FAMILY COURT AMENDMENT BILL 2001

Consideration in Detail

Resumed from 24 October.

Clause 45: Part 5A inserted -

Debate was adjourned after the clause had been partly considered.

Mrs EDWARDES: Yesterday the Attorney General was on his feet and was just getting into his stride convincing us where we needed to go with financial agreements. The real issue, which I identified yesterday, is that people who are now in a de facto relationship will not be able to determine for themselves how they want their property distributed between them. The reason for including previous financial agreements in the definition clause of the Bill is to keep property settlements out of the courts. The best option is for people to agree between themselves rather than the court deciding on the distribution of their property, which might be contrary to what were the intentions of the couple. As the Family Law Council of Australia has advised its members not to provide advice on agreements or to advise people to enter into those agreements, few solicitors in Australia will draw up such an agreement.

As I highlighted yesterday, the proclamation date is important, because of the retrospective impact on any agreement that exists prior to the date. What is the status of an agreement to distribute a couple's property that was entered into prior to the proclamation date? What is the status of an agreement that was entered into prior to the drafting of the legislation and the Bill's coming into existence? That is a major concern of people and should be a major concern of the Government, because not only will it need to run an extensive public awareness campaign for people on whom this legislation will impact, but also it may need to delay the introduction of this legislation as a result of the impact upon people who have no other recourse because of the current problem with the drafting of those agreements.

In summary, what is the status of financial agreements that have been entered into? At this stage we are talking about de facto couples; however, if the impasse has not been determined prior to the proclamation of this legislation, will the Attorney General delay the proclamation in order to assist the people on whom this Bill will impact retrospectively, and thus will have no other choice? The Attorney General should keep in mind that often people enter into de facto relationship for strong personal reasons. Firstly, they do not wish to get married and accept the responsibilities that come with marriage; and, secondly, they do not want their property to be impacted upon by a court. That has always been a strong view, particularly for people getting on in years who have accumulated assets. That is one of the reasons those people do not marry. Those people will want to enter into agreements prior to the proclamation of this legislation. We have a major problem if those agreements can be set aside.

Mr McGINTY: I can hopefully offer some comfort to the member for Kingsley about former financial agreements. Former financial agreements that deal with the property of the relationship or provisions for maintenance and things of that nature must be in writing and must be in existence at the date this Bill is proclaimed. The Bill will affect existing arrangements. I refer the member to an amendment listed on today's Notice Paper to insert at page 79, after line 25, the following -

> (2) A former financial agreement is binding on the parties to the agreement if, and only if -
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> (a) the agreement is signed by both parties; and
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> (b) the agreement has not been terminated and has not been set aside by a court.

The net effect of that amendment will be that, provided a financial agreement is entered into prior to the proclamation of the Act and that financial agreement is in writing, it is legally valid. That is the only procedural requirement in the Bill. If a couple commit their intentions in respect of their property in writing, that will be legally binding. In the future there will be other procedural requirements, such as the involvement of a solicitor in the process, which replicates the provisions of the Family Law Act in respect of marriages. As an interim measure, and bearing in mind the retrospective nature of this legislation, it will apply to relationships that exist at the date of the proclamation that are still in existence - if those relationship subsequently terminate.

Mrs EDWARDES: The brief legal advice that I have received from people who practice in this area is that, because the federal Government has introduced new provisions dealing with financial agreements - whether or not the lawyers enter into those agreements - prior financial agreements are potentially at risk. Therefore, concern exists among the legal profession about the current status of prior financial agreements. I do not know if

the Attorney General has received advice along the lines that if those people try to enter into an agreement now, prior to the Government bringing in this legislation, the federal Government's clauses have opened a window for those agreements to be set aside. The Attorney's proposed amendment states in pat, "only if . . . the agreement has not been terminated and has not been set aside by a court." There is a real difficulty for lawyers who are now attempting to provide advice to people who want to proceed into those agreements.

Mr McGINTY: Those people who at today's date have a financial agreement and those who now enter into a financial agreement prior to proclamation will be deemed parties to a former financial agreement; in other words, agreements that existed on the date of proclamation. The term "former financial agreement" led to the argument to which the member is referring. I recently spoke at a meeting of family law practitioners and addressed this issue. I said that we intended to respect current agreements, but future agreements would need to comply with the same legal requirements as do financial agreements entered into prior to marriage - or "prenuptial agreements", to use the popular terminology.

I refer the member to pages 51 and 52 of the Bill and the definition of "former financial agreement". The advice from the Crown Solicitor's Office is that this is crystal clear. I do not agree and, as a consequence, the Government has introduced this amendment to clarify that a former financial agreement simply needs to be an agreement in writing that has not been set aside. In other words, one does not need the other legal accompaniments to give it legal effect.

Mr Pendal: Is that the former financial agreement?

Mr McGINTY: We are talking only about agreements in existence on the date of proclamation.

Mr Pendal: Were they ever subject to being registered in front of the courts?

Mr McGINTY: No. There was never any recognition of or capacity to register de facto relationships. Because de facto partners will have property rights as a result of this legislation, the same legal requirements will apply - even though the agreement can be entered into during the marriage, or even after the marriage has ended. However, we are then left with the problem of what we do with people who have signed an agreement in good faith.

Mr Pendal: They still see them as current.

Mr McGINTY: Yes. They will be recognised as valid and will apply, even though they do not comply with what will be required for future agreements.

The legislation makes it clear that the Family Court will have the power to set aside those former financial agreements in the same circumstances in which one can set aside a contract. I refer the member to proposed section 205ZX, which deals with the circumstances in which the court can set aside either a financial agreement - that is, one made after the date of proclamation - or a former financial agreement. Those circumstances relate to fraud, whether the agreement is void, voidable or unenforceable.

Mr Pendal: That applies to any other form of agreement in any case.

Mr McGINTY: Yes, that is essentially correct. There are perhaps some provisions that go a little further; that is, giving the court an equitable jurisdiction. I refer the member to page 82, paragraph (c), which states -

> in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or part of the agreement to be carried out;

Impracticability is a ground upon which a contract can be set aside. Paragraph (d) states -

> . . . a material change in circumstances has occurred (being the circumstances relating to the care, welfare and development of a child of the de facto relationship) and, as a result of the change, the child or, if the applicant has caring responsibility for the child. . . a party to the agreement will suffer hardship . . .

The legislation contains equitable provisions. However, it primarily deals with when a court should set aside a document in a normal contractual sense. If someone did not fully disclose his or her circumstances or a fraud had been committed, one would expect the financial agreement to be set aside. Otherwise, if it was entered into in full knowledge of the circumstances and did not offend any of the provisions on pages 81 and 82, the contract in existence at the date of proclamation would be fully enforceable. That will go some way to dealing with former financial agreements. It will still give rise to the problems that exist in respect of prenuptial agreements in a marriage. We are simply duplicating those agreements for future financial agreements.

Mrs EDWARDES: I would like the Attorney General to seek advice from lawyers who practice in the field before proclamation. This is a potential time bomb. If the Attorney has himself covered in terms of retrospectivity, that will give some comfort to the legal profession and those who will be entering into these agreements. I accept the qualifications about a court setting aside an agreement in any event. However, this seems to be broader than that. That advice would be of great assistance to the legal profession and, in particular, to those who seek to enter these agreements prior to the proclamation of this legislation.

Mr McGINTY: I am happy to do that. Some friends of mine run family law practices. I have taken the opportunity, because of my lack of expertise in this matter, to ask them what this means in practice. I had a cup of coffee with one lawyer in Claremont and went through what it all meant. I certainly benefited from what the family law practitioners had to say at their conference.

Mrs Edwardes: Dowding, Crooks, Hynes is one of the largest firms dealing with family law. A couple of other big practices are also very knowledgeable.

Mr McGINTY: These amendments arose out of that discussion. In my view, they address that problem. I am happy to ensure that any problems the legal profession might have are addressed by this legislation. I think we have done that, particularly in respect of the former financial agreements, if not in other areas. It has taken into account the concerns they raised when they read the legislation. I am happy to follow it up even further to ensure that it is crystal clear that as long as it is an agreement in writing and not subject to the usual contractual grounds for setting aside a contract, it will be given full legal effect without complying with the new procedural requirements. That is certainly the intention.

Mr PENDAL: What we are talking about here and in latter parts of the Bill is the core of the issue. It spells out the reasons that we do not need this legislation. Some of us believe that we should not be bringing de facto relationships under the purview of the Family Court Act. However, even people who hold that view, which I do, have said time and again that there is no difficulty with the notion that the people who choose to live in a de facto or any other form of relationship are entitled to protection. I have no trouble with that either. It goes back to an issue that was debated in the other place as early as 1990. The suggestion was made time and again that what people needed for their protection was an agreement. The Attorney explained by interjection that any previous financial agreement signed between two parties will be respected under this new legislation unless it can be ruled as having been broken because of fraud, coercion and so on. However, it leads me to ask the question: how many people have taken advantage of those simple contracts in the past 10, 20 or 25 years? That question relates to people who are not formally married and who know that they are not protected at law, but who want some protection in the event that their de facto relationships come to an end. I am interested in that because it starts to put the correct hue on where the pressure for this to be formally recognised in Western Australia came from. I suspect the answer to the first question is that there have been only a few.

The second question, regardless of the answer to the first, is: to what extent have successive Governments in Western Australia sought to encourage people in de facto or same-sex relationships to enter into financial agreements for their own protection? I suspect the answer is that successive Governments made no effort. We would never have been confronted by this divisive piece of legislation had successive Governments, whether coalition or Labor, gone down the path of using public education programs such as the Quit campaign or many others. People should be aware that if they enter into those kinds of relationships, there are dangers for their financial future unless they have been formalised through a financial agreement. It is the nub of the whole thing. We should never have arrived at this position today. It leads me to the point that no-one has challenged in the course of this debate; that is, that this legislation is part of a political agenda on the part of people who want parity and equality of status in a relationship without having, if members like, the formal commitment of a registered marriage. I return to my starting point, because I know that I could raise it on several occasions in the course of debating this Bill: how many of those financial agreements exist; and, secondly, what efforts were ever made to encourage people to make greater use of them, which might have averted the need for us to use this legislation?

Mr McGINTY: The ability to enter into a financial agreement in respect of a marriage became effective through a commonwealth Act only in December last year. It is a new provision. There was no recognition prior to that of prenuptial agreements, if I can call them that, although they could be entered into once a couple married. The provision is now in place. I am told that the number entered into has been relatively small. We are aware of agreements that have occurred mainly in the eastern States, rather than here. I cannot provide the member for South Perth with more up-to-date information than that.

Mr Pendal: Is that for formal, registered marriages?

Mr McGINTY: Yes. The commonwealth Act provides only for marriages at the moment. There is no provision for de facto relationships, which is the reason it is being included in this legislation, which will replicate the marriage provisions.

Mr Pendal: My original question referred to financial agreements for de facto couples, which will be legitimised, if you like, and drawn into the Bill before us today. Do you have any idea of how many of those financial agreements have been drawn up?

Mr McGINTY: No, because there has been no registration process. Essentially, they are private contracts between partners.

Mr Pendal: Do we have any anecdotal evidence?

Mr McGINTY: I will provide a very anecdotal example. I am told that one person, who is now a registrar at the court, drew up quite a few when he was in private practice. I do not know whether "quite a few" means six or 600. They exist, but they are in the minority. It is difficult to try to put a figure on it because we are dealing with a new concept within the formal system. The legislation concerning marriages has been in operation throughout Australia for less than 12 months. We are proposing to introduce it here in respect of de facto relationships. I cannot give the member for South Perth any reliable information on that. His estimate would be as good as mine.

Mr Pendal: The second part of my question was: what have Governments here done over the past 25 years by way of public education to encourage people to go down the path of those financial agreements, which might have averted going down this path today?

Mr McGINTY: The simple answer is nothing. I appreciate the member raising the issue. The provision for financial agreements in respect of marriages is still hot off the press. We are introducing a new requirement that will substantially affect the property rights of de facto couples. It is incumbent upon the Government to undertake a publicity campaign of some sort to make sure that people are aware of changes to the law. That is something for which I had not planned, but in the light of the comment made by the member, I think it is valid. I will take that up with the Department of Justice and the Family Court to ensure that there is some broader understanding in the community about the changed legal impact on finances and property that will result from this legislation.

Mr PENDAL: I thank the Attorney General for that information. For the record, I am suggesting that there has been a lack of public education, but I am not suggesting that a public education program should promote de facto relationships at the expense of formal marriages. It is not the job of the Government to promote de facto relationships as a preferable lifestyle. What I am suggesting is that there should be a public education program that says that there are certain consequences for people who enter into de facto relationships and that those people would be well advised to consider financial agreements. I wanted to correct that nuance.

There was a second point I wanted raise. It is applicable here as it is referred to in later clauses. I understood the Attorney General to say during his second reading speech that it was possible for de facto couples to opt out of the provisions of this new legislation in favour of entering into a financial agreement. Will the minister explain that to me, because, regardless of my general views on the Bill, I find it a bit odd that anyone can opt out of a law in favour of another course of action. My understanding is that it will not be compulsory under the new Act to enter into a financial agreement because, in some respects, people will have their property rights protected as a result of what is being done here. A person might choose to enter into a financial agreement. I am interested to learn what would motivate a person entering into a de facto relationship to say that, instead of the protection of the amended Family Court Act, he wanted to take up the option of a financial agreement. I am struggling to understand the start and the finish of that continuum, because I cannot imagine what would lead people to do that. The Attorney General may be in a position to throw some light on that.

Mr McGINTY: We are moving into future rather than past financial agreements.

Mr Pendal: I understand that.

Mr McGINTY: People may wish to use future financial agreements as an opting-out provision. To do so, they will be required to get independent legal advice. This is spelt out in proposed section 205ZU, on pages 78 and 79 of the Bill. Essentially, the requirement is that, apart from both parties signing the document, they must seek independent legal advice about the effect of the agreement on the rights of the parties. A number of other things are spelt out on page 79 of the Bill. This provision simply recognises the diverse nature of relationships. The provision is the same as that for marriages, and that recognises their diverse nature. Someone made the point earlier in the debate that someone entering into a relationship or a marriage later in life, after he has accumulated significant property that he might be interested in passing on to his children rather than to someone else, is

different from someone who gets married or enters into a de facto relationship at the age of 20. Their requirements are different. The commonwealth Family Law Act recognises the capacity for parties to a marriage, subject to checks and balances, to enter into a contract that will effectively oust the Family Court from the division of property. In other words, people can prescribe how their property should be divided if their relationship or marriage comes to an end. We are picking up those provisions without change. Although it might seem strange that someone can contract out of the law, it is recognised as appropriate, given the diverse nature of the subject with which we are dealing. It is not unlike a consent order that might be made by a court, particularly in these areas. Parties realise their relationship or marriage is over, agree on how the property will be divided, and front the court with the agreement. The court will then give an order to rubberstamp that agreement between the former spouses or partners to a de facto relationship. This provision will allow a financial agreement to be formalised in advance. A financial agreement can be entered into before, during or after the marriage or the relationship. An agreement can prescribe these things, but it is subject to checks in the same way as the law now requires independent legal advice before parties enter into other types of contracts. It is becoming an increasing requirement of law, and this is essentially no different.

Mr Pendal: If a couple enters into an arrangement that some people would regard as inequitable, can that be contested at a later stage?

Mr McGINTY: Yes. This is prescribed in proposed section 205ZX on pages 81 and 82 of the Bill. A financial agreement, including a former financial agreement, can be set aside in certain circumstances. These include the usual contractual grounds of fraud and the like, and the conventional grounds of setting aside a contract, such as unconscionability or unfairness. Proposed subsection (1)(d) and (e) touches on that. Proposed paragraph (e) refers to unconscionable conduct by one of the parties, and paragraph (d) relates to circumstances that have changed to make an agreement unfair. Mere unfairness, such as one party getting the house and the car and the other getting the dog, will not in itself be a ground on which an agreement can be contested, unless the circumstances have changed or those sorts of arrangements need to be validated. There are sufficient grounds for an agreement to be challenged, provided the parties can meet the tests laid down by the legislation. These tests have been developed to determine unfairness in financial agreements in the event of a breakdown of a marriage.

Mr PENDAL: Several days ago I spoke to someone who was involved in the suggestion many years ago that everyone should sign prenuptial agreements. I will not mention his name in case I have misunderstood him. I consulted him because of the content of this Bill. He told me that I had misunderstood the original intent of prenuptial agreements. We are incorporating into this legislation prenuptial agreements or, as the Attorney General calls them, financial agreements. It was explained to me that the real intention of prenuptial agreements was to resolve what might on the face of it appear an equitable situation. He gave an example of a multimillionaire, Tom Smith, who marries a poorly placed woman in modest financial circumstances. The idea was for Tom Smith to protect himself in the event that the relationship collapsed from having his $200 million split up equitably and evenly - $100 million for her, and $100 million for him. He said that an agreement could be reached that gave her $2 million and left Tom Smith with $198 million, as it was his money and there were certain attendant risks attached. I do not know whether that becomes an unconscionable contract under the terms of this Bill. I do not understand what is an unconscionable contract. I am trying to get a handle on the value that will be attached to the financial agreements that will be formalised. Must the agreement be registered before the court?

Mr McGinty: The parties will need to have a certificate attached to the agreement, but they will not be registered with the court.

Mr PENDAL: Who will provide the certification?

Mr McGinty: The independent lawyer who gives the advice.

Mr PENDAL: Presumably, he will do so in accordance with the provisions of this legislation and, provided there is no fraud, coercion, impactability or unconscionability, he will give a certification to say that the agreement is a legitimate financial agreement.

Mr McGinty: Yes.

Mr PENDAL: That is a little clearer, although I am still having difficulty trying to work it out in the overall scheme of things. After the lawyer has given his certification, those people can say that, by virtue of the agreement, they have opted out of the processes of the Family Court Act of Western Australia. I continue to find difficulty in understanding how one is able to simply opt out of a process about which we are being highly prescriptive - the Bill goes on for pages, which is another part of my criticism. That process will be able to be

set aside by two people simply fronting up to their solicitor, who certifies that, on the face of it, the agreement appears to be acceptable.

Mr McGINTY: I will tackle the member's hypothetical case of the person worth $200 million. That person might enter into an agreement that provides that if the relationship breaks down, he will get $198 million and his partner will get $2 million. The notion of unconscionability goes to the issue of abusing the power that a person has when there is unequal power in the relationship. Someone entering into a contract is akin to the notion of duress and those sorts of circumstances. If, in the hypothetical example, the two people say that they are perfectly happy with the $198 million-$2 million division, and the relationship breaks down, bearing in mind that the person is bringing the whole $200 million into the relationship, the notion of unconscionability is not necessarily attached to it. If, however, during the course of that relationship, the woman had three children and she said that $2 million was not enough on which to raise three children, the changed circumstances that could render the agreement unfair would then be brought into play as a basis for striking down the agreement. However, it recognises that in the diversity of relationships, people will have different requirements. It is valid for that person to want to preserve his wealth. That in itself is not inherently unfair. Provided that everything is done scrupulously, with full disclosure and in a way that is not inherently unfair by one party abusing his or her position of power over the other, or something of that nature, an agreement will stand. It cannot be struck down simply because the judge, in his discretion, thinks that it should have been a 60 to 40 split rather than a 99 to one split, or something of that nature. That carries forward those essential contractual principles, but perhaps adds changed circumstances that render the agreement unfair as an additional ground for striking down the contract. Another point is that for people who have significant wealth, nondisclosure of a single element of that wealth would be grounds for striking down an agreement, and so it should be. If a person has not disclosed all when he or she entered into the contract, that person has not been fair. The area that will be most productive for lawyers, if I can put it that way, will be in establishing that there was nondisclosure. That highlights the importance of having independent legal advice that certifies what has been disclosed, so it then renders the agreement unlikely to be challenged in the future, provided that people are up front and honest about it.

Mrs EDWARDES: Perhaps the Attorney General will move his amendment, which is on page 8 of the Notice Paper, before we move on to further debate on this clause.

Mr McGINTY: I thank the member for Kingsley for that advice, and, as usual, it is sound. I move -

> Page 51, line 26 to page 52, line 2 - To delete the lines and substitute the following -
>
> > **"former financial agreement"** means an agreement made before the commencement of this Part between de facto partners with respect to any of the matters mentioned in sections 205ZP(2)(a) or (b), 205ZQ(2)(a) or (b) or 205ZR(2)(a) or (b), or matters incidental or ancillary to those matters;

Amendment put and passed.

Mr BRADSHAW: I move -

> Page 52, lines 18 and 19 - To delete the lines and substitute the following -
>
> > (a) that has commenced before the proclamation of the Part; or

My reason for moving this amendment is that I do not think any fair or reasonable-minded person believes in retrospective legislation. This is a classic example of retrospective legislation. It is not fair that people who, for one reason or another, have entered into a de facto relationship under one set of rules suddenly have a new set of rules forced upon them. Under those circumstances, it should be fair and reasonable to say that people who are currently in that situation should remain covered by those rules rather than be dragged under the new set of rules. I have always opposed retrospective legislation; I support it only rarely. I probably have supported some retrospective legislation, but I cannot think of any. This is a classic example of what we should not be doing. One of the clauses that has just been passed states that if people have a formal financial agreement, it will be recognised. However, in the main, arrangements such as that would not be in place. It is wrong for us to force people to come under this new arrangement. In the future, people who enter into de facto relationships will enter into them under the new rules, if they are passed. Therefore, it will be a different ball game. However, the people who are already in a relationship should not be forced under the new rules because they took up the relationship under the previous rules. The law will be more cognisant of formal agreements when people enter into de facto arrangements in the future. However, once people have been in a de facto relationship for some time, it is hard for them to suddenly say that they will put in place a formal agreement, because it might start to create friction between the people in the relationship. Although some people who want to marry want a formal agreement before they get married, I am sure that many people do not do so because it tests the strength of their feelings about getting married.

I will not support the legislation, particularly if my amendment is not passed, because I do not believe that people should suddenly find themselves faced with a new set of rules if they have already formed a relationship. I seek the support of the House for this amendment.

Mr McGINTY: I will pick up some amendments that take up some of the points that have been raised, particularly by the members for Kingsley and Alfred Cove. We are not adopting a "no amendments" stance. However, in this case, we will take a hard line. This legislation is about the breakdown of relationships. It will not apply retrospectively to any relationship that has finished at the date of proclamation. To my way of thinking, given the subject matter of the legislation, which is breakdowns and how property is distributed, it is not retrospective. However, it certainly will apply to a relationship that is on foot at the date of proclamation, if that relationship subsequently breaks down.

I appreciate the point that has been raised by the member for Murray-Wellington; that is, for people who enter into a de facto relationship as at today's date, the law is as we understand it in respect of the subsequent division of property. If the relationship subsequently breaks down, different rules will be applied to that relationship at the point of breakdown than those rules that applied at the creation of the relationship. I accept that, and I accept that the member argues that it is retrospective legislation. However, in a technical sense, I do not accept that, because this legislation is directed at the breakdown of relationships and the division of property.

The other problem is that we seek to effect a significant change in the financial and property incidents of a relationship at the point of breakdown. If we were to accept that the legislation did not apply to any existing relationship, we would defer for a very long time the full impact of this legislation; longer than I would consider appropriate in these circumstances. This legislation must provide redress where unfairness results from the fact that here in Western Australia, alone in the Commonwealth, we do not have laws that regulate this area of activity. The laws in the other States relate to the breakdown of the relationship, not to when the relationship was entered into. It would be unusual to defer the equity and justice contained in this legislation for too long a period for it not to apply to existing relationships.

Mr PENDAL: Would the member for Murray-Wellington clarify his amendment for me? On the face of it, this legislation does not appear to be retrospective. My understanding is that the member is concerned about a couple who have been in a de facto relationship on their own terms up to this point and who might have a financial agreement. I understand that we will respect those financial agreements by incorporating those agreements in the legislation. Therefore, no-one is trying to alter the rules under which that couple went into the relationship if we incorporate their valid prenuptial financial agreement or whatever the couple might have called it. If we incorporate and respect a de facto couple's agreement, I find it hard to understand how we would retrospectively diminish their prospects.

I share the member's concerns about retrospective legislation. However, on some occasions retrospective legislation is good. I suspect the member's attitude is coloured by the occasion years ago when retrospective legislation for tax schemes was introduced into the federal Parliament. The Liberal Party culture believed that retrospectivity was inherently bad because it made something illegal today that was legal yesterday. We would be legislating retrospectively if we said that today's Bill would make all current agreements between a man and woman void, whether they were written on paper or verbal. A couple might have made an agreement that in the unfortunate event of a separation they would each take half of everything. They might have agreed that one partner would take the house on the farm and the other partner would take the city house. That type of agreement is just as binding as any other, albeit much more difficult to enforce. However, we are not doing that. I thought that what we are doing would give comfort to the member for Murray-Wellington. I would like to know whether I am wrong about that. Although I am not against all retrospective legislation, I have some concerns that I share with the member.

Mrs EDWARDES: In my speech in the second reading debate, I raised the same concerns referred to by the member for Murray-Wellington. For a number of reasons, it is a great shame and it is disappointing that this legislation has not been aired as publicly as it should have been. Key changes that are being imposed by this legislation will impact on people who have deliberately chosen to live in a de facto partnership. People live in de facto relationships for several reasons. They might not want the rights and responsibilities of marriage and they might not want the same commitment as a marriage.

Another reason is often linked, apart from other reasons, to property settlements. I am not talking about the boyfriend and girlfriend who just live together and are having a damn good time who do not believe they are living in a marriage-like relationship. Previously, I have quoted from an Australian Bureau of Statistics report that shows that many young de facto couples do not believe they are in a marriage-like relationship. Other couples have a strong commitment to each other and are in long-term relationships but do not want to get married because of the financial responsibilities that are attached to it. We have identified some of those cases in

which the relationship has dissolved and the distribution of property has been inequitable. We have identified that issue, which should be addressed.

Who is aware of this legislation? All of a sudden at midnight on the day this Act is proclaimed, the lives of de facto couples will change. The Government must embark on a long-term public campaign to identify those people whose lives will change at midnight when the Act is proclaimed. Some of those people will be in for a big surprise. The legislation has not had the public airing it should have had.

Mr Pendal: How would they be in for a big surprise? How will anyone's relationship be affected when we go from the old system to the new system?

Mrs EDWARDES: Suddenly, at midnight on the date of proclamation, the Family Court will have the ability to distribute property between de facto couples in the event that the relationship dissolves. At one minute to midnight, the Family Court was not involved. If the relationship were dissolved, the only impact on a couple would be that they could make an application to the Supreme Court. I am not even sure whether many people know about that option because there has been such little use of it. Most people in relationships resolve disputes between themselves in any event and deal with their problems fairly. However, the reason for the change has been the inequity and unjust treatment that has occurred when two parties have contributed to the property but only one party benefits. This legislation attempts to address that.

At midnight on the date this Act is proclaimed, those people who do not know of its existence will suddenly find the Family Court involved in their lives even though they do not want to get married. Some people choose not to get married because of their faith or because they do not want the rights and responsibilities of marriage. Some boyfriends and girlfriends do not believe they are in a marriage-like relationship anyway; they just believe they are just having a damn good time. Young people will say that they do not believe they are living in a marriage-like relationship. The statistics I was able to find show that only 30 per cent of de facto couples stay together for more than two years. The majority of de facto couples who live together do so for fewer than two years. From the date this legislation is proclaimed, it will impact on de facto couples who did not know that the Family Court would enter their lives. Some of those people will be absolutely horrified. The member for Murray-Wellington is concerned about the impact on those people. The Attorney General has not told us what public awareness campaign he will conduct before the Bill's proclamation.

Mr BRADSHAW: The member for South Perth has misinterpreted me. I am not worried about those couples who have a formal agreement because those people can look after themselves and are covered. People have entered into relationships under certain rules and regulations, but suddenly we want to change those rules and regulations. I do not believe in retrospective regulation. This House makes too many rules and regulations. It is about time we rid society of some of those rules and regulations that control people's lives. We have gone overboard. As I once said, eventually, we will have to have a licence to breathe if Parliament and other places continue to pass so many rules and regulations.

It is wrong that, after people enter into arrangements under one set of rules and regulations, all of a sudden Parliament wants to change those rules. Let people who wish to enter into de facto relationships in the future make up their minds whether they wish to do so under the new rules and regulations, and also give them the opportunity of knowing that, if they have an agreement, it will also be adhered to. Many people in the past, because there has not been the same emphasis on the Family Court involvement, have not worried about such things. Of the number of de facto relationships that break up, the number that reach the Supreme Court would be minimal, because of the cost, public ignorance, the amount of assets involved, and so on. This law does not really apply to people on the pension living in Homeswest accommodation, with no assets and no money to distribute. Such people will just go their own separate ways. There are many people in between that scenario and the mega-rich. A few years ago, there was a major court case involving a de facto relationship. From a personal point of view, I object to retrospective legislation. Obviously, I still support my amendment and I hope the House will take cognisance of it. Any fair-minded person would say that retrospective legislation is wrong, unless there is a very good reason for it, and in this case there is not. I know that inequities and unfairness exists out there, but that is life. People who have gone into de facto relationships to this point in time have done so under the knowledge of the laws that are now in place. We cannot be out there protecting all people from themselves, as much as some members would like to think we can. Regardless of what this Parliament puts in place, inequities and unfairness will still exist. There should be no retrospectivity in this legislation, and this amendment will remove that retrospectivity.

Amendment put and a division taken with the following result -

Ayes (16)

Mr Ainsworth	Mr Day	Mr Johnson	Mr Pendal
Mr Barron-Sullivan	Mrs Edwardes	Mr Marshall	Mr Waldron
Mr Birney	Mrs Hodson-Thomas	Mr Masters	Ms Sue Walker
Mr Board	Mr House	Mr Omodei	Mr Bradshaw *(Teller)*

Noes (31)

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

Pair

Mr Trenorden	Mr Kucera

Independents

Dr Constable	Mr Graham

Amendment thus negatived.

Dr WOOLLARD: Before I move the amendment standing in my name, will the Attorney General please explain how proposed section 205U(2)(b) will operate?

Mr McGINTY: Once a person is 18 years of age, the law will apply. This section provides an exception to the application of this part of the law to people who are under that age. It is akin to the requirement of the marriage law that persons be aged 18, although the court can allow marriage under that age. A discretion is vested in the court to allow it to take special circumstances into consideration. Some cases occasionally feature in the media with a couple under the age of 18 seeking from a magistrate permission to marry. That approval can be granted in a variety of exceptional circumstances, but otherwise persons wishing to marry must be over the age of 18. That is a comparable provision to that provided by the proposed new section. Given that this legislation deals with property, it should not catch people who are not adults. It must be borne in mind that this is subject to an amendment on the Notice Paper which will make it more specific and which will require that the parties be above 18 years of age at the time the application is made to the court.

Proposed section 205U(2)(b) excludes the operation of this law if either or both of the de facto partners has not attained 18 years of age. In other words, if at least one of the partners is 16 or 17 years of age, there is a discretion, but this law can never apply to people under the age of 16 years. One can think of certain cultural circumstances in which there might be a de facto relationship between people under the age of 16 years. That would certainly not be the norm. In fact, if there were a sexual element to that relationship, it would be a breach of the Criminal Code. However, between the ages of 16 and 18 years, proposed paragraph (b) states that the court must make a finding that the circumstances of the relationship are so exceptional and unusual as to justify the application of this part to the partners. Therefore, it does not apply to people under 16 years of age. As I have indicated, it is a problematic cultural and criminal area for people under the age of 16 years, and this provision will not apply. However, between the ages of 16 and 18 years, there is a discretion to allow the court to apply the provision. For instance, the court might find that there are exceptional circumstances because the partners have a child, and that is a factor they want to work into any property distribution, if it is appropriate in those circumstances. Otherwise, the requirement is that both parties be 18 years of age or older.

Dr WOOLLARD: Does the use of "de facto" in this proposed section include gay, lesbian and heterosexual relationships?

Mr McGinty: Yes, it does.

Dr WOOLLARD: If it does, I believe that the proposed section should be redrafted to fully reflect the current state of the law. Yesterday I spoke about the opinions I will express when equal rights legislation is moved in

this House. I believe that the age for heterosexual, gay and lesbian relationships should be 18 years. This legislation anticipates the proposed changes to the equal rights Bill, and this proposed section should be a consequential amendment to that Bill. I therefore move -

Page 52, lines 20 to 26 – To delete the lines.

Mr McGINTY: The effect of the amendment that has been moved by the member for Alfred Cove is possibly unintended. However, the effect of deleting that proposed paragraph is that the law will apply to every de facto relationship, regardless of the age of the parties. The Government believes that it should apply only to relationships in which the parties are above the age of 18 years, except when the court finds that there are exceptional circumstances when the parties are between 16 and 18 years of age. In any event, it will not apply to people under the age of 16 years. If that exclusion is deleted, the Act will include more relationships than the Government proposes to include. I do not think that is what the member intends. I understand the intent that we should not be seen to be condoning in any way something that is currently unlawful; that is, sexual activity of gay men under the age of 21 years. It is really only the gay situation that is relevant, because male-to-female sex is legal from the age of 16 years, if I can put it that way. The effect of the member's amendment will be to include young people in the scope of the Act, whereas she wants to exclude them. I think that is the reason the member is seeking to delete those lines.

Secondly, the age at which people can engage in sexual activity without legal sanction, whether it be homosexual or heterosexual, is an issue that we will debate most probably later this year. This provision will not impact on the Criminal Code, which currently requires that, for homosexual sex, each party be 21 years of age or older. Therefore, by stating that a particular relationship is or is not included within the scope of this Bill will not affect the Criminal Code.

Heterosexual sex when the woman is under the age of 16 years is a sexual assault, because, under the law, someone under the age of 16 years cannot give consent to engage in sexual activity. For men, homosexual sex is unlawful under the age of 21 years. That will remain the case under the Criminal Code. This provision simply deals with the nature of those relationships that will be subject to a property division in the event the relationship breaks down. For those reasons, the Government cannot support the amendment that has been moved by the member for Alfred Cove.

Mrs EDWARDES: The Attorney General has a problem. Under this proposed section, by virtue of the definition of de facto relationship, a homosexual couple, one of whom is under the age of 21 years - that is a breach of the Criminal Code, and that is why the provision does not include an age under 16 years - is able to take an action to the Family Court. This provision endorses an unlawful act. Until the Parliament changes the law, this is virtually endorsing an unlawful act under the Criminal Code, and it will put the court in an unenviable position when dealing with a couple whose actions are unlawful. When the Attorney General was asked to explain the operation of this proposed section, he clearly said that the reason the age is 16 years is that it would be unlawful if the age were less than 16 years.

Under the definition of de facto partners that is proposed in this legislation, the Government is effectively endorsing something which for male same-sex couples is a breach of the Criminal Code. Therefore, the Attorney General should support the amendment, and if the Parliament changes that section of the Criminal Code, he should put forward a consequential amendment, without presupposing that in the meantime. I do not think huge numbers of people will be involved before the Attorney General puts those laws before the Parliament.

Mr McGINTY: I guess it always pays to be a bit smarter and read to the bottom of the page, because the last two lines on page 52 go some distance towards dealing with the concerns that have been raised. The member for Alfred Cove asked me about proposed section 205U(2), which I read and told her what was the intention. Proposed subsection (3) touches on this very issue. It says -

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

I guess that is the attempt to deal with that issue.

I come back to the point raised by the member for Kingsley. The only possibility of anything unlawful under this provision is homosexual sex. There is no problem with heterosexual sex under this formulation. This provision would enable the court to deal with a homosexual relationship in which one of the partners was under 21 years of age. In other words, without prying too much into their private life, I presume that they had breached the Criminal Code. That was the point raised by the member for Kingsley. This legislation does not presuppose that the proposed amendments to the gay and lesbian law reform, which have been announced, will be carried. It expressly says that it will not authorise anything that is unlawful, and homosexual sex under the age of 21 is unlawful and will remain unlawful. This legislation deals with the distribution of property in a relationship that

has broken down. I do not see a problem with that approach. We are dealing with the reality of the situation and it would be most unusual for matters of this nature to come forward, but they might. That is the best contribution that I can make to this debate.

Mr PENDAL: I want to express my concerns and tentative support for the members for Alfred Cove and Kingsley. Notwithstanding what the Attorney General has said, it seems to me, as a legislator, that proposed section 205U(2) presumes to do certain things. Why do we need to have this proposed section? The Attorney General has made a vague reference to some cultural difficulties that might be picked up. He then talks about proposed subsection (3) saving the proposed section. It is against my will that the Bill, which deals with de facto relationships and then, by extension, same-sex relationships, will send a message, or pre-empt something that Parliament may or may not do later in the year.

Mr McGinty: If this proposed paragraph were deleted, it would enable the court to deal with relationships regardless of age. It would expand its range of effect. However, if the view of the three members is that it should be deleted, that is not something that I would resist, if that helps the member with his comments.

Mr PENDAL: In any debate like this we are challenging a view - that of the Attorney General - and also trying to get some lead or guidance from him as the minister in charge of this Bill. I picked up on a nuance from the Attorney General when he said to the member for Alfred Cove that he understood what she was trying to do and if she removed the proposed paragraph, it would probably result in an unintended consequence. That led me to believe that he was effectively saying that he understood what she was trying to do but perhaps there was a better way of doing it. I would be interested in that because the proposed paragraph seems to be doing exactly what the member for Alfred Cove thought it was doing, and her view has been supported by good advice. Given that the Attorney General has said that he is prepared to see the proposed paragraph deleted, it then leaves people like the member for Alfred Cove and others to face the consequences of what the Attorney General said earlier on; namely, that it might have unintended consequences. I am not sure whether he should be satisfied with that. Perhaps, it is an amendment that we should be jumping over because the standing orders allow us to return and recommit to something at a later stage. I seek your guidance, Madam Deputy Speaker, on whether we should move onto another clause, and not vote on this one, and then have it recommitted before the end of the consideration in detail stage. Party politics are not at play here. I listened to what the member for Alfred Cove said and she seemed to make a lot of sense, particularly knowing that she sought advice. I listened to the former Attorney General and she also seemed to make a lot of sense. I then listened to the Attorney General and alas, much to my distress, he even made some sense. Therefore, it may be one of those things that is better sorted out when people are sitting around a conference table informally and trying to come to a better understanding of the situation. The opportunity exists to use the device of recommitting the Bill at a later stage on that proposed paragraph if we are not confident that what we are doing is the right thing.

Mrs EDWARDES: Potential problems could arise. An example is a homosexual couple in which an elderly male, who has collected quite a few assets of dollar value over the years, and a 20-year-old man have been together for more than a couple of years. When relationships - of whatever nature - break down there is always hurt, and as such, the charge under the Criminal Code is against the older male, even though it may have been a consensual relationship. Therefore, the younger male could quite easily take the application to the Family Court in a vindictive manner and, therefore, the Attorney General is potentially placing people in that situation. Therefore, I support the motion to delete the lines. By virtue of the Attorney General's definition, he is incorporating same-sex couples into de facto partnerships; therefore, he would need to delete the lines until such time as Parliament has changed its view on that section of the Criminal Code.

Mr PENDAL: The word that I was trying to recall earlier was "postpone". A provision exists under the standing orders for us to postpone an amendment and return to it at a specific stage, or at the end of the consideration in detail stage. I would like to see that done as the point raised by the member for Alfred Cove is a very important one. If she is wrong, then I would like to be reassured by informal discussions outside of this formal atmosphere. If she is right, then I would like to proceed down the path that she and the member for Kingsley have in mind, that is, the deletion of the proposed paragraph. Therefore, in these circumstances - it is not my amendment - I would like this amendment postponed until it has been further clarified to my satisfaction. I move -

To postpone the amendment moved by the member for Alfred Cove.

The DEPUTY SPEAKER: My advice is that members have a number of choices. First, members cannot postpone parts of a clause. The whole clause, and not parts thereof, must be postponed. Secondly, members can withdraw the amendment or amendments that are causing further debate and come back to them during the consideration in detail stage. Thirdly, members can move the amendments now and, if a problem remains, the

same thing can be done at the end during the consideration in detail stage. Clearly, members cannot postpone parts of clause 45. The whole amendment can be withdrawn, but parts of the clause cannot be postponed.

Mrs EDWARDES: We are not seeking to postpone the clause or even part of it; we are postponing only the decision on the amendment. Perhaps the member for Alfred Cove should withdraw her amendment and bring it on at a later point. That would probably be a better way to deal with it, rather than by dealing with the clause.

The DEPUTY SPEAKER: That can be done only through the consideration in detail stage. Members cannot go back to an amendment. It must be withdrawn and moved again during the consideration in detail stage.

Mrs EDWARDES: We are dealing with the whole clause.

Mr McGinty: No. Once there are amendments, you cannot bring them back at a later stage.

Mrs EDWARDES: Yes, we can, because we have not yet voted on the clause. We received advice from the Chair yesterday that the number of amendments and the length of the section were such that we could go back to amendments if the clause had not been voted on. On this occasion, we are just moving the amendment. The member for Alfred Cove does not wish to proceed with her amendment until there has been further consideration, but before the clause has been voted on. That would not have to be dealt with through recommittal.

The DEPUTY SPEAKER: My understanding is that as further amendments are proposed, members are precluded from going back to previous amendments. Members may discuss something that has been raised before, but not an amendment per se. Standing Order No 132, titled "No amendment to words already agreed to" states -

> No amendment will be proposed -
>
> (a) in any part of a question if a later part has been amended, or is proposed to be amended, unless the proposed amendment has been withdrawn by leave of the Assembly without a dissentient voice; or
>
> (b) to any words which the Assembly has resolved will stand part of a question except to add other words to it.

Mr McGINTY: I want to facilitate this debate. The member for Kingsley raised a matter yesterday and we will seek to have the Bill recommitted for the purpose of considering an amendment to a part of the Bill with which we have already dealt. I will facilitate efforts to come back to this clause at the end of the debate to deal with it in whatever way is considered appropriate.

Mr Pendal: To recommit?

Mr McGINTY: Yes, to recommit the Bill at the end of the debate on the consideration in detail stage.

Mr Pendal: Will the practical effect of that be that the member for Alfred Cove will withdraw the amendment on the understanding that the Attorney General has given a commitment to recommit the Bill for the purpose of considering her amendment?

Mr McGINTY: Yes.

Dr WOOLLARD: I seek leave to withdraw the amendment on the basis that the Attorney General has undertaken that the amendment will be discussed during the reconsideration in detail stage.

[Amendment, by leave, withdrawn.]

Mr McGINTY: I move -

> Page 52, line 20 - To insert after the word "if" the following -
>
> , at the time of applying to a court under this Part,

If this subclause is to remain in the Bill, this amendment seeks to give greater specificity to the time at which the age is taken into account. It will better define it.

Amendment put and passed.

Mr McGINTY: I move -

> Page 52, line 22 - To insert after "age" the words "at that time".

The amendment is proposed for the same reason as the previous amendment.

Amendment put and passed.

Mrs EDWARDES: This is the crux of some of the problems and concerns raised by proposed section 205V of the Bill. One concern that has been raised is that de facto relationships will be given marriage-like status if this legislation is passed. The legislation that was required was one that dealt only with property and financial interests between parties when relationships broke down. However, under this proposed section, there is a series of problems with the definition, which grants marriage-like status to de facto relationships. The Attorney General has made it clear that he is talking about not only the property and financial arrangements between two parties, but also the relationship between them. This is such a loose definition that it is open to far wider interpretation than the Attorney General anticipated. There is the potential to include carers or other domestic-type relationships. A discussion in the Chamber yesterday compared domestic relationships with de facto relationships, but one example I raised in the second reading debate was of the widowed brother and sister who lived together. Under proposed section 205V(2)(c), it is not essential that a sexual relationship exist between the parties. The issue of whether the parties lived together is critical, particularly with the amendment under schedule 1 to the definition in the Administration Act 1903. That is a critical point. It is not my interpretation, but one that is used by the legal profession, which practices in this area. I suggest that the Attorney General remove schedule 1, which deals with amendments to the Administration Act, and get some advice from those who deal with probate and property law. Their advice is that proposed paragraph (b) should be deleted, not just amended, as is proposed by the Attorney General. The amendment has resulted from discussions the Attorney General has had with family law practitioners, who said the paragraph was far too loose. Their view is that it should be deleted. It is inconsistent with proposed section 205V(1), which refers to "2 persons who live together". According to proposed subsection (2)(b), that is not an essential criteria. I understand the Attorney General's point about some of the issues relating to people living together, such as the point in time that judgment should be made and the difficulties determining that if someone has spent six months in hospital or working overseas. However, the court will look at the conduct and evidence of the parties. One of the examples that has been mentioned is that of the truck driver who is supposedly travelling interstate for three or four days but is actually down the road with another de facto partner. The conduct of the parties is taken into account. If the truck driver were pretending to one partner that he was travelling over east, he would be regarded, for the benefit of these amendments, as living in a de facto relationship. There are all sorts of loose connections, and they will create a huge number of applications. Already, Western Australia will have more applications than anywhere else in Australia because people will be able to go to the Family Court. However, this will open it far wider than is intended by the Government. This is a critical section because of the status it gives to de facto relationships, its looser than anticipated nature in encompassing wider relationships and the real problems and uncertainty the loose drafting of the definition will create for any application under the Administration Act.

Dr WOOLLARD: I move -

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

I thank the Attorney General for discussing this matter with me. He told me that the term "marriage-like" is used because it is legally accepted in other States. It is my understanding, from talking with the Attorney General, that the term "marriage-like" includes gay, lesbian and heterosexual relationships. I believe that by using the term "interdependent" rather than "marriage-like", we would call it as it is. The term "interdependent" is used in the federal Migration Act, of which section 237, reasons for subdivision, states -

> (b) under the regulations, a person satisfies a criterion for certain other visas that give, or might lead to, authorisation for the person's permanent residence in Australia if the person has an interdependency relationship with either an Australian citizen or a permanent resident of Australia that is genuine and will continue;

Paragraph (c) states -

> (ii) pretending to be a de facto spouse; or
>
> (iii) pretending to have an interdependency relationship.

As I said yesterday, the term "marriage-like" is not acceptable to the Christian community. I have also spoken to senior members of the gay community who have expressed their concerns with the term. The people with whom I have spoken would be far more comfortable with calling a spade a spade and using the term "interdependent relationship" than "marriage-like relationship".

Mr PENDAL: What the member for Alfred Cove is proposing is a bit like the curate's egg; it is good in parts. I would be more comfortable if the matter were dealt with slightly differently. I agree entirely with the member's comments on the use of the term "marriage-like". Something is either a marriage or it is not. I think it becomes

one of those cute things we try to do to say that an apple is a pear or whatever. However, although I agree with the member that we should legislate against the use of the term "marriage-like" - I will vote for its deletion - I am not sure we should put another term in its place. A couple of days ago, I raised my concerns about the amendment to delete "de facto" and substitute "domestic". I had some difficulty with that because I thought domestic meant something quite different from what was intended. The House did not proceed with that. I would like to convince the member for Alfred Cove that we would achieve her end if we removed the term "marriage-like" altogether. The proposed subsection would then read -

A de facto relationship is a relationship . . . between 2 persons who live together in a relationship.

The legislation lists a number of criteria. The "marriage-like" terminology would disappear. I would be happy with that, but I am hesitant about then including in the Bill the word "interdependent". It might have some other unintended consequences, to borrow the Attorney General's phrase. I understand that we are dealing with the amendment listed on the Notice Paper in two parts. The member has moved to delete one set of words, and she will later move to substitute another set. What I am saying may make sense to the House, and even the Attorney General. I turn the argument back to him. This amendment would test his motives. He has been at some pains to say that this Bill is about the end of relationships, and that the Government is not, through this Bill, making a judgment about putting de facto relationships on a plane with formal marriage. If that is the case, it would not be any button off his shirt to delete the nonsensical term "marriage-like". I would like someone to indicate that there is merit in our agreeing to the first part of what the member for Alfred Cove wants - to delete the term - and then not going down the path of putting in a word about which I feel equally uncomfortable.

Mr HYDE: There may be some merit in the proposal of the member for Alfred Cove, but I would like the Attorney General's view. We need a legal term to describe the situation. I said the other day that the term "marriage-like" is not offensive to my generation. More importantly, it does not mean marriage. I gave the example that a zebra is a horse-like animal; it is not a horse. It is different.

Mrs Edwardes: But it is called a zebra.

Mr HYDE: Gay, lesbian and de facto relationships are not called marriages. I have been involved with this through immigration law and elsewhere, and I believe that marriage-like is the acceptable legal term. It is not saying that it is marriage, for all the other issues that have been raised.

The term "interdependency", as I alluded to previously, got through the Senate with, I think, approval of both sides of the House. Interdependency also includes carers - that is, a non-sexual relationship - as part of the immigration change. When people go for an immigration review, they must prove that there is a longstanding commitment, but it may be in a non-sexual way. There is a blurring there. I am quite happy with the term "interdependency". I do not know whether it is right and acceptable in this case. I also seek advice from the Attorney General -

Mr Pendal interjected.

Mr HYDE: Yes; it is a sharing relationship. People are dependent on each other.

Mr Pendal: I know. However, I am saying that one could talk about that in terms of being in a dependent relationship. That is what I am getting at.

Mr HYDE: If it is a dependent relationship, it is normally a child-parent or guardian-child relationship. There is a dependency aspect there.

I also ask the Attorney General whether intersex and androgynous people are covered under this. My reading of the Bill is that "marriage-like" removes the issue of determining whether a person is female, male or otherwise. My gut feeling is that "marriage-like" would provide protection for androgynous, intersex, chromosome 28 people and others, although other definitions would not. I am open to hearing from the Attorney General on this issue.

Mrs EDWARDES: In an endeavour to assist the Attorney General prior to his response, the deletion of the words "marriage-like" will not take away what the Attorney General intends in the rest of the definition. It does not detract from anything that he wants to achieve by virtue of this definition. If I remember rightly - I do not have a copy of the model Bill - one of the options did not include marriage-like. It was not one of the options that included carers or the like.

Mr McGinty: I think it was.

Mrs EDWARDES: I want that clarified, because I thought that one of the options did not include the words "marriage-like". I do not think it is needed, because the definition of the relationship, with all its criteria, is still

there. On the issue of interdependency, including carers, which was raised by the member for Perth, if the Attorney General were to accept my further amendment in relation to the fact that a sexual relationship must have been at some point an element of that relationship - that was the concern I had with a widowed brother and sister living together - it would be made an essential element under proposed subsection (2), which might get over the problem about carers, when it is not intended to do so.

Mr McGINTY: The objection is simply one of terminology. Most people who have spoken so far have not wanted an equation between a marriage and a de facto relationship, particularly a gay de facto relationship. It is, however, a question of the legal effect of the different words that are being proposed. The experience around Australia has been fairly varied. For instance, the Victorian legislation defines a domestic relationship as a relationship between two people who, although not married to each other, are living or have lived as a couple on a genuine domestic basis. In terms of a definition, that starts to raise some quite difficult issues.

Another approach that could be adopted would be to look at the words that were used by Justice Kirby in the case of A.A. Tegel Pty Ltd v Madden. He characterised a de facto relationship as the relationship between persons who, though not legally married, live together sharing domestic circumstances and bound by affection and usually sexual relations.

Mr Pendal: What was that the definition of?

Mr McGINTY: That was the definition of a de facto relationship by Justice Kirby. The member for South Perth might be interested to know that the Queensland definition of a de facto spouse states that two persons are a couple if they live together on a genuine domestic basis in a relationship based on intimacy, trust and personal commitment to each other. Around Australia there are a variety of uses -

Mrs Edwardes: Can you relate that to the model Bill?

Mr McGINTY: Yes. The model Bill has been drawn up by the Attorneys General around Australia to deal with this issue. The Bill has three definitions of a de facto relationship. The first is designed to cover a heterosexual de facto relationship and is defined as a relationship between a man and a woman who are adults and who, although not legally married, live as husband and wife.

Mr Pendal: Is that the model?

Mr McGINTY: That is the first model dealing with heterosexual de facto relationships.

Mr Pendal: Do they make a statement one way or the other about the status that that relationship is given alongside a formal marriage, or do they remain silent on that?

Mr McGINTY: In the model Bill?

Mr Pendal: Yes.

Mr McGINTY: In terms of property?

Mr Pendal: No; in terms of the point we are discussing about where the status of marriage ultimately is seen vis-a-vis the model Bill's definition of something that I would say is not a marriage, but is clearly a relationship. In other words, are they trying to make a statement in the model Bill about the relative value of a formal marriage and a de facto marriage?

Mr McGINTY: No, they do not. This Bill is solely about de facto relationships. There are three definitions in the Bill and people choose the one that suits what they want to cover. The definition I have just read is applicable to heterosexual de facto relationships. The second definition contained in this Bill seeks to include same-sex or homosexual relationships in the definition. Its definition of a de facto relationship is a marriage-like relationship between two adults. The third definition is one of a domestic relationship, which is designed to include a heterosexual de facto couple and a homosexual de facto couple, as well as a domestic carer when no sexual relations take place. A domestic relationship is defined as a relationship between two adults in which one or both of them provide personal or financial commitment and support of a domestic nature for the material benefit of the other, and it includes a de facto relationship.

Mrs EDWARDES: I want to allow the Attorney General to adequately complete his answer, because I know that he has not picked up a number of matters that the member for Perth wished him to address.

Mr McGINTY: I thank the member for Kingsley for enabling me to continue in full flight.

Mr Pendal: Can you read the last bit again, which you hurried?

Mr McGINTY: This is designed to include both heterosexual and homosexual de facto relationships, but it also includes the domestic carer. The third definition of a de facto relationship in the model Bill states -

> **(1)** A ***domestic relationship*** is a relationship (other than a legal marriage) between 2 adults in which one or both of them provide personal or financial commitment and support of a domestic nature for the material benefit of the other, and includes a de facto relationship.
>
> **(2)** However, a ***domestic relationship*** does not include a relationship between 2 adults if one provides the other with commitment and support -
>
> (a) for fee or reward; or
>
> (b) on behalf of someone else.

The definition will not include fly-in domestics, but it will include a caring relationship that is not based on a commercial consideration. We have decided that domestic relationships that are essentially of a non-sexual nature should be excluded from the scope of this Bill. Although legislation in the ACT, New South Wales and Victoria includes those types of relationships, it goes beyond what I understand broadly to be a de facto relationship.

Mr Pendal: The irony is that many opposition members may accept the definition of a genuine domestic relationship as being a relationship whereby a person should get all the benefits because it might be a situation in which a person has been a life-long carer. The more I hear, the more confusing it becomes.

Mr McGINTY: It is not without its difficulties. The best legal brains in the country have come up with those three legal definitions I have read, depending on who is covered.

Mrs Edwardes: They were just the Attorneys General!

Mr McGINTY: I think the member for Kingsley was involved in that process when she was the Attorney General, which is why I made the comment.

We have opted for those de facto relationships that have a sexual component, whether they be gay or heterosexual. Essentially, we have picked up the definition from this legislation with some very minor modifications, and adopted the model. The starting point must be the consideration of whom should be included.

In response to the member for Alfred Cove the member for Perth said that if the notion of interdependency were taken as the definition, it might well include the domestic carer; in fact, I think it would. Therefore, the scope would be broadened to include more people in the legislation. Some people do not want the words used in the statute to have the effect of equating a de facto relationship with a legal marriage. That point of view has been put forward by a number of members opposite. We have thought about this and we do not want to be unnecessarily offensive - although some people will think we are being offensive - in the language that we use. If there were a better way to more accurately describe the description of a marriage-like relationship for those whom we want to be caught within the scope of this legislation and on whose property rights we want to impinge, we would happily use that description.

Mr PENDAL: What does the Government lose by deleting the words “marriage-like”? The legislation will still leave a clear definition of a de facto relationship. Nothing would be lost by deleting the words that could otherwise offend some people. All of the words that describe adequately a de facto relationship would be left, to which there is no objection.

Mr McGINTY: If we could find a happier accommodation, I would consider it. I consider the words “marriage like” to be limiting because it must be established that that is part of the relationship.

Mr Pendal: With respect, that is what is said in the following seven or eight descriptive pieces about what constitutes a de facto relationship. It seems that the Government would not lose anything by taking out the words “a marriage-like” and leave in everything else.

Mr McGINTY: That is the question. If deleting the words “marriage-like” would not enlarge or narrow the scope of what is sought, I would happily delete them. However, I am concerned that their deletion would expand the scope of people who would be caught by this legislation. The Bill is built on some case law to which I have referred previously. The legal advice is that it would have an expanding effect and we have to be careful. If the legal advice were that by listing the criteria, as we have done, and taking into account the existence of a sexual relationship and the nature of common residence, the scope of people who would otherwise be caught by the legislation did not expand, it would not present me with a problem.

Dr WOOLLARD: Would the Attorney General be comfortable if I moved an amendment to delete the words “marriage-like” from proposed section 205V(1)?

Mr McGINTY: We have received legal advice that if we were to change the definition of a de facto relationship to read "a de facto relationship is a relationship other than a legal marriage between two persons who live together in a relationship", that could mean brother and sister. That is what I mean about possibly expanding the definition. One would then consider whether they had a sexual relationship. A brother and sister could have a sexual relationship, although it would be highly illegal and improper. The member for Alfred Cove's amendment would add an element of uncertainty.

I can understand why members want to avoid the language of equation with marriage, but let us not do it in such a way that would achieve undesired consequences.

Mrs Edwardes: What about the word "couple"?

Mr McGINTY: The word couple is a wider definition and is used in some other States. We will debate this issue for some time. Members might like to reflect on this debate over the lunch suspension and consider whether there is a better formula before we vote on the matter. To proceed with the first half of the member for Alfred Cove's amendment would have undesirable consequences.

Dr WOOLLARD: Would the Attorney General accept an amendment if we combined proposed sections 205V(1) and 205V(2)? The wording would merge the two to clarify the components. It would then read -

> a de facto relationship is a relationship other than a legal marriage between two persons who live together in a relationship with factors which are indicators -

Mr McGinty: I understand what the member says.

Mr HYDE: I oppose that proposition and I oppose the original intention to delete the wording. Many members have thought long and hard about this issue and are trying genuinely to come up with an alternative. I do not believe that there is an alternative to "marriage-like". I accept the point of view of some members that they want to make sure that the special place of marriage is preserved. Similarly, people who are involved in de facto and same-sex relationships would take similar umbrage if there were any connotation that their genuine and important relationships, which are based on love, commitment, sharing and intimacy, were denuded.

Again, I hark on the Attorney General's view that the meaning of "marriage-like" is not the same as marriage; it is not supposed to equate marriage-like relationships with marriage. I am sure that those people who are in committed, long-term de facto relationships and committed long-term same sex relationships do not consider themselves to be married. Gay and lesbian couples have the option to go to Amsterdam and Hawaii and to be married under those jurisdictions. The majority of people in same-sex relationships in Western Australian society, and the majority of people in long-term de facto relationships have decided that they do not want to be in a marriage, and everything that entails, and the legal and cultural associations that holds in our society. I oppose the amendment.

Debate interrupted, pursuant to standing orders.

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