

ACTS AMENDMENT (LESBIAN AND GAY LAW REFORM) BILL 2001

Committee

Resumed from 27 February. The Chairman of Committees (Hon George Cash) in the Chair; Hon N.D. Griffiths (Minister for Racing and Gaming) in charge of the Bill.

Clause 1: Short title -

Progress was reported after the clause had been partly considered.

Hon PETER FOSS: I have just been discussing with Hon Nick Griffiths the best way to deal with the Acts Amendment (Lesbian and Gay Law Reform) Bill 2001, because it is an unusual Bill. It would be a waste of time our discussing the various parts of the Bill until we have decided upon the definition that is proposed to be contained in new clause 85. However, we should not resolve that definition until all the clauses have been discussed. I suggest that after clause 1, we move to new clause 85. However, before we take the final vote on new clause 85, we should deal with all the matters that relate to part 2, including any new clauses. In other words, whereas we normally deal with new clauses only after all the other clauses have been debated, I suggest we deal with new clauses as they arise in each part, otherwise we will become exceedingly confused and it will be difficult to have a lucid and reasonable debate.

Hon N.D. GRIFFITHS: It is important that we proceed through this debate in an orderly and proper manner. I agree that new clause 85 should be discussed after we have dealt with the short title. Hon Peter Foss is proposing that we discuss new clause 85 prior to clause 2. I suggest, Mr Chairman, that we deal with part 1 and then move to new clause 85. Proposed new section 13A of new clause 85 deals with references to de facto relationship and de facto partner, of which I have a definition, to which Hon Peter Foss proposes to move amendments. Is Hon Peter Foss suggesting that we do not vote on that issue at that stage? Is it not appropriate that we vote on these issues after we have discussed them? We can then proceed to deal with the other clauses knowing the Committee's definition of "de facto" - otherwise the meaning of "de facto" will be just its normal everyday meaning, whatever that may be - and knowing the ramifications of such relationships for each and every matter. I ask Hon Peter Foss - and other members if they wish to do so - to indicate whether he agrees to deal with clauses 1 and 2, and new clause 85 and the issues that are set out on pages 2 and 3 of the supplementary notice paper, and then the other parts in that order. It is also proposed to insert a new clause 84, but there is no reason that that cannot be dealt with in its normal place. I would be grateful if Hon Peter Foss could provide his thoughts on this matter. We need to set the ground rules and then we can proceed.

Hon PETER FOSS: I agree, to some degree, with the minister. It would be a nonsense to talk about the remaining clauses of the Bill before we had decided upon the definition of "de facto". In the course of discussing the definition, I do not want to dwell excessively on the impact it will have on the other parts of the Bill; I would rather deal with the impact as we go through those other parts. However, the problem is that if an issue were to indicate that the definition is unsatisfactory, we would need the opportunity to reconsider the definition in light of that matter. I do not want to put the cart too much before the horse, otherwise we will have to look at new clause 85 with a view to how it will affect the Adoption Act 1994 in a certain way or other Acts in other ways. That would be unfortunate and rather lengthy.

Hon N.D. GRIFFITHS: We should have before us a settled definition as we move through the clauses. If it transpires in the course of our discussion that the Committee agrees that a particular difficulty needs to be addressed, such as an interpretation that is unforeseen and unintended, there is nothing that prevents us seeking a reconsideration of that clause. I think that is the appropriate way to go; otherwise things could get a bit iffy. If we come across something that is unintended and is not appropriate for the good of the community from the point of view of the Committee, I will move for reconsideration.

The CHAIRMAN: Hon Peter Foss and the Minister for Racing and Gaming have suggested the manner in which we might handle the preliminary stages of this Bill. I indicate to the Committee that I will put clauses 1 and 2 and then move to new clause 85. Whether or not there is a vote on new clause 85 is up to the Committee. Standing orders enable that clause to be postponed even after debate on it. However, I intend to put clauses 1 and 2 and then move to new clause 85. Then the Committee can decide how it intends to proceed after that. As much as that might satisfy Hon Peter Foss and the Minister for Racing and Gaming, I put it to the balance of the Committee because I need the consent of the Committee to agree to that course of action. Before I proceed in that way, I call on Hon Peter Foss.

Hon PETER FOSS: I raised one other point with the Committee; that is, the question of new clauses. Unfortunately, there is a fourth issue. I am afraid electronics let me down. I sent these details in electronic fashion to the Clerk's secretary, but somehow she did not get them. I have a hard version and it might be helpful if the hard version at least were given to people until the official supplementary notice paper comes out. I am

sure members would like to have a copy. There are a number of proposed new clauses. Normally we would deal with the whole Bill and then deal with all the new clauses. I suggest that we deal with any new clause that relates to a part after we have dealt with that part, so it is out of the way. Then we could go on to the next part and deal with any new clauses at the end of that part. It would be treated almost like a series of Bills rather than one big Bill. In other words, I suggest that we follow the normal committee approach, but with that small variation.

Hon N.D. GRIFFITHS: That approach is satisfactory and is a safer course, with the exception being new clause 85.

Hon MURRAY CRIDDLE: I am happy to deal with new clause 85 after clause 2. However, we need to leave open the opportunity to revisit that clause, because anything could happen as we go through the committee stage; things will unfold.

The CHAIRMAN: Again, it is my intention to take clauses 1 and 2 and then move to new clause 85. Then the Committee can decide whether it wishes to vote on new clause 85. I understand the proposition that has been put by Hon Peter Foss about those additional amendments that are being circulated as they relate to the particular Acts they seek to change. That matter can be dealt with as we progress through the committee stage. Therefore, I ask the committee whether it consents to that course of action. No member has indicated any other course of action and I notice a number of members nodding in the Chamber; therefore, we will adopt that course.

Hon PETER FOSS: I intend to be brief. The Opposition opposes this Bill and will vote against the first clause. We believe that this Bill is one of the most divisive and undermining Bills ever to come before this Parliament. It has been ineptly introduced and offends a large section of our community, including the religious principles of a substantial number of valuable people in our community. The process has been handled in a way that meant those people have not been given an opportunity to be heard.

We had hoped that those parts of the Bill that we could support would be separated so that we could demonstrate our good faith to the gay and lesbian community. However, the Government has shown no corresponding good faith to enable this Bill to be drafted in a way that would separate the issues. We find it disgraceful that artificial insemination and adoption have been brought forward in this partisan way. Never before in this Parliament have those issues been stampeded through. Previously, attempts were always made to arrive at consensus on those issues.

We find equally despicable that the Government has rolled together the issues of homosexual age of consent and the protection of our children to give the public the impression that not much is happening. The Government sought to keep this matter from the public. I have answers to questions on notice from the Leader of the House representing the Premier indicating that these policy matters did not go before the people at the last election. In some cases people who are now ministers in the current Government actively concealed them. The Opposition finds the whole process of the Bill despicable. The Bill is anathema and we will vote against it.

Hon N.D. GRIFFITHS: The issues in this Bill have been before our community for many years and they have been debated in this House and in Parliament on many occasions. The member's reference to the protection of minors is interesting because, as we go through the committee stage of this Bill, we will show that greater protection is being afforded to minors. When this Bill becomes law, as I trust it will, it will lead to a more harmonious and tolerant society. This Bill is about making the lives of many of our citizens better. It will give them the opportunity to have greater happiness, and that is worthwhile. I very much regret that the Opposition is opposed to the Bill.

Clause put and a division taken with the following result -

Ayes (12)

Hon Kim Chance	Hon Graham Giffard	Hon Louise Pratt	Hon Ken Travers
Hon Kate Doust	Hon Nick Griffiths	Hon Ljiljanna Ravlich	Hon Giz Watson
Hon Adele Farina	Hon Dee Margetts	Hon Jim Scott	Hon Ed Dermer (<i>Teller</i>)

Noes (11)

Hon George Cash	Hon Ray Halligan	Hon Norman Moore	Hon Bill Stretch
Hon John Fischer	Hon Frank Hough	Hon Simon O'Brien	Hon Alan Cadby (<i>Teller</i>)
Hon Peter Foss	Hon Barry House	Hon Barbara Scott	

Pairs

Hon Jon Ford	Hon Robyn McSweeney
Hon Sue Ellery	Hon Derrick Tomlinson
Hon Tom Stephens	Hon Murray Criddle
Hon Robin Chapple	Hon Bruce Donaldson

Clause thus passed.

Clause 2: Commencement -

Hon PETER FOSS: I have a query on this clause. It provides not only for an ordinary commencement but for a special commencement. It provides not only for the proclamation but also for different days for different provisions. It has become a custom in this place that we have a bit of an idea about such proclamations. Although clause 85 is not yet in the Bill, and it will probably be a bit hard to put it in the Bill, the clause should not be subject to this provision. Although I cannot ask about clause 85, because it is not yet in the Bill, it does not seem appropriate that clause 85 should be fixed by proclamation. I would like to know which provisions need some sort of intermediate action before they come into effect and which ones the Government believes will be immediately proclaimed.

Hon N.D. GRIFFITHS: The most obvious one is in respect of part 7, which will involve a regulation. I am advised that other areas may involve regulations after further consideration. In respect of the Equal Opportunity Act covered by part 8, it is customary to allow some time for the community to be aware of the fact that the law has changed. I am not suggesting there should be a significant delay, but these are commonplace reasons for having Acts become law by way of proclamation.

Hon PETER FOSS: Could the minister give an indicative timetable of what will come into effect immediately and what will require some time? I understand the equal opportunity question. I imagine the delay will be six to 12 months. What period will be needed for the provisions for parliamentary superannuation?

Hon N.D. GRIFFITHS: I am advised that there will not be an immediate proclamation to that effect. The timetable of six to 12 months, to which the member referred, would probably be it. I would have thought that some matters dealing with discrimination would come in within a reasonable time. I believe that six to 12 months is an appropriate time for regulations to be dealt with. I am sure the Committee appreciates that the regulations that deal with superannuation are complex. Having had the opportunity over the past 12 months to look at some of the regulations that deal with superannuation matters, I can assure the Committee that they require considerable thought.

Clause put and passed.

The CHAIRMAN: As indicated earlier, we will now move to new clause 85.

New clause 85 -

Hon N.D. GRIFFITHS: I move -

Page 48, after line 16 - To insert the following new clause -

85. Section 13A inserted

After section 13 the following section is inserted -

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

- (1) A reference in a written law to a de facto relationship shall be construed as a reference to a relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship.
- (2) The following factors are indicators of whether or not a de facto relationship exists between 2 persons, but are not essential -
 - (a) the length of the relationship between them;
 - (b) the nature and extent of common residence;
 - (c) whether there is, or has been, a sexual relationship between them;
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
 - (e) the ownership, use and acquisition of their property (including property they own individually);
 - (f) the degree of mutual commitment by them to a shared life;
 - (g) whether they care for and support children;
 - (h) the reputation, and public aspects, of the relationship between them.
- (3) It does not matter whether —
 - (a) the persons are different sexes or the same sex; or
 - (b) either of the persons is legally married to someone else or in another de facto relationship.
- (4) A reference in a written law to a de facto partner shall be construed as a reference to a person who lives, or has lived, in a de facto relationship.
- (5) The de facto partner of a person (the “**first person**”) is the person who lives, or lived, in the de facto relationship with the first person.

I note that Hon Peter Foss has foreshadowed a number of amendments to this new clause. I understand that we will first deal with and vote on the proposed amendments and then vote on the clause. I understand that Hon Peter Foss will deal progressively with his proposed amendments to the clause.

Hon PETER FOSS: I intended to write down on paper a number of scenarios so that members could have a copy of them, but I will provide them verbally. I will perhaps try to get them down on paper at some later stage, so members can refer to them.

Hon N.D. Griffiths: Perhaps Hansard will copy them down.

Hon PETER FOSS: I am sure Hansard will, but I am not sure whether we will be able to refer to them. I will try to assist by making shorthand notes.

Scenario A involves a married man who lives with his wife and three children in the family home in Perth. He is employed as a fly in, fly out worker. For six months of the year, in alternating months, he spends his time in another town, where he lives with a woman as if they were husband and wife, in that people think they are married - she maintains the house and they have sex. The only difference is that he is already married to another woman, with whom he lives for six months of the year.

Scenario B involves four university students - three females and one male - who share a house in Cottesloe. They have lived together in that house for some years and from time to time share the same room. Sexual relationships occasionally occur between the housemates. They share a common fund of moneys to which they all contribute and with which they have acquired a number of valuable pieces of furniture and equipment for the home they share. They intend to stay there for the rest of their university lives. There are, fortunately, no children. The neighbours are not sure who is married to whom but they think there is a domestic relationship between them.

I have a problem with scenario A. I do not doubt that the man has, as a result of his conduct, a financial obligation to the woman living in the country. His behaviour has led to a reasonable expectation by her of proper behaviour by him in financial terms. If he wishes to behave in that way, certain obligations should follow

from it. I do not have a problem with that. However, I do have a problem that for all purposes under this law the wife and the de facto wife will be treated equally. There is no provision in the Bill that recognises the status of marriage; in fact, the Bill creates a status. The problem that the Opposition has had all along with this legislation is not with the wish to do right by the woman living in the country but with the status that will be created. The Bill provides people with a capacity to do things as de facto partners.

Members might believe that proposed subsection (1) of the definition will resolve the matter, because we know in Australia what a marriage is and, presumably, the reference to a "marriage-like relationship" means a relationship that in all respects, other than legally, is a marriage. However, we do not recognise in Australia the concept of multiple marriages. In fact, we say that a bigamous marriage is not only an illegal marriage but also an offence. What aspects of a marriage are we disregarding? How far will this definition go in disregarding the characteristics of marriage for the purpose of status?

As every member in this Chamber has heard, I offered initially to try to resolve the dichotomy between the wish to provide property rights to a person who has deserved those property rights as a result of the action of people and the status that is conferred by this definition. This definition, because it is in the Interpretation Act, will apply to all the remaining Acts referred to in this Bill; it will apply to every Act in the State, whether or not it is mentioned in the Bill; and it will apply to every future Act that uses that term.

It suffers from a fundamental flaw, which I pointed out during the second reading debate and which I tried to point out when I suggested we refer the Bill to the Standing Committee on Legislation: it confuses two intentions. It is a simple answer that will have the wrong effect. Members should not say that I did not tell them, because I did.

I will move amendments that are appropriate for questions of status. However, I do not know that they are appropriate for questions of property. If, as sailors are reputed to do, a man had a wife in every port, the financial obligation should be imposed irrespective of how many wives he had. I would not have a problem with that. If a person disregarded his marital obligations and played around to that extent, I would not have any sympathy for the fact that he had too many partners. However, I have considerable difficulty with conferring this status under all the other Acts referred to. The issue becomes confusing, particularly in the light of some of the Acts to which it will apply. At various stages we have conferred "kinship" capacity on people. We are saying that the person who is nearest and dearest to us is that close-kin person - irrespective of whether we are living with someone and are married to someone else whom we have not got around to divorcing. I do not have any problem with that.

However, should the same right apply when the relationship is bigamous or polygamous? Its practical application will be difficult. Why not use the general term, "The person making the decision must speak to the person who has the closest relationship to that person"? It would be too confusing. A definition like that would drive insane an official who was trying to make decisions about somebody. Officials would say that they could not work on that basis because they would have to apply value judgments, which would create problems. What would occur if a wife and two concubines turned up? Where is the resolution for that situation in the Bill?

I will be very interested to know how, in some cases, a presumed father will be identified. What if a woman had several de facto husbands and a particular person was deemed to be the father? Should all their names be listed? Will they all be deemed to be the father? When we deem something, it is conclusively presumed. No facts are allowed to be considered. Once it has been conclusively presumed, no evidence may be adduced to the contrary.

The Opposition believes that at its base the use of this definition has been determined through confused and poor thinking. A de facto partner may be entitled to property obligations and rights, but that is totally different from being given parental and kinship rights. We do not believe the two overlap.

The fault in this legislation, therefore, is not in what is being sought to achieve but the process to achieve it. The Government has muddled it so much that many problems will arise during its implementation. I do not agree with much of what the Government is trying to do. However, if as the Government's legal adviser I were asked what I thought of the legislation and how effective it would be, I would say that it was useless.

It must be the worst set up piece of legislation I have ever come across. As we go through, we will deal with various bits.

As I said, in the first part of this proposed section, we really do not know what is meant by "a marriage-like relationship" because of what is stated in proposed subsections (2) and (3). People would have thought that they understood what proposed subsection (1) meant. It states -

A reference ... to a ... relationship ... between 2 persons who live together in a marriage-like relationship.

I do not have a problem with that. However, we start to get into difficulties when we go on. Proposed subsection (2) states -

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

- (a) the length of the relationship between them;

That is fair enough. It is a bit like the concept of domicile. Probably the most important thing is the taking up of the relationship and the intention behind it. I would probably have put what is currently proposed paragraph (f) underneath proposed paragraph (a), because merely the length of the relationship without some form of commitment does not seem to mean anything. I do not care what is the length of the relationship, it does not mean anything if there is no commitment. It is probably correct that the length of the relationship does not matter if there is commitment to a shared life. Proposed paragraph (b) states -

the nature and extent of common residence;

Let us take situation A and vary it a little: same man, same job and same arrangement at his workplace, but for six months of the year he lives in Perth on his own. Is he in a de facto relationship with the woman at his workplace? I would say that he is. If we did not have this definition, I believe people would say that he is. Where in the Bill does it say that the fact that he happens to have two relationships disqualifies him from having that status - not disqualified from being able to recover property? In fact, the property part is not even in this Bill; it is in another Bill. This definition seems to make sense in a Bill that we are not even considering; it does not make sense in this Bill, which might have been why it was left out in the first instance. Proposed paragraph (c) states -

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

That is a difficult question. Some people find it anathema that there be a sexual relationship other than in lawful marriage. However, how can there be a marriage-like relationship that does not involve a sexual relationship? Although the law has changed a little over the years, there was not a marriage without consummation. In fact, one could apply for a decree of nullity on the grounds of non-consummation. That was another factor. There was the promise that people made to each other in public before witnesses to live together to the exclusion of all others for the rest of their lives. The one further thing required was the consummation of the marriage. I understand that we are throwing out some of those concepts. It seems strange that this kinship is given to a totally different type of relationship.

The example I gave of situation B was those university students. What if we leave the sex out of it? What difference does it make whether or not the sex is there? I realise that these are factual questions. I am not asking Hon Nick Griffiths to give me the answer, but somebody at some stage must answer the question, and that will be the courts.

The problem I have is that there is not the slightest hint from Parliament as to how they are to decide it. It is not very handy to say that we have the legislation but we have no idea what it means, and handball it to the courts in the hope that they will work it out for us and in doing so will not make a complete hash of it. In each of the two scenarios I have proposed, a very good argument could be made that there was a de facto relationship. There could be a de facto relationship with the woman living in the mining town as well as a legal relationship with the woman living in Perth. There could also be a de facto relationship between each of the students; interestingly, it would probably be between the male student and all the females. We have not yet resolved the question of property between all the females. Unless there are sexual relationships between them, I do not think there would be a de facto relationship. There is certainly a chance of a de facto relationship between the male student and each of the three female students. There may be a relationship between the three female students; if sex is not important and they have not been having it, perhaps there is. I think we are getting to absurd results. I do not believe the two propositions I have put up are all that unusual. I have not selected something that is totally beyond possibility. I happen to know that scenario B exists. It was not drawn from my mind at all; it was drawn from my knowledge. What is the answer to this? Should we go to court? Should we find it there? What are we trying to achieve? The definition has been left so vague that we are probably opening a can of worms and do not know where it will finish.

Proposed subsection (3)(a) states -

It does not matter whether -

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

There can still be a marriage-like relationship. That takes out another basic understanding of what is a marriage-like relationship. That is the intent. We are stepping that much further away from what a marriage-like

relationship has always been; namely, a union between a man and a woman. This states that it does not have to be between a man and a woman. We are not left with an awful lot of what is a marriage. Nonetheless, that is the intent. Paragraph (b) states -

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

Leaving aside the bizarre fact that if a person has two legal wives he will go to jail but if he has two de facto wives he will not go to jail, are we actively permitting an alternative system of bigamy and polygamy? We are virtually saying that marriage has gone out of fashion, but if people do not want to get married they can still have all the things that go with marriage. We are now allowing polygamous marriages. I am pleased to say that the Family Court Act allows people who have entered into a polygamous marriage to get a divorce. However, the Marriage Act does not permit a polygamous marriage. A person who has entered into a polygamous marriage can come to Australia and have that marriage recognised. However, a person cannot enter into a polygamous marriage in Australia. Australia has never had the concept of concubines; that is, women who are regarded as second-class wives. Some countries even today still allow concubines. It is not for me to criticise other cultures. Thailand still allows concubines. Muslim countries recognise senior wives and junior wives. However, we have never recognised the concept of second-class wives, whereby people can have a multiple set of wives, one being the legal wife and the remainder being concubines. Frankly, as I said, I am not prepared to criticise a place such as Thailand, although there are many things in Thailand that I cannot put down to being merely cultural differences; I do not approve of many of them and this is one I do not approve of, and it is certainly not something that I would accept coming into Western Australia. The reality is that this allows concubinage. Is that what we want to have? What is so wrong with the concept of monogamy? Why, when we are trying to give the same rights to gay and lesbian people, do we have to invent for everybody else, including heterosexual people, the concept of polygamist marriages and concubinage? What is the mystery? Where out in our community has been the cry from people who say, "I cannot be a concubine."

This is not exactly something which does not happen as a bizarre aberration. It certainly happens. I remember reading the other day about a man in Salt Lake City who had been prosecuted for having some huge number of wives. The only reason he was prosecuted was that he was blatant about it. Apparently a man can have multiple wives in Utah and get away with it as long as he does not make too much of a fuss about it.

Hon Simon O'Brien: There is a penalty built in, of course.

Hon PETER FOSS: Having too many wives?

Hon Simon O'Brien: No, having multiple mothers-in-law.

Hon PETER FOSS: We will not need to be quiet about it in Western Australia. We may find ourselves overrun with Mormons, because those people who believe in multiple marriages will find this a very good place to come to, because they will legitimately, with full assurance for all their wives and children, come to Australia and live openly as a multiple spouse family. I do not support that. That was not even contemplated by the people who proposed this legislation. The people who supported this legislation would be horrified of this concept. We have heard about close, enduring relationships, that there can be relationships between people without the sanction of marriage which can have all the attributes of marriage, that they can be as genuine and as caring and as supportive as any other form of legal marriage. While not agreeing with that as a proposition, I am afraid, for reasons which I am sure everybody knows, I can sympathise and understand the wishes of those people for an opportunity to have some sort of security that they would get if they were married, but why at the same time do we have to endorse and encourage bigamy and polygamy? If it is the intent of the Government that we allow and encourage and support this sort of relationship, it should come out and say so. If that is intended, if that is what this Government wants, if it wants to allow people to have all the same rights of parentage, of being a spouse, of having property succession, kinship, adoption, deemed parenthood for multiple marriages, it should tell us. If that is what the Government really wants, then after it has told the Opposition it should go out and tell the public, who would be horrified, particularly those people in strong, caring relationships who are looking to this Bill to give them some credibility and status. They do not want to be thrown into the garbage bin along with all the people who want to have dozens of wives and concubines. If that social engineering is intended by the Government, it should tell those gay and lesbian couples in monogamous, caring relationships that they will be put in the same bin as people who add a harem to their legitimate marriage.

I propose some amendments that address these objectionable characteristics. They do not solve all the problems, but I do not believe all the problems can be solved on the floor of this House. That opportunity would have been available only if the Government had been prepared to split the Bill, send it to a committee, and start again. At least something can be done to make this Bill more acceptable and then, particularly when the Family Court Amendment Bill 2001 comes before this House, maybe it can be fixed up there. I believe there is some basis in that Bill to deal with property obligations. I propose to insert, after the word "but" in proposed subsection (2),

the words, "except for those contained in paragraphs (a), (b), (c), (f) and (h)". That will involve not only current paragraphs (c), (f) and (h) but also a new paragraph (ab), which is "whether the two persons reside together". Somewhere along the line, what constitutes a marriage-like relationship must be decided. I do not have a problem with the concept that a mix of factors may go to make up such a relationship, but there should be some underlying ones that make it a marriage-like relationship. I am not necessarily wedded only to these factors - it is mainly the concept I am attempting to convey. Should some of the factors be regarded as paramount, or purely supplementary evidence?

There is a question I perhaps should have posed to the minister before, because it is important to make a distinction between the two uses of this definition. Is there nothing in this definition to require some form of conduct in order to give rise to obligations? I ask this because this definition has really been devised to go into the Family Court Amendment Bill 2001, which is where it started. If the basis of declaring a person to be a de facto was the action of people to raise an obligation to give some form of financial recompense, many of these issues would disappear. If this is a provision that compensates people when there is a duty to be compensated, there is no problem. However, this definition does not work by granting itself in any sort of obligation. It grants itself in a status; in other words, a number of characteristics are accumulated and then one ends up with a status. This definition does not bind the person on the basis of action but, rather, on characteristics. If we are dealing with characteristics, I would like to move the amendment in the supplementary notice paper that inserts after subsection (2)(a) of proposed new section 13A a new paragraph (ab) that reads "whether the 2 persons reside together;". We have the nature and extent of common residence but we do not say there needs to have been any. It is fair to ask about the nature and the extent of common residence. However, it is essential to ask whether there has been any common residence, because I fail to see how it can exist without there having been any. I move -

Proposed subsection (2), after line 3 - To insert -

(ab) whether the 2 persons reside together;

I later intend to move the insertion of a clause that will make new paragraph (ab) a compulsory requirement, among others, in order to determine whether there is a de facto relationship.

Hon N.D. GRIFFITHS: There are many circumstances in which people are married and do not live together for reasons of choice. That may be because of illness or infirmity, when, for example, one partner in a marriage may reside in a nursing home. The proposed definition in new clause 85 adequately deals with the issue of common residence. It is one of a number of factors to be taken into account. The Committee should remember that we are dealing with situations in which people will be seeking remedies, rights and obligations and, as Hon Peter Foss has pointed out, there will be occasions in which courts will need to decide on these matters. These concepts are not new. A few years ago a draft Bill was developed to follow the instructions of the Standing Committee of Attorneys General. Hon Peter Foss may not have agreed to the proposition, but parliamentary counsel from the Australian Capital Territory drafted a de facto relationships Bill. The former Attorney General may be familiar with that. I am advised that the words in that draft Bill, which came from the Standing Committee of Attorneys General, were used to model the words before us in proposed new clause 85. The matter is best left as I have proposed, and not as Hon Peter Foss proposes to amend it.

Hon PETER FOSS: I seek leave to amend my amendment by inserting the words "have resided" after the word "person". The amendment would then read -

Proposed subsection (2), after line 3 - To insert -

(ab) whether the 2 persons have resided together;

Amendment, by leave, altered.

Hon PETER FOSS: I do not believe that SCAG or its committees are necessarily infallible in a papal sense. Many of the things that have come out of SCAG are regarded as being incredibly flawed. Therefore, the argument put forward by the minister is not a good one.

Hon N.D. GRIFFITHS: This amendment proposes that the criterion in proposed new section 13A that is contained in new clause 85 be that the two persons have resided together. That is a sensible amendment and the Government will vote for it.

Amendment, as altered, put and passed.

Hon PETER FOSS: I move -

Proposed subsection (2), line 2 - To insert after "but" -

except for those contained in paragraphs (ab), (c), (f) and (h)

We have just inserted paragraph (ab). Paragraph (c) refers to “whether there is, or has been, a sexual relationship between them”. Again, we must work out how far we are prepared to depart from the basic concept of marriage. Paragraph (f) refers to “the degree of mutual commitment by them to a shared life”. Everybody I have heard speak on this issue has talked about the commitment to a shared life as a fundamental aspect of what we are trying to protect. Finally, paragraph (h) deals with “the reputation, and public aspects, of the relationship between them”. There must be at least what is called common fame, so that people openly have that sort of relationship and it is not merely a secretive one. Again, this goes back to the concept of marriage. It is a public declaration of where people stand.

Hon SIMON O'BRIEN: At times like this we risk appearing to get stuck on items of fine detail. I do not want us to get caught up on matters of fine detail. However, these are important points and will impact on people in the future; therefore I rise on this point, which might seem minor, but which could potentially be of some moment to people, particularly to those who are affected by disabilities of one type or another. I refer to the inclusion of paragraph (c), which would impose, in effect, something as an essential factor or indicator to be established to show that a de facto relationship exists between two persons. I do not believe that we should have on our statutes a requirement that it is essential to demonstrate that a sexual relationship has existed or does exist between two persons, whatever their other arrangements or circumstances. The simple reason for that is an unforeseen aspect of this issue. Hon Peter Foss, as the mover of the amendment, may wish to seek leave to remove paragraph (c) from his amendment if he agrees with me. That might be one way to do it. If that is not possible, I ask you, Mr Chairman, to put the four parts of this amendment seriatim, or at least excise paragraph (c), so we can vote on that separately, because I wish to vote against it.

I have probably made the point but, for the record, the fact remains that not infrequently people setting themselves up in a genuine de facto relationship may be prevented from entering into a formal marriage even though they may wish to do so. That does happen. This applies in particular to people of more mature years. It also may be the case that people in that situation who to all intents and purposes have set up in a de facto relationship do not have a sexual relationship. That is not from any lack of mutual attraction or sense of physical companionship. There may be other physical reasons why sexual relations of a conventional kind are not achievable. Despite that, plenty of couples in a loving relationship no longer have sexual relations, for example, because of physical incapacity. In the case I have presented a couple might not have had sexual relations because of a physical or other incapacity. A surviving former de facto partner should not be placed in a position in the future of having to prove that they have had a sexual relationship with their partner in the past. I have provided a little detail of my reasons to give members an opportunity to consider this matter. I now turn the matter to Hon Peter Foss for his response. I suggest we delete proposed paragraph (c).

The CHAIRMAN: I am not in a position to take those suggestions individually. If a member is not happy with one paragraph, he is in a position to move a further amendment to delete it. The member has put another proposition to Hon Peter Foss and no doubt he will respond in due course.

Hon PETER FOSS: I will do anything to gain consensus among members. I seek leave to alter the amendment by deleting proposed paragraph (c) from the amendment.

Amendment, by leave, altered.

Hon N.D. GRIFFITHS: The observations of Hon Simon O'Brien on the issue with which we have just dealt were spot on. It illustrates what happens when one factor is raised in importance over so many other factors that would need to be taken into account in the event that rights and obligations must be pursued following a relationship breaking up. One of the most important ingredients in many - perhaps most, but not all - relationships is whether the people in a relationship care for and support children. Many people are not married or live in a de facto or a marriage-like relationship in which children are cared for and supported. We all know that; it is obvious. However, that is a very important ingredient for many relationships.

When these matters are considered, it is necessary to take into account a number of criteria. The importance of a particular criterion will vary from case to case. The proposition before the committee is not new; it has already been implemented in many jurisdictions in Australia. There are strong similarities between what is being proposed here and what is contained in the law, for example, in Queensland, Victoria and New South Wales concerning de facto relationships.

I note that the Bill deals with same-sex couples, but the concepts of the respective criteria that are set out in proposed new clause 85 are arrived at, and have been arrived at, after considering what is taking place there. I also draw to the attention of the Committee the fact that the commonwealth Social Security Act sets out a number of criteria that are not dissimilar to those being proposed here. The phrase “marriage-like relationship” is contained in the commonwealth Social Security Act. The Commonwealth Government is presided over by those of the same political colour as the Opposition.

Hon Peter Foss: The commonwealth Parliament is not the Commonwealth Government.

Hon N.D. GRIFFITHS: I know. The Commonwealth Government administers Acts and has the capacity to initiate change if it is uncomfortable with the situation.

Hon Peter Foss: It cannot always get Bills through the upper House.

Hon N.D. GRIFFITHS: It will be interesting to examine when the particular provisions of the Social Security Act to which I have alluded came into operation. It was not always the case that upper Houses were not in the control of the Government of the day. I think that Mr Howard was Treasurer during a number of years when that was the case.

The Government is proposing something that it is believed will work. Laws in the other Australian jurisdictions have been operating now for various periods, depending on which jurisdiction one picks. I am advised that a number of cases and that a body of case law can be referred to. Again, as I have demonstrated on behalf of the Government, if the Opposition comes up with something that is constructive and will make the law operate better in the event that the Bill is passed - I trust it will be passed - we will accommodate it. However, what is being proposed by Hon Peter Foss in this amendment, even though it has thankfully been improved through the intervention of Hon Simon O'Brien whose point was very worthwhile, will make matters work not better but worse and, therefore, we are opposed to the amendment.

Amendment, as altered, put and negatived.

Hon PETER FOSS: The Committee will notice that I did not call for a division on that amendment. I do not intend to divide on every single matter, but I will call for a division at the end of the clause. I hope that people respect the fact that I am not in any way accepting that there could not have been a division on the amendment. I simply believe that I should not take the time of the Committee in that manner. I move -

Proposed subsection (3), paragraph (b) - To delete the words "or in another de facto relationship" and insert instead -

provided they are separated from them, nor does it matter that they have been in a de facto relationship with another person provided they have ended that relationship

This amendment is to deal with my great concern that we are departing radically from the concept of a marriage-like relationship by permitting multiple relationships. One of the most common problems is with people who are in a de facto relationship who have ended their marriage but have not secured a divorce. I accept that as a reality of life. That is certainly one of the items of mischief with which we need to deal. However, I do not believe that we need to take the next step, which is to say that we will change the concept of marriage, which is the commitment of two people to each other, into a concept of a commitment to whomever someone happens to be with at the current moment and for as long as that person happens to be with them.

The idea behind this amendment is to allow a person to have successive de facto relationships but not multiple de facto relationships. I find the concept of multiple de facto relationships quite offensive. Under a Bill that we are not discussing today - the Family Court Amendment Bill - if a de facto relationship were to cease, the parties could still claim rights from that relationship if they were not in another de facto relationship. The Government has proposed that the rights from a previous de facto relationship will come to an end two years after that relationship has ended. The Opposition is saying that a person should not be allowed to have parallel de facto relationships. A person can have serial de facto relationships when a marriage, although not legally, has come to an end, but the Opposition does not support polygamy, bigamy or concubinage.

Hon N.D. GRIFFITHS: I listened with interest to the observations of Hon Peter Foss on proposed new clause 85. I found scenario A interesting and scenario B somewhat more colourful. Scenario A - the fly in, fly out situation in which a man has a wife in the metropolitan area and a de facto in regional Western Australia - may be somewhat commonplace. It is interesting that the commonwealth Family Law Act 1975 came into operation in 1976 when Malcolm Fraser was Prime Minister. From memory, the Liberal-National Party coalition Government had a majority in both Houses of Parliament for much of the period between 1975 and July 1981. It did not have to deal with hostile upper Houses, balances of power or matters of that kind. The coalition Government presided over that law and could have changed it if it had wanted. Section 75 of that Act is relevant to spousal maintenance and property. A number of criteria are set out. Subsection (2)(m) states -

if either party is cohabiting with another person - the financial circumstances relating to the cohabitation;

A person could be married and have a coexisting de facto relationship; presumably, that person would be separated before attending the Family Court. However, the fact of the marriage would still exist.

Hon Peter Foss: We have allowed for that. The amendment does not prevent it.

Hon N.D. GRIFFITHS: The fact that more than one relationship exists, hopefully, is not commonplace, but it does occur. There may be an A-B scenario in which someone has a de facto in each of two ports. Why should one or both de factos, after all the criteria are examined, not be able to access certain rights and obligations? They should be. This is about rights and obligations that arise from a number of criteria and about people being dealt with appropriately. Putting barriers in front of them of the kind proposed by the member will not advance those rights and obligations. I heard the member's statement about monogamy. I agree that it is an appropriate way to behave and that we should frown on other aspects of behaviour. The Government wants to provide for people's rights and obligations and to set out circumstances that can be taken into account to trigger those rights and obligations. This is not about penalising people who find themselves in particular situations.

Hon PETER FOSS: I hope Hon Nick Griffiths listens to me carefully; he obviously did not before. As I said initially, there is a distinction to be made when a person incurs multiple obligations. I do not have any problem with that point, which is why I said the definition does not apply. A definition in a Bill relating to obligations to settle property matters between people who have acquired common property or who have engaged in common endeavours would not be a problem; however, this is not such a Bill. The difficulty with this definition is that it must suit all occasions and all events.

Before I moved the amendment, I made the point that this is not about an action that a person does to render himself or herself liable to halve or share property or to maintain somebody. If an action can be identified that indicates a man has led a woman to believe that she is his wife and that he has supported, maintained and helped her to work and they have acquired property together, I do not have a problem with a law that deals with the immorality and inequity of behaviour that seeks to avoid certain obligations. I said that initially; but this Bill is not that law. The Government has proceeded on the basis that it is that law, but it has not written it in that way. The Opposition understands what the Government is trying to achieve but it has not written the Bill in that way.

The Opposition wanted to split the Bill to enable arguments, such as those raised by Hon Nick Griffiths, to be dealt with separately, because they are separate. Whatever members might say about that - and I might agree with them - where will we go when we reach the part of the Bill that will amend the Adoption Act and the Acts relating to in-vitro fertilisation? The proposed amendments to those Acts have sent a significant part of the public climbing up the wall, furious with the Government simply because it is not able to make a distinction between the example Hon Nick Griffiths just gave, which I can support, and all the other legislation which I cannot.

I wonder whether I am getting through to the Government. I know the public is not getting through to it. It is time the Government thought seriously about what it is doing. We are trying to get the Government to understand that a solution exists. I do not know why we are bothering. We would do better to let the issue go and let government members get a bucket of ordure tipped all over them by the people they will upset. I suppose we are not being a good Opposition because we are trying to improve the legislation and to give the Government a solution to the mess it has created in the community for the people from whom the Government wants support and whom surely it respects. It has unnecessarily confused two aspects of the legislation.

Respectable, moral, upright, god-fearing people in this community have begged the Government to consider what it is doing. It may very well be that the Government is so strongly committed that it will proceed and do something of which those people do not approve anyway. However, the legislation does not need to be as bad as it is. It is one thing to have a principle and stick to it, but another to create something by accident due to woolly-headed thinking and lack of legal appreciation.

As a lawyer I enjoy debate and probably drive all my colleagues mad. At least Hon Nick Griffiths has the capacity to read the Bill and understand what the Government has done. I wonder whether a lawyer has examined it before now. I sometimes wonder whether half the problems that occur with legislation arise from examining too little, too late. I am sure that, had someone examined the legislation earlier and queried what was being sought, the Government would have drafted it in a different way. We are now locked in a battle over some words that I accept do not achieve what the Government wants to achieve in this legislation. The point Hon Nick Griffiths made is a very good point about different legislation. Unfortunately, we are not talking about that legislation. The definition in this legislation is a disaster. I beg Government members, who have the trust of the people of Western Australia, to think.

We have a couple more hours to discuss this issue before we have a break. I do not expect the Government to suspend the Committee right now. However, I genuinely and sincerely ask the Government to consider the matters I have raised and whether it is possible that two definitions or two approaches should be taken. Is it possible that the Government should consider what I suggested originally: the law of equity could well be developed to cater for the occasions to which the minister referred? As I said before, I would not care whether the inequity occurred to one person or 100 people or whether they were of the same sex or another sex. In that circumstance, we have an obligation to act properly. I do not see any problem with the court enforcing that. We

cannot say that, as a result of inequitable behaviour towards a third party, the third party can somehow become a quasi spouse.

I do not think we will achieve this today. However, I make what might seem to be an impassioned plea, because that is the way I feel. The minister's objections to my amendments are valid in the context of the Family Court Amendment Bill, but the amendments are fundamental to the Opposition's objection to this Bill. We will proceed, and when we deal with some of the Acts later, we will pick up on that point. However, I think the minister will find that the same argument will come up again and again, and we will be bound by this definition. Until this definition is in place, it will be a problem.

Hon N.D. GRIFFITHS: I propose to approach this debate constructively. It has been a constructive debate so far, and I believe that will continue to be the case. I note the views of those opposite and the observations of Hon Peter Foss. There were differences across the Chamber on a number of issues. Certainly, the proposed new clause will put the definition of de facto with which we are dealing into the Interpretation Act, and that definition will carry through to a number of other Acts. However, the definition of de facto in those Acts will operate by way of a trigger. Its precise application will vary depending on the circumstances of the particular Act. For example, adoptions work in a particular way, as does kinship with respect to death. Therefore, the application of the definition will vary according to the legal circumstance that is being dealt with. I suppose that will lend itself to a number of discussions on the definition of de facto as we move through the various clauses of the Bill.

It is not right to say that there might be a scenario in which, given certain matters, a difficulty might be caused. I am not conceding a point with respect to difficulty. However, if a difficulty arises, that will be examined, and should it be necessary, following debate and consideration after the passage of a particular clause, to invite the House to reconsider the matter, that will be done. On behalf of the Government, I am determined to approach this issue constructively - that is not to concede anything for the sake of concession - with a view to ensuring that people in same-sex relationships are dealt with fairly and on a par with people in heterosexual relationships. However, I point out that the Government is not in any way seeking to set up a status of marriage. Marriage is a commonwealth matter; therefore, the Government has no power to do so, just as the Commonwealth has no power to deal with de facto relationships or exnuptial children, save when that power has been referred by an Australian jurisdiction. That is how I propose to approach the matter. Constructive points will be acceded to. However, I do not think what has been proposed by Hon Peter Foss enhances matters.

Amendment put and negatived.

Hon PETER FOSS: I move -

Proposed subsection (4), line 2 - To insert after the word "or" -
where the context requires,

[Continued on page 8003.]

Sitting suspended from 3.45 to 4.00 pm