Speech by

LINDA LAVARCH

STATE MEMBER FOR KURWONGBAH

Hansard 9 December 1999

PROPERTY LAW AMENDMENT BILL

Mrs LAVARCH (Kurwongbah—ALP) (9.57 p.m.): I commend the member for Caloundra and the member for Indooroopilly for supporting the Property Law Amendment Bill. As someone who practised as a solicitor specialising in family law prior to election to Parliament, I speak on this Bill drawing heavily from that experience. The Property Law Amendment Bill is an important piece of legislation as it will potentially impact on the lives of hundreds of thousands of Queenslanders who live in de facto relationships. It is worthwhile and long overdue reform of arcane and complex laws and doctrines that are applied to the distribution of property when a de facto relationship breaks down.

While it is a Bill which deserves the support of the House, it does mark a series of failures in the legal and governmental structures of Queensland and Australia. I speak on this Bill with a sense of disappointment about good reform which could have been done so much better. The principal source of my disappointment is that the Family Court will not be the forum which will be responsible to hear and determine cases of de facto property disputes, but rather such matters will be heard within the State courts. I will explain a little later why I believe the Family Court is the better option.

The second ground for disappointment is that the Bill shows starkly, and once again, how poorly the Australian Federal system of government responds to matters which require cooperative and coordinated action by six States and the Federal Government. It is another example of the uniform rail gauge syndrome which bedevils Australian federalism.

The final reason for disappointment is the sheer time that it has taken this Parliament and successive Queensland Governments to finally legislate to fix what has been for several decades a clear deficiency in our laws. Years have passed, and thousands of people have been disadvantaged and unnecessarily distressed by political failure. Of these thousands of Queenslanders who have been harmed, the greatest hurt has been experienced by women and, in many cases, the children for whom they are responsible. In short, what this Bill does is to legislate a regime of rules to guide either the Supreme, District or Magistrates Courts in dividing property held by de facto couples on separation. In doing so, it creates a clear and understandable set of principles, whereas at the moment the law is to be found in an amalgam of common law and statutory rules governing the laws of contract, trust and equity.

In contrast to the law applying to married couples, the law applying to de facto relationships at present places the partner in whose name the property is held in a vastly superior position. It means, for instance, that a woman who has contributed both in financial and non-financial terms to the acquisition of a home is severely disadvantaged if that home is in the name of the man alone. To receive a fair distribution from the value of the property based on her contribution, the woman would most likely need to rely on the law of constructive trust via the Queensland Supreme or District Courts if a dispute arose at separation. A married person faces no such legal burden to add to the emotional distress which accompanies the ending of a major and long-term relationship. This Bill will overcome this injustice, and for this advance the Attorney-General is to be commended. But it could have been better. Let me explain why.

The Australian Constitution gives to the Federal Parliament the power to make laws in relation to marriage. This has seen the Commonwealth legislate for marriage and the breakdown of marriage, and since 1959 and the passage of the Matrimonial Causes Act such laws have recognised the need to

divide property regardless of in whose name title in the property is held. These principles are currently found in section 79 of the Family Law Act. The Commonwealth, however, has power in relation to couples who are, or have been, legally married. De facto couples do not fall within the Commonwealth legislative power and have been left to the mishmash of State laws, to which I referred before.

It might have been legitimately argued that until social changes of the 1960s and the 1970s, the number of couples living in long-term de facto relationships was quite small and there was little need for laws to govern property division in the event that such relationships ended. Equally, there have been arguments raised on moral and other grounds that there should be no specific laws on de facto relationships as a matter of public policy. There are most likely still some members in this House and in the community who argue this today. While I can appreciate this view, I cannot support it. In any event, almost 12% of Queensland couples are in de facto relationships, and that includes same sex couples. Twelve per cent of the population is far too big a slice for the Parliament to shut its eyes to.

Once it is concluded that the laws governing de facto relationships are inadequate and in need of reform, the question is then asked: what form should the law take? It is here that the Bill takes, in my view, the second-best rather than the best choice. The Explanatory Notes refer to there being three alternatives open to Queensland for de facto law reform, namely—

referring power to the Commonwealth;

seeking uniform legislation; and

enacting Queensland legislation.

This Bill is, of course, the third course. In my view, referring constitutional power to the Commonwealth is the best course, and it is disappointing that it has not been—and apparently cannot be—taken. The Constitution allows the States to refer areas of State responsibility to the Commonwealth Parliament. Clearly, our founders recognised and foresaw that the division of powers between the Federal and State Parliaments created in the Constitution might need amendment over time and provided a number of mechanisms for this to occur, including State referral of power. It was this course which was adopted by the States in 1992, when jurisdiction was given to the Family Court to make orders about children of de facto relationships. This means that the Family Court can determine issues about the residence of children and the contact the children have with the non-residential parent, irrespective of whether that child is born to a married couple or a de facto couple. This, of course, makes sense. A child should not be legally disadvantaged based on the lifestyle choices of their parents.

Mr Lucas: Absolutely.

Mrs LAVARCH: I thank the member for Lytton.

Equally, the Family Court is equipped with counselling and mediation services designed to safeguard and give priority to the best interests of the child. There is no such counselling service attached to the State courts. The referral of power was agreed by the States at the Standing Committee of Attorneys-General. It followed a prolonged process of negotiation of Commonwealth/State relations, but it did get there in the end. If the children of de facto couples are now governed by the Family Court, why should property issues of de facto couples also not be handled by the Family Court? Certainly this was the view of the Queensland Law Reform Commission when asked by Attorney-General Dean Wells in 1990 to advise on de facto relationships. The commission recommended that the Family Court be given jurisdiction either by means of cross-vesting legislation or preferably by referral of constitutional power. Of course, given the recent High Court decision on cross-vesting, it is the referral of power which would be the surest legal path available to this Parliament.

This recommendation was picked up by the Goss Government and proposed to Parliament in the Commonwealth Powers Amendment Bill 1995. That Bill, as noted in the Explanatory Notes, lapsed when the Parliament was prorogued at the time of the 1995 election. The same recommendation was made by the Federal parliamentary committee which reviewed the Family Law Act in 1994. The Keating Government accepted that committee's recommendation. Why then does this Bill reject this course?

The Attorney's second-reading speech does not canvass the issues, but the Explanatory Notes comment that—

"A referral of power is not possible at this time or in the foreseeable future."

SCAG rejected a proposal from the Law Council of Australia for uniform legislation, and only two jurisdictions—the ACT and Tasmania—indicated at the November 1999 SCAG meeting interest in a Commonwealth proposal for referral of power on a State by State basis. I am a little surprised that Queensland, given the position it adopted in 1995, did not apparently also express interest in the referral of power. Maybe concern about the delay in the Commonwealth enacting legislation, together with the failure of the Commonwealth to commit to legislate for same sex couples, are the reasons for our lack of interest.

As I mentioned earlier, the end result is a failure of Australian federalism. We have an unsatisfactory outcome which will feature—

de facto children issues being determined in the Federal Family Court; and

maintenance or support for children being determined by the Federal child support regime, but de facto property being determined by a State court.

Inevitably, in some circumstances, proceedings arising from the one relationship will need to be taken in two separate courts at the same time. It would be open for the parties to give their consent to a State Magistrates Court to determine both children and property issues, but in difficult contested matters it would be most likely that two courts would be involved. Whilst this is unsatisfactory, complicated and costly, it is not, to my mind, the worst outcome. What is most disappointing is that de facto couples will not have access to a specialist counselling service and conferencing mechanisms to help resolve property issues. It is the counselling service and conferencing mechanisms which mark the distinct philosophy of the Family Court and make it the best forum to handle the aftermath of failed relationships. With no State Government counselling, the State courts and, more importantly, Queenslanders will be at a disadvantage. I hope that the Attorney-General will continue to press his counterparts at State and Federal levels to achieve a comprehensive outcome based upon the referral of powers to the Commonwealth.

The terms of the Bill in itself contain good reform of the law. In large measure, the Bill picks up concepts and principles contained in the Family Law Act. I note that it recognises cohabitation agreements and separation agreements which reflect the announcement at the Federal level of the intention to recognise pre-nuptial agreements. The Bill, however, does not attempt to pick up other mooted or announced changes in the family law property scheme—for instance, the assumption of equal contributions to the acquisition of property.

Further, the Bill does not deal in a comprehensive way with the issue of superannuation. As time passes, superannuation entitlements, along with the family home, will become the most common and valuable asset or financial resource in a relationship. The rights to superannuation have long been a difficult issue for the Family Court, and the Federal Government has been unable to propose a final legislative approach.

These mooted changes to the Family Law Act have come about through recognition that the Family Law Act has long been a source of difficulty, inconsistency and injustice for women. Extensive research undertaken through the Australian Institute of Family Studies throughout the 1980s—and I believe that some further research has been done in the 1990s—shows that the cost of marriage breakdown is still disproportionately borne by women. Now, if after 25 years of the Family Law Act and the Family Court recognising future needs and non-financial contributions of women, there still exists widespread poverty for women after divorce, it does not take much of an imagination to work out what the situation is now for women after the breakup of a de facto relationship. This Bill seeks to address and assist women by incorporating the principles underlying a property division under the Family Law Act. However, I wish to highlight that as the Family Law Act moves to address these issues—and I truly hope that it does— Queensland will have to regularly amend its laws to keep up with what is happening under the Family Law Act, or the same disparity which led to this law being brought into the House in the first place will again become apparent.

In summary, I have outlined why I believe that the good reform under this Bill should be supported. I have also outlined why even this good reform could have been made better for the women of Queensland. It is my hope that we will continue to work in this area to address any inequalities that arise.