



James Goold House
P.O.Box 146
East Melbourne Vic 8002
Australia

22nd February, 2008.

Honourable Rob Hulls, M.P.,
Attorney General,
55 St Andrews Place,
MELBOURNE, VIC., 3000.

Dear Mr. Hulls,

I am grateful to have been provided with an opportunity to comment on the *Relationships Bill* 2007. I should add that I was disappointed not to be given an opportunity to consult about this important piece of legislation before it was given a second reading in the Parliament.

The Bill

The Bill, if enacted, would introduce the status of a “registrable relationship”; it would establish a Relationship Register on which registrable relationships could be registered; it would provide for the issue of certificates certifying entries on the register and the use of these certificates in legal proceedings; and it would authorize the making of legally enforceable relationship agreements between persons who are not married but who are (living together as) a couple. In addition, the Bill would provide for the adjustment of property interests on the dissolution of domestic relationships including registered relationships and de facto relationships. In this final respect, the Bill builds on the existing provisions relating to the dissolution of de facto relationships found at present in Part IX of the *Property Law Act* 1958.



The Bill appears to identify non-marital sexual activity as the principal criterion of its operation. Section 5 defines a “registrable relationship” to mean (*inter alia*)

a relationship between two adult persons who are not married to each other but are a couple where one or each of the persons in the relationship provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof.

(Certain relationships for reward are excluded.) The element “who are not married to each other but are a couple” is distinct from the other elements in the definition. Its meaning is not defined elsewhere in the Bill. When it is compared with and distinguished from the other elements of the definition, it appears to require that the relationship is one of sexual intimacy, which, given the rest of the definition, is necessarily non-marital. The very use of the term “relationship” in this context connotes a form of physical intimacy different from manifold other forms of friendships. That interpretation is confirmed when consideration is given to the second reading speech and its references to “couples who want the dignity of formal recognition of their loving relationship to register it” and “redressing (the) historical injustice(s)” to which (it says) “(l)esbians, gay men, intersex and transgender people” have been subjected.

Public policy should support marriage

I am disturbed by the contents of the Bill, and respectfully suggest that it should not be enacted in its present form. My principal reason for this is that the Bill, if enacted, would have the clear tendency to compromise the priority which public policy should and, at present, does give to marriage. It also seems to be the case that the drafting of the Bill is deliberately opaque and that the government is not being candid with the community as to its purpose. The suggestion that the Bill is necessary to overcome some unfair discrimination and to supplement the statutory amendments in 2001 does not survive analysis.



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The State exists to foster and promote the common good. In brief, it will do so by promoting relevant public policy. Its role is to foster the welfare of the individuals and the institutions that make up the community it exists to serve. It is not the task of the State to compromise those institutions.

There are no institutions more central to the individuals who make up the community than marriage and the family. Their centrality is self-evident: marriage is the necessary condition for the succession of generations; it is the institution in which the young are nurtured and brought to physical and moral maturity.

Not only is marriage essential to the survival of the human race; good family life is the necessary condition of a good citizenry. A good marriage will only occur when husband and wife subordinate their own inclinations, ambitions and projects to the good of their marriage and that of their family. The willingness of the spouses to make such sacrifices, both as individuals and parents, must last throughout their lives if they are to be successful. In this, the willingness of the spouses to commit themselves to each other for life is the condition necessary to their stability. Public policy identifies and, then, encourages the sacrifices involved in marriage; it does so, in part, by conferring a special status on those who are married.

Marriage is also the institution which provides the intimacy necessary to human flourishing of husband and wife. Finally, marriage and family are the institutions which engender and have the love and emotional attachment necessary to care for the aged, the needy and for the vulnerable.

Truly it is said that marriage and the family are nature's masterpiece.



The educative effect of law

In order to understand how the Bill, if enacted, would compromise marriage it is necessary to bear in mind the obvious circumstance that the law plays such an important and decisive role in forming and ordering what many people consider to be right and proper. The distinction between the moral and the legal is not just theoretical: the law does not compel us always to act morally, nor does it make unlawful much that might be thought of as immoral. But, for many, if not most in the community, the law and what it contains constitute the principal foundation to their sense of moral propriety. Over the last 50 years, we have seen it happen, time and time again, that society's sense of what is good or evil in a given domain depends to a great extent upon the attitude of the law to the different choices made in that domain. This circumstance is the more obvious as the traditional foundations of morality other than the law have been weakened.

The Bill compromises marriage

The Bill, if enacted, would tend to compromise the public policy which accords primacy and centrality to the family in the following ways. In making the following comments, I am well aware that the Federal Parliament has defined marriage as the relationship between a man and a woman and that it is not competent for a State parliament to enact legislation which is inconsistent with the federal *Marriage Act* 1961.

The Bill compromises marriage in so far as it establishes a legally recognised relationship which imitates marriage, yet does not have about it the conditions necessary to be achieved in order to bring about or terminate a marriage. It is, if you will, a form of "marriage-lite".

Further, the establishment of the Relationships Register is intended to confer a privilege on those who register their relationship, giving them the status akin to marriage. The obvious purpose of this is to teach that same-sex relationships have about them the same dignity as marriage, thereby undermining the truth that marriage and family life depends upon the complementarity of the sexes.



Society need to encourage young people to marry and to take on the burdens associated with the raising of the next generation and the care of the last generation. This legislation will encourage acceptance of lack of responsibility at a time when young people should be encouraged to accept the responsibilities of adulthood. The recent experience in France is highly relevant. On 15 January 2008, Reuters reported on the analysis by the French National Institute for Statistics and Economic Studies (INSEE) of census data. The data had revealed that more children were born out of wedlock in France than to married parents for the first time in 2006. The enactment of the Civil Solidarity Pacts legislation (15 November 1999), which was introduced for purposes similar to those described by you in your second reading speech, has had a pronounced effect upon the willingness of young adults to commit to marriage. Moreover, it is a melancholy fact that stable marriages are less likely to be achieved when the putative spouses have been in a de facto relationship before marriage; this legislation can be anticipated to exacerbate that circumstance as it provides the opportunity for a legally recognised relationship short of marriage and without the status of marriage. The dictum bears repeating “Moral hazard exists when government policy creates incentives that make bad behaviour rational”.

The exclusion of recognised relationships

The fact that the Bill excludes from its operation and, thus, from the benefits it confers, many other relationships in respect of which the parties should not or need not be treated as strangers when it comes to the sharing or determination of benefits or entitlements is further evidence that the Bill is directed, not to the amelioration of some injustice, but to the granting of marriage-like status to the relationships of those who are not married.



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The ability to make legally enforceable relationship agreements is central to the operation of the Bill. The definition of domestic relationships in s.35 excludes a broad class of people from the ability to make a relationship agreement. There are many examples of people care for each other as companions into old age. Their relationship involves (to use the words of the definition) “personal and financial commitment and support of a domestic nature” but they would not satisfy the Bill as they are not a “couple” or they are not “living together as a couple”. Why should such people not be able to make a relationship agreement? Moreover, there is every reason for one to share in, say, the pension entitlement of the other. Such is their relationship that it is unjust to treat the survivor as a complete stranger in law in respect of the estate of the deceased companion. The example of elderly siblings is obvious. Many brothers or sisters care for each other into old age; why are they to be excluded from the benefits of the Bill? And, finally, why is marriage outside the relationship a disqualification? Many married couples support elderly and other needy relatives. In doing so, they relieve what would otherwise be a burden on the public purse. Yet, they are not entitled to the benefits of this proposed legislation.

It is most unsatisfactory that those parties who do contribute significantly to the common good by caring for the elderly, the needy, and the vulnerable are offered nothing by this legislation. The criterion for the availability of benefits is non-marital sexual intimacy, something which, so far as public policy is concerned, merits no encouragement or any particular solicitude.



Conferring benefits on marriage is not unjust to the unmarried

In the second reading speech, you spoke of discrimination against same-sex couples. It goes without saying that men and women with homosexual tendencies must be accepted with respect, compassion and sensitivity and every sign of unjust discrimination in their regard should be avoided. While it can be accepted that persons with homosexual tendencies have been subjected to unfairness and unjust discrimination in the past, the fact that law and public policy have not treated relationships between them as being the equivalent of marriage is not an instance of unjust discrimination. The benefits which the law confers upon marriage are justified by reason of the benefits which marriage confers upon society. Although much has been done to weaken the public policy that prefers marriage, how can it be said that there is unjust discrimination in that those who are not prepared or willing to commit to marriage are unjustly deprived of some benefits or entitlements? The fact that entitlements are made available to select groups of people does not entail that those excluded from those benefits are being treated unjustly. The benefits associated with a particular state are an expression of the public policy that favours that state and encourages others to take it up. Take the example of the benefits conferred upon members of the military and upon their families. Obviously, those benefits are an expression of the respect that society has for service personnel and a mode of encouragement to others to take up the burdens associated with life in the services. It would be ridiculous to suggest that the conferral of benefits on those associated with the services involves an unjust discrimination against those of us who do not serve. It is the same with respect to marriage and family life. The benefits and entitlements that public policy confers upon marriage reflect the contribution that marriage and family life makes to the common good.

The necessity to overcome injustice

While it may be the task of public policy to sort out the effects and consequences of non-marital sexual activity, there is nothing about any form of such activity that is deserving of any public policy of respect or encouragement.



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I accept that there are ways in which public policy must ensure justice or may have failed to ensure justice in respect of certain relationships.

On the one hand, as it became common for men and women to live together in de facto relationships, it was necessary for the law to enact legislation, not for the purpose of encouraging or sanctioning such relationships, but for the purpose of adjusting the property rights of the couple when, for example, property held in the name of one of them had been acquired from contributions made by both of them. On the other hand, the rigour with which the common law enforced testamentary dispositions had to be addressed by statute in order to ensure that the moral claims of family members (who had been excluded or overlooked by the testator) were justly met.

The Bill is not necessary

It is suggested that the law is justified by the need to facilitate the amendments to various laws brought in by *Statute Law Amendment (Relationship) Act 2001* by providing “proof of the existence of the couple relationship for the purposes of Victorian Law.” At a meeting with my representatives on 31 January 2008, your Chief of Staff explained that the intention of the bill was not to create new rights but to assist “domestic partners” more readily to prove their relationship and access statutory rights and entitlements under the Acts the subject of the reforms in 2001. (I note that this statement of the purpose of the Bill contrasts sharply with the purposes that you stated so clearly in the second reading speech.)

With respect, if that is the purpose of the legislation, a sledgehammer is being used to crack a nut.



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I note the very limited significance of an entry on the proposed “Relationship Register”. Under Section 22(1), the Registrar may issue a certificate certifying particulars contained in an entry on the register. Section 22(2) provides that such a certificate is to be admissible in legal proceedings as evidence of “the facts recorded in the entry”. Such facts will include the facts which satisfy the elements of the definition of registrable relationship. In other words, the certificate will be evidence of the fact that a person is one of a “couple” and a party to a relationship where one or each of the persons provides personal and financial commitment and support of a domestic nature for the material benefit of the other. The certificate will thus be admissible in proceedings under Part 3.3 of the Bill.

It has been pointed out to me that the Bill only provides that the certificate is “evidence” of the facts recorded in the register. It is not *prima facie* evidence; it is not conclusive evidence. It is evidence which can be contradicted by or outweighed by contrary evidence. In fact, the certificate is of very limited forensic value. No doubt, the limited forensic use to which the entry can be put is a reflection of the fact that the relationships which the Bill intends to regulate are notoriously unstable. With respect, it seems most unsatisfactory that a legal institution is being established, which is intended to mimic marriage, for such limited practical effect. The law is perfectly capable of assessing the nature and longevity of a de facto relationship without the need for “registrable relationships” or a Register.

For all of the above reasons, I respectfully submit that the Parliament should not be asked to proceed with the enactment of the Bill. The limited practical use for the Register is entirely outweighed by its capacity to compromise marriage and by the incentive it creates to irresponsibility.

I foreshadow that if notwithstanding this letter the government determines to proceed with the Bill in its current form that I will put before parliamentarians and the community my objections to the Bill as detailed in this letter.



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With every good wish,

Yours sincerely in Christ,

+ *Denis J. Hart*

ARCHBISHOP OF MELBOURNE.

cc: Hon. John Brumby, M.P., Premier of Victoria.
Ms Julie Ligeti, Chief of Staff to the Attorney General.