Speech by

Mr L. SPRINGBORG

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PROPERTY LAW AMENDMENT BILL

Mr SPRINGBORG (Warwick—NPA) (Deputy Leader of the Opposition) (9.01 p.m.): This Bill is aimed at providing a clear, comprehensive and fair statutory framework for resolving the property and related matters of de facto couples. The Opposition is supportive of legislation which will achieve that aim. There is no doubt that the lack of any comprehensive de facto relationship legislation in Queensland has produced a number of very difficult situations for many people, especially women who have been in long-term de facto relationships but the property remained in the name of the male person. While there are many legal remedies available to people in such relationships, it is true that to establish equitable title is a costly and complicated business. Obtaining relief under the law of contract or trusts or doctrines of unjust enrichment or unconscionable conduct or equitable estoppel is, of course, open, but at a cost and after a period of time.

The Minister's reasons for codifying the law and ensuring that de facto couples can plan their financial future are sound and are generally supported. In particular, it is prudent that the law in this State recognises the capacity of people to enter into a binding cohabitation or separation agreement, subject to the protections enshrined in this legislation.

There are a number of points that I want to make. As the Minister would realise, the National Party and—according to the conscience vote now to be exercised by the Liberal Party—a number of Liberal members will not be supporting the expanded definition of "de facto spouse" in proposed section 60 to include same sex relationships. I will explain the reasons for our opposition to this piece of legislative social engineering in a moment.

First, it is clear that, whether some people approve of de facto relationships or not, they are a fact of life. The Explanatory Notes point out that in 1991, 9.7% of all Queensland couples were de facto couples, which is 1.5% above the 8.2% Australian average. However, what also needs to be pointed out is that in the period 1982 to 1992 the number of de facto relationships in Australia doubled. In 1971 only 0.6% of all couples in Australia were cohabiting outside of marriage. As I said, just 20 years later, this had increased to 8.2%. No doubt this trend will continue.

Many people regret the fact that increasing numbers of young Australians are not marrying but living in such relationships, but it is now a fact of life. Not only that, but there are many problems that can result when such relationships dissolve. Many problems and injustices can and do occur. It was back in 1980, I think, when the then coalition Government enshrined for the first time in Queensland legislation substantive rights for de facto couples by allowing a surviving de facto spouse to make a testator's family maintenance application. Since that time there have been other attempts at law reform.

In 1990 this Parliament referred power to the Family Court over custody and maintenance of the children of de facto relationships. Then in August 1994 the tragic Moura underground mine disaster highlighted the unfair situation of the de facto partners of the men killed being unable to institute a common law claim for damages for the wrongful death of their partners because they were not listed in the persons entitled to make a claim under the Common Law Practice Act. This led to report No. 48 of the Queensland Law Reform Commission and, from recollection, an appropriate amendment to reflect the recommendations being made. I think that was made by the Honourable the former Attorney-General, the member for Indooroopilly.

So there has been a clear trend in this Parliament for around 20 years to recognise the reality that around 10% of all couples are cohabiting outside of marriage and deserve the same basic rights as all other couples. Not only that, but the history of past legislative initiatives has often been necessitated by clear instances of injustices and the pressing need for appropriate and prompt action to resolve the situation.

I recognise the view that is often expressed that, if the State gives increased legal recognition to relationships outside marriage, this undermines the value of marriage itself. Passing this legislation, however, does not equate a de facto relationship with the bonds of holy matrimony and it is not intended, I am sure, to do so. Rather, from my point of view, it is a practical piece of law reform generally designed to recognise social reality and provide some basic forms of justice to deserving people.

There is also another dimension to this, and it is one which the Minister should bear in mind. People who live in a de facto relationship have deliberately chosen not to become married. There is an inherent freedom of choice in our society for couples to determine what sort of domestic relationship they prefer. A number of bodies that have looked at this matter, including the New South Wales Law Reform Commission in 1993, advocated a continued distinction between the legal rights and obligations pertaining to married couples and de facto couples. Instead, it recommended that the role of the State should be to remedy injustices and reform any anomalies in the law. It stated that there was an obvious policy reason for maintaining a distinction because marriage involves "a public commitment that is not a necessary element" of a de facto relationship.

The lack of a formal public commitment— a legal reference point, if you like—has not just a religious implication, but a very significant legal one, especially when one deals with questions of proof about the nature of a relationship. This is a point I will deal with shortly, because it has significant implications in the context of stamp duty concessions. Having said that, I suggest that in the scheme of things there is an overriding duty on Parliaments to play a protective role in preventing unfairness and harsh property outcomes in relationships. Taking a protective role is not to be confused with equating de facto relationships with marriage. Rather, it is a recognition of the need for the Parliament to ensure that legal injustices are overcome, especially when such injustices could apply to up to 10% of the adult population of this State.

The second point I make is that the function of the law in the regulation of the financial aspects of family relationships is remedial. It is to effect a just resolution of the parties' financial position when their relationship breaks down. A subsidiary role is to make such relationships more stable. There is no doubt that many relationships break up due to financial issues and worries. Ensuring that there is a just and stable framework to resolve financial issues in the event of problems in such relationships may well, in fact, help to buttress such relationships. So this is another factor that should be borne in mind when considering this legislation.

The next point is that we are now going down the path of non-uniform State legislation and not down the path of referring power to the Commonwealth mainly because, as the Explanatory Notes make clear, the Commonwealth will not be covering same sex couples. I have to say that I am pleased that we will have our own legislation and that we are not referring more and more matters to the Commonwealth. The fact of the matter is, as the Explanatory Notes point out, the Family Court has delays of up to two years for trials. There are delays for trials in the District Court of only six months.

On top of that, under the uniform civil procedure rules, the parties can under this Bill, up to a point, choose a State court to deal with their application. Using the State system is more appropriate, more cost effective and offers decentralised justice. In addition, it ensures that this Parliament can continue to determine the destiny of Queenslanders in accordance with the wishes of Queenslanders as expressed through the ballot box every three years. Nevertheless, it is a matter of concern that the decision to introduce State legislation was, in fact, determined not by these valid factors, but by the issue of same sex couples. I am very disappointed that a matter as important as this has again been determined by social engineering considerations.

I will now deal with some matters in the Bill. The first matter is that the Bill, by proposed section 258, ensures that this legislation is non-exclusive in its operation. It would appear that the right of parties to continue to bring claims under the general law has been preserved. While we support the concept that equitable provisions should continue to play a role in determining de facto property rights, I point out to the Minister that problems have arisen in other States with sometimes conflicting decisions. As time is short, I will not say any more other than that this is an area that warrants ongoing supervision.

In particular, I refer the Minister to a very interesting article written by Professor Bailey-Harris in which she argues—

> "As a system, equity has proved inadequate in providing accessible and just remedies for those whose de facto relationships break down. It has proved unsatisfactory both where it is

the primary source of relief, and where it plays a secondary role to statute. Recent experience in Australia leads to the conclusion that equity should be completely supplanted by statute in the field of de facto relationships."

The second matter is the definition of "de facto spouse". I am concerned that the definition in the Bill is wide, open-ended and vague. It provides that two people must have lived together as a couple, and then goes on to say that they 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."

I ask the Minister—and I think this is very important—what does that mean? This afternoon I typed the word "intimacy" on my computer and then clicked on the thesaurus, and this is what it came up with—

> "Emotional closeness, closeness, warmth, caring, affection, cuddling, touching and familiarity."

As can be seen from that, our definition of "de facto spouse" is very open and certainly not in accordance with the tradition in this State where it used to be defined as an "ongoing connubial relationship". That is an important point for the Attorney-General to respond to when he sums up.

In that regard, I note that the Scrutiny of Legislation Committee, in Alert Digest No. 15, said—

> "... the term 'de facto spouse' is defined in part by reference to general criteria, and that these necessarily introduce an element of uncertainty into the establishment of the concept."

I compare that definition with the one contained in the New South Wales De Facto Relationships Act which, at least until the last few months, defined this term to mean—

> "The relationship between de facto partners, being the relationship of living or having lived together as husband and wife on a bona fide domestic basis although not married to each other."

It appears to me as though we are going down the same path as the ACT, which applies its Domestic Relationships Act to—

> "Personal relationship (other than legal marriage) between two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other, and includes a de facto marriage."

The Explanatory Notes to the ACT Act make it clear that this statute includes not just same sex relationships but any relationship that goes beyond friendship and neighbourliness— whatever that means.

I would hope that will not come to pass with this statute. One of the risks that one runs with moving away from the concept of a heterosexual marriage to one that is more vague is that a Bill of this nature can be used in ways that are not anticipated and that are not appropriate. This Bill is designed to deal with relationships in the same way as marriage—relationships where there is a substantial intermingling of assets and relationships that may result in family relationships, including children, or at least a parent and child relationship.

I hope that we have not moved so far away from accepted and responsible views of relationships that we would ever contemplate legislation that tries to govern disputes between friends and the like and impose on one of the partners all the drawbacks of deemed regulation and, on the other, windfall rights. That is the risk that we run when we have definitions as broad and vague as the one I have quoted. This problem could have been partially resolved by a properly drafted Explanatory Note. Instead, section 260 is explained in the Notes—and these are Notes that can be used by the courts for assistance in interpreting the meaning of statutes—as follows—

> "Section 260 sets out the meaning of a 'de facto spouse'."

That is a master statement of the obvious. No doubt the Minister could quickly bring out his much used quotes from Alice in Wonderland and find one that is apposite for such a non-definition.

The fact of the matter is that we have a critical definition that goes nowhere. I think that the Minister needs to address this matter clearly and properly in his response. I might also say that the Minister's response to the Scrutiny of Legislation Committee, which is set out in Alert Digest No. 16, is potentially misleading. In it, a decision of the New South Wales Supreme Court is cited in regard to the term "bona fide domestic basis". The court case cited is a very useful one, and the criteria outlined are apposite. However, as I pointed out, the New South Wales definition—at least at the time of the court case—refers to people living together as husband and wife. That critical phrase is totally absent from this Bill, and I would respectfully suggest to the Minister that the explanation which he provided to the Committee is incorrect, or at least inappropriate.

The third issue follows from the second. What we are debating is not just a series of amendments to the Property Law Act, but, in addition, amendments to the Stamp Act. The Minister pointed out in his second-reading speech that exemptions from stamp duty are provided for transfers of motor vehicles and principal places of residence between de facto couples during their relationship. In addition, exemptions are also provided for any instruments that are executed on breakdown of the relationship if made under a court order, including a consent order. I have no problem at all with stamp duty exemptions that flow from a court order.

The relevant officers in the Treasury Department will have a certified document, or series of documents, to work from. The risk of any improper tax avoidance would be nil, or so far as the definition of de facto spouse in this Bill, next to nil. The problem I see lies with exemptions from stamp duties for transfer of motor vehicles and principal places of residence. In particular, I am concerned about motor vehicle transfers.

As I pointed out, the definition of "de facto spouse" is very vague. Public servants in the Office of State Revenue will be placed in a very difficult position when they are presented with claims about transfers of property between people in an alleged de facto relationship. No doubt appropriate documentation will have to be signed and declared, but at the end of the day, there is the scope for substantial tax avoidance by unscrupulous people.

I am pleased that the Explanatory Notes point out that there has been some form of consultation with the relevant tax parties, because I hope that they will be able to deal with this problem. At least in a marriage relationship, there is some point of reference, some clear documentation and some legal superstructure, if I can use that terminology. With this Bill, there is nothing of the kind. As much as the coalition is keen to regularise and assist people in these situations, the fact is that there are problems of proof and these problems are exacerbated by the very drafting of this Bill. I hope that this matter is kept under review. I also hope that, if problems arise, solutions are produced that do not result in any hardships for people in genuine de facto relationships. As I said, the risk that we run in drafting legislation such as this in such a slipshod manner is that, down the track when problems arise, innocent people will be disadvantaged.

The next issue I want to raise is the concern highlighted by the Scrutiny of Legislation Committee about an application for adjusting interest in property that may benefit the child of a de facto couple. The committee noted that the Bill enlarges substantially the common law rights of the children of such relationships. Unfortunately, the Minister's response to the committee focused on those cases where a child has contributed to the property of such a relationship when the committee was dealing with cases where no such contribution had been made. At paragraphs 6.8 and 6.9 of Alert Digest No. 15, the committee made the following comments—

> "The common law decisions, by way of contrast, have tended to focus on the financial and non-financial contributions (direct or indirect) which the parties have previously made. The new statutory regime requires consideration to be given to a range of matters related to the future needs of the parties, and the committee considers that the Bill, by expressly including future child-care obligations as one such need, will operate to the benefit of the children concerned.
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> In conclusion, the committee infers from the Minister's response that it is intended a property adjustment order may only be made in favour of children if they have made a contribution to property and that contribution is substantial."

As the Minister would know, the committee has recommended that the Bill expressly declare any intended limitations on the availability of property adjustment orders in favour of children. I do not seek to suggest that the Bill be amended, because there are, or there may be, good reasons for having provisions favouring non-contributing children. In fact, I am sure that I could outline one or two myself. The point that I raise is that the Minister's response did not deal with the point that the committee raised, and I think that the point that the committee raised is an important one. Therefore, I would appreciate it if the Minister could address this issue in his response.

The final substantive point that I wish to make relates to the fact that the Bill is drafted to apply not just to heterosexual relationships but also to same sex relationships. In addressing this matter in his speech, the Minister said that this was dealing with the matter in a non-discriminatory fashion. There is no doubt that this is the case if one approaches it from a narrow and very legalistic point of view. However, many other people would say that the Beattie Labor Government is dealing with this matter in a totally inappropriate, unfair, inequitable and morally vacuous fashion. Many people genuinely interested in law reform in this area recognise that this is a very provocative initiative and designed to attract attention to a particular facet of legislation in a way calculated to arouse controversy and obscure the substance of the measure.

I find it disappointing that since July this year, the Government has launched a media campaign focusing almost solely on recognising gay and lesbian relationships in Queensland's property laws but

giving next to no emphasis to de facto law reform generally. In a page 1 story in the Courier-Mail of 17 July, the Premier was quoted as saying—

> "My Government is currently preparing the Property Law Amendment Bill of 1999 ... same sex couples will be recognised in this legislation ... de factos of any kind ... it doesn't matter if they are same sex couples or whether they are heterosexual couples—if they are in a de facto relationship there should be some protection for property."

A few weeks ago I said that I was concerned that the Labor Party was using same sex couples as political pawns, and I reiterate that concern. It is interesting to note that the Government was looking at these reforms last year, but dropped them in the run-up to the Mulgrave by-election after significant backbench opposition. It is amazing what a majority of one will do to quiet the backbench and encourage the progressive Beattie Government to push ahead with a raft of social engineering policies.

Quite clearly, homosexual persons in a stable relationship who have property disputes, or if there are issues on the death of one of the parties, can rely on the current law. There are a number of current decisions dealing with such issues both here and elsewhere. For example, I refer to the decision of the Queensland Court of Appeal in the case of Harmer v. Pearson, which is reported in 1993 Volume 16 Family Law Reports at page 596. As I said previously, the current law of equity and contract is complicated, arcane and expensive. However, there is a legal regime that provides rights for resolving property disputes in same sex relationships. I think that it is very wrong to suggest that only by the passing of this Bill will homosexuals be granted adequate rights.

The real issue is whether we should combine the issue of heterosexual and homosexual relationships in the one de facto relationships Bill. On this point, I would like to refer to Professor Marcia Neave, who advanced the following point of view—

> "While it is irrational to draw a distinction 'on the basis of the sexuality' of those who cohabit, it is the division of labour which characterises heterosexual partnerships which is a major cause of women's inequality. I do not agree with (the) contention that 'there is no one standard pattern of role diversion for any category of family relationship in contemporary society'. Whether or not they are in paid work, women in heterosexual relationships almost invariably take primary responsibility for housework and child care. I am unaware of any evidence of such systemic role division in homosexual partnerships. Equitable principles will often provide adequate remedies for homosexual partners who make indirect financial contributions or non-financial contributions (not taking the form of domestic labour) to family resources. Thus, for both pragmatic and policy reasons it may be justifiable for statute to focus on heterosexual relationships."

I have quoted Professor Neave, because it is clear that there are a number of points of view across the ideological spectrum that are against mixing in the one generic statute governing de facto rights those of both homosexual and heterosexual couples. Professor Neave points out that there are obvious systemic differences between male and female relationships and same sex relationships. Those differences are well documented and it would be foolish and quite irresponsible to deny them.

How realistic is it to draft a statute designed to deal with the situation, say, of a woman with four children who has lived in a de facto relationship for many years, who is financially destitute and who has no real bargaining power with that of two young middle-class homosexuals who are both earning good salaries and who both have access to professional advice. The reality of heterosexual relationships is clear to every member in this House. This Bill has been drafted with those realities in mind. In those circumstances, trying to apply this model with these inescapable facts of life to other relationships that do not have the same roles and power situations is not sensible.

In addition, the very fact of mixing the two concepts causes immediate definition problems of the type that I have outlined already. The risk that this poses in the longer term is that legislation of this type, with its vague and open-ended definition of de facto spouses, could be interpreted in the years to come in a fashion that will cause social, economic, legal and fiscal problems.

A related problem is that it is clear that there are a number of fundamental differences between heterosexual and homosexual relationships. Apart from the power dimension, homosexual partners do not produce children. They do not have all of the various issues of every kind that involve being a parent and bringing up kids, except in those rare circumstances where one or both of the parties has had children from a previous heterosexual relationship.

To say that this fundamental difference can be ignored when drafting generic legislation dealing with de facto relationships is a nonsense and may cause distortions in the way that such legislation is drafted and interpreted. It is sometimes forgotten that equal treatment under the law, having regard to the different nature of relationships in our society and, particularly, the difference in the nature of relationships between heterosexuals and homosexuals, does not equate with identical treatment. Therefore, treating same sex de facto couples in an identical legal fashion should not be confused with saying that they are being treated equally under the law. They are two different concepts altogether.

The idea that the one size fits all approach can be applied to regulating all forms of non-married relationships not only causes many problems but also fails to guarantee equality of treatment. There is no level playing field amongst all relationships such that identical legislation can produce the same beneficial results. There are a number of other points I could raise, some practical and some philosophical. However, I will say this: the stance that we are taking is not biased or influenced by homophobia. It is motivated by a sincere desire to ensure that the vast majority of relationships formed outside the bonds of marriage, many of which involve young children, can be appropriately protected by specific and well-directed legislation.

We are not saying that homosexual Queenslanders should be denied their legal rights. Over the past decade, homosexuality has been decriminalised and discrimination on the basis of sexuality prohibited. This is not a case of discrimination. It is a case of recognising the fundamental difference in certain relationships and ensuring that, by social engineering and political opportunism, long overdue legislation for heterosexual unmarried partners is not sidetracked by certain political agendas pushed by the Left Wing of the Labor Party.

I agree with Professor Neave that the sorts of relationships that exist in same sex partnerships are many and varied. They are quite different from heterosexual relationships and I am not convinced that the current operation of the common law and equity does not give those people satisfactory protection. At a time when stable family relationships are increasingly being recognised as fundamental to the maintenance of a sustainable society, it behoves any Government worth its salt to promote family values and to do everything it can to uphold the institution of the family.

Instead, with this Bill we see a preoccupation with a certain type of relationship that is in the minority and an effort to draft key provisions of the Bill in a way that focuses on that minority situation. The extent that this undue attention has resulted in the Bill being drafted in a vague way with potentially unfortunate consequences is an indictment on the competence and priorities of this media-driven Government.

In conclusion, the Opposition supports legislation that gives basic and long overdue protections to de facto couples. To the extent that the Bill achieves this aim, it deserves support. However, as I said, much of the publicity generated by the Government on this initiative has focused not on the 10% of heterosexual Queenslanders in de facto relationships who may benefit from the Bill but on the very small minority in same sex relationships. The way that this Government has promoted the Bill has been divisive and opportunistic. The only people pushing for the expansion of this legislation to cover same sex couples are certain lobbyists and few political opportunists.

This is a difficult issue from a host of legitimate perspectives: religious, legal and financial. I might add that the very genuine religious point of view that many decent people hold dearly should not be dismissed lightly or in a offhanded manner by anyone in this Government. In particular, I note what Archbishop Bathersby said, which is worth quoting for the information of the House. He said—

> "Everybody is equal in the eyes of the law and the eyes of God and there are ways of protecting those rights. However, making rights by comparing other relationships to the family can be an erosion of the importance and protection that needs to be given to the family and the family unit."

I would have thought that a responsible Government that hoped to achieve bipartisan and lasting reform might have focused, initially at least, on introducing legislation that we all could support and then building a base from which further reforms could be sensibly discussed. Instead, we are again presented with a series of media releases and are then dumped with legislation that exacerbates divisions and problems.

This issue is a matter of personal beliefs. Many of us believe that whilst we respect individual homosexual people we do not believe that that respect should go as far as extending recognition in law for homosexual couples to areas reserved for a man and a woman living in a long-term relationship, generally with a number of children. For a Government elected on achieving consensus and sustainable reforms, this is yet another example of how this Government simply cannot deliver.
