

COMMONWEALTH POWERS (DE FACTO RELATIONSHIPS) BILL 2003

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

The purpose of the *Commonwealth Powers (De facto Relationships) Bill 2003* is to refer to the Commonwealth Parliament, under to section 51(xxxvii) of the Commonwealth Constitution, power over certain financial matters arising out of the breakdown of de facto relationships.

Reasons for the objectives and how they will be achieved

Under the Commonwealth Constitution, only the Commonwealth Parliament has the power to make laws with respect to marriage, divorce and related matters.

The *Family Law Act 1975* (Cth) (Family Law Act) regulates marriage breakdown and divorce and related matters such as the care of children after relationship breakdown and the adjustment of property interests.

Part VII of the *Family Law Act* also deals with family disputes involving children whose parents are not married following a reference of power from all States (except Western Australia) between 1986 and 1990. Under the *Family Law Act* the Family Court of Australia has jurisdiction to resolve disputes in relation to matters that fall within the ambit of that Act.

In 1993, in Report No.44, De Facto Relationships, the Queensland Law Reform Commission expressed the view that the Family Court was the most suitable forum to hear and determine property disputes which may arise from the breakdown of a de facto relationship.

In October 1995, the *Commonwealth Powers Amendment Bill 1995* was introduced to the Legislative Assembly. That Bill was in similar terms to the *Commonwealth Powers (De facto Relationships) Bill 2003* (the Bill).

However, the 1995 Bill lapsed following the prorogation of the Legislative Assembly in March 1996.

In 1999, following a lack of agreement on the terms of a referral between the Commonwealth and the States, Queensland enacted Part 19 of the *Property Law Act 1974* to enable de facto partners to resolve property disputes following the break down of a relationship. Without this legislation, de facto partners needed to base an action for redistribution of property under the law of equity, trusts or contract.

The Commonwealth subsequently renewed its invitation to the States to refer power over financial matters arising out of the breakdown of relationships between de facto partners to enable jurisdiction over these matters to be given to the Family Court and other federal courts having jurisdiction to hear matters under the Family Law Act.

The Bill was prepared through the Standing Committee of Attorneys-General, and is to be enacted in similar form by other States who have accepted the Commonwealth's invitation to refer power.

The Bill will enable the passage of Commonwealth laws to give the Family Court jurisdiction over de facto property disputes. The major benefit that will flow from having de facto property disputes dealt with under the *Family Law Act* is that both child and property issues will be dealt with by a single court. This will reduce duplication of proceedings, costs and help minimise the stress that accompanies the breakdown of relationships.

The reference of power is made possible by section 51 (xxxvii) of the Commonwealth Constitution, which gives the Commonwealth Parliament the power to legislate with respect to "matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States".

A Commonwealth law made with respect to a referred matter only extends to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

Administrative cost to Government of implementation

The referral of power to the Commonwealth will not result in any increase in expenditure by the State.

Consistency with Fundamental Legislative Principles

The Bill is generally consistent with the fundamental legislative principles set out in the *Legislative Standards Act 1992*.

Under the *Legislative Standards Act 1992*, section 4(3)(g), whether legislation has sufficient regard to rights and liberties of individuals requires a consideration of whether the legislation adversely affect rights and liberties, or imposes obligations, retrospectively.

Clause 4(4) of the Bill extends the reference of power to the Commonwealth to de facto relationships that ended before the commencement of the Act.

The Commonwealth could amend the *Family Law Act* to extend jurisdiction to all de facto relationships regardless of whether they ended before the commencement of the relevant *Family Law Act* amendments.

However, the Commonwealth has indicated that its intention is to legislate to allow for orders to be made in relation to relationships that have broken down prior to the reference being made only where final orders have not been made in State courts in relation to the property in dispute.

In addition, it is likely to allow applications for such orders to be made where previous orders are later set aside under State law. The Commonwealth does not envisage any other retrospective effect and final orders in State courts would be a bar to applying to a court exercising jurisdiction under the *Family Law Act*.

The Bill does not breach the above fundamental legislative principle because the retrospectivity is beneficial and does not have an adverse effect. The retrospectivity will allow greater access to the family law scheme.

Section 4(2)(b) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the institution of Parliament.

Clause 2 of the Bill provides that the *Acts Interpretation Act 1954*, section 15DA does not apply to this Act. Under section 15DA of the *Acts Interpretation Act 1954*, an Act automatically commences 12 months from assent day if a proclamation for commencement has not been made. A regulation can extend the postponement of commencement for a further year.

Section 15DA limits the time the Executive is able to defer the commencement of an Act passed by Parliament.

While it is acknowledged that it is generally not appropriate for an Act to facilitate the indefinite deferral of the commencement of an Act, it is considered reasonable in this instance. The reason for displacing section 15DA is that the Commonwealth has not yet provided the State with detail of the proposed amendments to the *Family Law Act* that will be enacted in response to the referral of power.

This displacement will ensure that referral does not become operative before the Commonwealth has enacted the necessary amendments to the *Family Law Act*, and the State is satisfied with the content of the amendments.

CONSULTATION

Community

The Queensland Law Society and the Family Law Practitioners Association were consulted.

Government

Relevant Government agencies and Departments were consulted during the preparation of the Bill, including the Government Superannuation Office and the Office of State Revenue.

The Bill was prepared through the Standing Committee of Attorneys-General, in conjunction with the Special Committee of Solicitors-General and the Parliamentary Counsels' Committee.

NOTES ON PROVISIONS

Clause 1 sets out the short title to the Act.

Clause 1(2) sets out the purpose of the Act, which is to refer certain financial matters arising out of the breakdown of de facto relationships to the Parliament of the Commonwealth for the purposes of the Constitution of the Commonwealth, section 51 (xxxvii). Section 51(xxxvii) provides that the Parliament has power to make laws with respect to “matters referred to the Parliament of the Commonwealth by the Parliament or

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Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.”

Clause 2 provides that the Act commences on a date to be fixed by proclamation. *Clause 2(2)* displaces the operation of section 15DA of the *Acts Interpretation Act 1954*.

Clause 3 defines certain words and expressions used in the proposed Act.

The Bill defines “de facto relationship” as “a marriage-like relationship (other than a legal marriage) between two persons”. This is inconsistent with the definition of “de facto relationship” contained in section 36 of the *Acts Interpretation Act 1954*.

Section 36 defines “de facto relationship” as “the relationship existing between two persons as a couple because each is the de facto partner of the other”. Section 32DA then contains a detailed definition of “de facto partner”. However, the Bill departs from the section 36 definition to ensure that the referrals made by referring States relate to the same category of relationship.

Clause 4 deals with the reference of power. Power is referred to the Commonwealth Parliament, to the extent to which it does not already have power, over financial matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships between persons of different sexes. Power is also referred over the same subject matter arising out of the breakdown of de facto relationships between persons of the same sex.

Clause 5 provides that the Governor may, at any time, by proclamation published in the gazette, fix a day as the day on which the references under this Act are to terminate.