no capacity to make ongoing contributions, so that is incorporated into the property settlement. People who are better off will have ongoing capacity to make maintenance payments. The provisions in the paramount proposed section have the effect of confining the factors to be taken into account to contributions.

I draw attention to a proposed section further on in the Bill, which does very much what the member is advocating, but which enables that broader range of circumstances to be taken into account. Proposed section 205ZI is on page 61 onwards and is headed "Alteration of property interests - FLA s.79". Proposed subsection (4) on page 62 of the Bill refers to the factors that must be taken into account. The first factor is the financial contribution made, and the second is the non-financial contribution made on behalf of a de facto partner or a child of the de facto relationship to the acquisition, conservation or improvement of any of the property. It then refers to the contribution made by a de facto partner to the welfare of the family, and refers also to the effect on earning capacity, which is not a contribution to the acquisition of the assets of the relationship, and so on. These matters are already covered, and it is important to leave some capacity to go beyond the matter of contribution. The legislation seeks to do that by replicating the provisions of the Family Law Act.

Amendment put and negatived.

Mrs EDWARDES: An amendment stands in my name on page 10 of the Notice Paper, which would insert a new clause of notification. I do not propose to move that amendment because the Attorney General has given me a copy of an amendment he will move that he said reflects what is intended by my amendment. Although that is not necessarily the case, that will be the subject of the consequential debate that will flow when the Attorney General moves his amendment.

Mr McGINTY: I accept the thrust of the point raised by the member for Kingsley. Potentially, it would be unfair to a spouse of the partner who has an interest in property not to be notified when a subsequent de facto relationship has occurred and a claim has been made on the estate. We will move an amendment that includes the thrust of the member for Kingsley's proposed amendment, which should satisfy that matter.

Mrs EDWARDES: I refer the Attorney General to proposed section 205ZB on pages 55 and 56 of the Family Court Amendment Bill. That proposed section relates to an order that a court may make under the division. We have debated the definition of de facto relationship. In order to make an application to the court, a party must meet the definition of a de facto relationship and then, in order to make a determination of property interest, the court must refer back to proposed section 205ZB, which states -

> (1) A court may make an order in relation to a de facto relationship only if satisfied -

Further criteria are identified in the proposed section, which further states -

> (a) there has been a de facto relationship between the partners for at least 2 years;
>
> (b) there is a child of the de facto relationship who has not yet attained the age of 18 years and failure to make the order would result in serious injustice . . .
>
> (2) In deciding whether there has been a de facto relationship between the partners for at least 2 years, the court must consider whether there was any break in the continuity of the relationship and, if so, the length of the break and the extent of the breakdown in the relationship.

During the second reading debate, many members pointed out that two years is a short time for a relationship. In all but one other State, the provision is two years. In South Australia it is three years. What happens in a model Bill or what happens elsewhere is not necessarily true and reflective of what we believe in Western Australia; this is one such circumstance. I referred members to statistics that showed that 30 per cent of de facto relationships last for more than two years. In the main, it is a transitory type of relationship. An even smaller percentage of de facto relationships last for longer than 10 years. I do not have the percentage of people who go from de facto relationships to then marry, which may be the reason for such a small number of de facto relationships that last beyond two years. However, those figures were not available to me.

Many people would regard a two-year relationship as nothing more than a one-night stand. It is a short time to establish a relationship and to form a strong commitment. I am sure that most members who are married or are in a relationship would know that the first two years, or perhaps even the first seven years, are probably the hardest; some members would say it was longer than that. It can be hard for both partners to work hard together in a marriage. However, two years is a short period to establish and have a long-term commitment. It will be a surprise and a shock to many people in de facto relationships to find that after two years the Family Court will enter their lives and distribute property in the event of a breakdown in the relationship.

Mr McGINTY: This is an important provision in the legislation. Apart from the definition of a de facto relationship with which we have already dealt, these are the three essential criteria that must be satisfied before the courts can make an order: first, the relationship must have existed for two years; secondly, there is a child from the relationship and a serious injustice would result if a property adjustment was not made; and, thirdly, when substantial contributions have been made to the property of that relationship and a serious injustice would result if an order were not made. I emphasise the crucial nature of this clause because unless one of those three factors is present, the Family Court will not have the power to make an order to adjust the property interests of the parties. We have debated the matter of the relationship having to have existed for two years.

This morning, a question was raised about providing an information program to advise people that their rights will be adjusted. The Department of Justice had planned to run the very information campaign that I said I thought was appropriate. At the time, I did not know that that program would be put into operation. Currently, that program is in train to make sure that information is provided to the general public.

Mrs EDWARDES: Before the Attorney General moves his amendment, I bring his attention to page 57 of the Family Court Amendment Bill. Proposed section 205ZD refers to a time limit for making applications for the alteration of property interests and maintenance. A de facto partner whose de facto relationship has ended can apply to the court under this subdivision 2 only if the application is made within one year. South Australia is the only other State that makes the application period for one year; all the other States provide for two years. The reason for that is to finalise the situation, particularly the financial situation, between two parties as quickly as possible so that both of them can get on with their lives.

Proposed section 205ZD(2) means that a de facto partner can apply to the court and can be granted an extension if hardship would be caused to that partner if leave were not granted. This issue is currently the subject of some debate among the legal profession because most people get an extension of up to two or three years before the Family Court. As such, the time of one year for extensions of hardship to bring an application is honoured in the breach because the average is two or three years. The longest time for an extension of hardship has been 33 years. Therefore, the view exists that the period of one year in this section is being observed more in the breach, and will not necessarily ensure that time limits are being met to finalise matters between the parties as quickly as possible.

Mr McGINTY: The issue of requiring someone to make an application within one year relates to the setting aside of a financial agreement to spousal maintenance and the division of property. The only reason for the one-year period is that I am told that is the provision in relation to marriages, in which one year is allowed from the issue of the decree absolute dissolving the marriage to make the application for property division. That model has simply been followed in this case. Given that there is capacity for the court to extend the period if there is hardship, I would expect that in all appropriate cases that would be granted.

Mrs EDWARDES: I ask the Attorney General to move his amendment before we move on.

Mr McGINTY: I move -

> Page 57, line 3 - To delete the words "**Time limit for making applications**" and substitute the following -
>
> **Applications, and notifications to spouses**
>
> Page 57, after line 12 - To insert the following -
>
> (3) If a de facto partner who is a party to an application under this Division has a spouse, that person is to give that spouse notification of the application in accordance with the rules.

This amendment picks up on the discussion that took place between the member for Kingsley and me, that someone who is still married should be given notice, because it is likely that person has a property interest that would be affected. Part of the qualification is that we will need to go back, at the conclusion of this consideration in detail as I foreshadowed earlier in this debate, to insert a definition of "spouse". That definition will be -

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

Mrs EDWARDES: I thank the Attorney General for picking up the sentiment of the previous amendment that I was going to move. However, the majority of that amendment can be picked up in the rules, so that is not an issue. The issue was that the spouse did need to be notified. To be lawfully married to that person, as in the definition the Attorney General will move later, the notice must be given before the decree absolute. That can apply at any time in one's life, and, as such, one can be lawfully married forever, until such time as the decree absolute goes through the court. The issue we are dealing with now is property rights and interests, so if a spouse - someone who is lawfully married - applies for a decree absolute, that person is no longer a spouse. However, that person may not have made application to the courts for a property interest right. A de facto partner could then come along and make application in relation to the property that the former spouse - because they are no longer legally married, and are therefore outside this clause - does not need to be notified. This is dealing with the same property that the former spouse would have had a right to in terms of an application to the court. If there are proceedings on foot, I would hope that the ability of the court to be able to bring the two together would be there, but I cannot trust that. When one or other of the parties are or have been married, and the subject matter of the application by the de facto partner is before the court, that person has a right also to be notified. It is more likely that property settlements will take place after decrees absolute, because everyone counts the 12 months, even though some do not need to do that.

This amendment does not deal with cases in which a decree absolute has been granted, and yet a property settlement has not taken place, either because the proceedings are on foot or an application has yet to be made and the spouse will not be notified other than by another party who may have an interest. As such, the amendment moved by the Attorney General does not go far enough, and I will be moving a further amendment to the Attorney General's amendment to address the previous spouse and the fact that that person should also be notified as a party to the proceedings.

Dr WOOLLARD: When the Attorney General responds to the member for Kingsley's concerns, could he also clarify what happens, if a party to an application has a spouse, if the de facto who is making the application is a de facto who has lived in a relationship with one de facto for three or four years, and then moves on to another relationships with another de facto for three or four years? I do not believe that the wording here includes the first and the second de facto relationships, if it is someone who is moving through relationships on a regular basis.

Mr McGINTY: In discussions with the member for Alfred Cove and the member for Kingsley, it was drawn to my attention that it would not be uncommon for somebody who had been married for a long time - generally speaking, the husband - to move in with someone in a de facto relationship, and then that relationship breaks down for one reason or another. The question that was really posed then was what would happen to the interests of the former wife, who may not have initiated legal action to obtain a decree absolute dissolving the marriage, and may also not have done anything to effect a formal distribution of property? There was a need to make sure that the wife's interests were not overridden. The amendment that I have moved would ensure that, when somebody is still legally married but has moved on into a de facto relationship and a claim is made against that person because the relationship has broken down, in respect of property in which the former wife might have an interest, that former wife is required by the Act to be given notice of the proceedings, so that she can then appear to represent and to preserve her interest. I accept that as an appropriate thing to do. The former wife, who is still the legal wife in that situation, would be required to be served with papers as someone with an interest in the property in any event. I made the point that order 9, rule 2(5)(b)(viii) states that at a directions hearing, the court or registrar may make orders or directions in relation to any aspect of a number of matters, and subparagraph (viii) is "giving notice to persons who are not parties to the proceedings". I am told that, as a matter of practice, a question would be asked about who else might have an interest in the property. Clearly, the current wife, given that the parties are still married, would be one such person.

Mrs Edwardes: Your amendment does not deal with the former spouse; it deals only with the situation in which those people are still married, before a decree absolute is issued.

Mr McGINTY: Yes. If a decree absolute had been issued, the former wife - that is, the legal wife who has been left behind - would be served with papers arising from the operation of this order.

Mrs Edwardes: But not under your amendment?

Mr McGINTY: No. My amendment specifies that - this is in the Act, not in the orders of the court - someone who is still legally married to that person must be served with the papers, so that he or she can intervene to protect his or her interests. That is only if the parties are still legally married. The member for Kingsley is right in that between a decree absolute and an order in respect of property, which need not be made until 12 months

after the decree absolute issues - it could be much later by leave of the court - that person could theoretically be left in the cold. However, in my view, that person would be picked up by the existing rules of the court, which require notice to be given to that person. It is a question of how far back one wants to go in including in the Act, as distinct from the orders of the court, a requirement that the former wife be served. I believe that the situation is covered, but we wanted to make doubly sure by including in the Act a requirement in respect of a person to whom someone is still married. That is not unreasonable because, although in the hypothetical case that the member and I have discussed, a woman who had been married for 30 years might be sitting at home, thinking that her husband will come back to her one day, and therefore not do anything through the Family Court, once a decree absolute had been issued, that person would have been through the Family Court and would be used to the court procedures. That person who has had that sort of exposure, would therefore be aware of the property distribution questions, and would no doubt be keeping an eye on them. Therefore, the situation is covered, but perhaps not as expressly as the member for Kingsley would like.

Dr WOOLLARD: I thank the Attorney General, because I discussed that matter with his advisers, and I was concerned that a previous marriage partner might be left out when an application was made by a de facto. Therefore, I am pleased to see this provision in the legislation. However, I am still uncertain about what happens and when. Will it come up later in the Bill? When there has been a de facto relationship, with maybe two or three children, and then another de facto relationship with maybe another two or three children, what will happen in those circumstances?

Mr McGINTY: I did my best, in response to the last issue, to answer the question the member just asked. It is covered by the rules, in my view.

Dr WOOLLARD: Could the Attorney General again clarify exactly where that is covered?

Mr McGINTY: When there is a past de facto, there will be no requirement in the Act for that person to be given notice. It is only a past legal spouse who will be given notice under the Act. However, then the orders of the court cut in, and provision is made, at the directions hearing, for the giving of notice to people who are not parties to the proceedings. The question of who else had an interest in the land would be asked, and a former de facto is a person who should be served under the orders of the court. Therefore, a former de facto would fit into that situation. However, as a result of this amendment, the only people that we will require to be given notice are legal spouses, who are still married and who would have an interest in the land by virtue of their married relationship.

Mr JOHNSON: The Attorney General said that people who had gone through the Family Court for the dissolution of their marriage would know the score - I am paraphrasing - about what has happened and what to do. I dispute that. Many people whose marriages are dissolved - for instance, people with disabilities - would not necessarily be aware of, or worldly wise about, what is going on in the Family Court in the dissolution of a marriage. That could also apply to some ethnic couples.

My colleague the member for Kingsley said that a decree nisi is issued, and about 60 days after that the decree nisi becomes absolute. Many people who are in that position think that is the end of the marriage, it is all gone, and there is nothing else. They think they have no more claims or anything else. However, I understand that in the 12 months after the decree absolute has been issued, at which point the marriage is finished, either party can lay a claim to an interest in any property that they may have held jointly, even though it may not necessarily have been done at the time of the decree absolute. During that 12 months, a former spouse has the right to be informed if something is happening with an interest in any property that, for argument's sake, the husband is holding. If, in the meantime, the husband had been living in a de facto relationship for two years, the de facto would be given the right to claim, but the previous spouse would not be informed because the marriage had ended. However, there is that 12-month period. Is that covered in the legislation? Many people do not understand what, in truth, is going on in the Family Court when a marriage comes to a conclusion.

Mr McGINTY: After the marriage has been dissolved, but before a property distribution has been made, those people would still be required to be served by the court with the papers about the subsequent proceedings between the two de factos. When that de facto relationship breaks down subsequently, not only the parties to that de facto relationship - they are obviously parties to the proceedings - but also the former spouse, given that a property distribution has not been effected, would be required to be notified under the orders of the court, even though the couple was no longer legally married. These people would be given notice. We are doubly emphasising it in the case of someone to whom a person is still married.

I was prepared to accept the argument advanced by a number of members opposite. They said that if people formally entered into a marriage, until such time as it was formally ended, certain responsibilities and liabilities should accrue, including the giving of notice. However, once the marriage is finished, under the orders of the court, a person will still be notified at a directions hearing, so there is no chance that he or she will be left out in

the cold. It will still occur, but we are not putting it into the Act. It was perhaps my error in making a concession on the key point in this; that is, that it can be added to. Questions then arise about the former de facto. What about the former wife in that one year between the order absolute and the 12 months that pass before the applications for property can be finalised? All those questions arise. It will be a requirement that anyone with an interest in the property will be notified by the court of any application made to deal with the property. That is put in twice in respect of someone to whom a person is still married.

Mr Johnson: My colleague is happy with that one.

Mr McGINTY: I do not think she is happy!

Dr WOOLLARD: Will the Attorney General consider an amendment to his amendment to insert proposed subsection (3), to provide that if a de facto partner of a person making an application under this division has a spouse, a former spouse, or has been in a previous de facto relationship, that person is to give that spouse, former spouse or previous de facto partner notification of the application in accordance with the rules? If the wording were modified slightly, it would count for whether a marriage still existed, and whether there were, or had been, one or more de facto relationships.

Mr McGINTY: The short answer is no, for two reasons. First, we have spent time considering the definition of a de facto relationship. Evidentiary questions would be asked about the existence of a de facto relationship. That does not occur with a marriage; a person knows whether or not he is married. A bit of paper says that a person is married, so it is easy to say, "Yes, I must do that." There would be all sorts of problems in trying to establish, in some circumstances, whether another de facto relationship existed. Secondly, there might well have been a property distribution in respect of former relationships. The wording proposed by the member for Alfred Cove suggests that notice must be given to any former partner, whether or not there has been a property settlement. Frankly, a lot of people would say, "I don't want my wife or de facto of 20 years ago to know. She has no right to know. We settled our property at that time, so let's move on." I have tried to accommodate the central point that has been raised about someone who is still legally married. I do not feel inclined to take it any further on the basis that the interests of anyone who still has an interest in that property will be protected by the order of the court.

Amendment on the Amendment

Mrs EDWARDES: I move -

> That the amendment be amended by deleting all words after "If" and substituting the following -
>
> > a de facto partner of a person making an application under this Division has
> >
> > (a) a spouse; or
> >
> > (b) a former spouse who has not been a party to proceedings under Part VIII or Part VIIIA of the Family Law Act 1975 (cth) with that person;
> >
> > that person is to give that spouse or former spouse notification of the application in accordance with the rules.

I propose that amendment for all the good reasons that have already been stated tonight. When a decree absolute is passed, a former spouse might not necessarily have completed a property settlement. It is totally unfair and unjust to that former spouse. In the Attorney General's own words, the former spouse would become a victim. The Attorney General has indicated that he or she would be notified under the rules of the Family Court. The former spouse deserves better than that. That person should be a party to this division and should be given due notice and recognition that proceedings with the Family Court have not been completed.

Mr McGINTY: My advice is that the Government has conceded as far as it should on this matter, so the Government will not agree to the proposed amendment.

Amendment on the amendment put and a division taken with the following result -

Ayes (13)

Mr Ainsworth	Mrs Edwardes	Mr Marshall	Mr Bradshaw *(Teller)*
Mr Birney	Mr Edwards	Mr Masters	
Mr Board	Mrs Hodson-Thomas	Mr Pendal	
Mr Day	Mr Johnson	Dr Woollard	

Noes (26)

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

Pairs

Mr Trenorden	Dr Gallop
Mr Waldron	Mr Hill

Independents

Dr Constable	Mr Graham

Amendment on the amendment thus negatived.

Amendments put and passed.

Debate adjourned, on motion by Mr McGinty (Attorney General.)