

Privileges Committee

**Draft Constitution
(Disclosures by Members)
Amendment (De Facto
Relationships) Regulation
2010**

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Terms of Reference

That under section 14A of the *Constitution Act 1902*, the draft Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010 be referred to the Privileges Committee for inquiry and report by Wednesday 23 June 2010.

LC Minutes (10/6/2010) 1928

Committee Membership

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Recommendation

Recommendation 1

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That the draft Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010 be supported.

Chapter 1 Introduction

Establishment of the Inquiry

- 1.1 On 10 June 2010, the Hon Penny Sharpe MLC, Parliamentary Secretary, tabled the draft Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010 in the Legislative Council (Appendix 1). The draft Regulation proposes amendments to the definition of ‘de facto partner’ in the *Constitution (Disclosures by Members) Regulation 1983*, which governs the disclosure of members’ interests in New South Wales. The proposed amendments are consequential on changes made by the recently enacted *Relationships Register Act 2010*.
- 1.2 On the same day, the Legislative Council referred the draft Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010 to this Committee for inquiry and report. The terms of reference for the inquiry are set out on page (iv) of this report.
- 1.3 The *Constitution (Disclosures by Members) Regulation 1983* was made under section 14A of the *Constitution Act 1902*. Section 14A(5) of that Act requires that, before making a regulation relating to disclosures by members, the Governor must provide any parliamentary committee established for the purpose of considering the proposed regulation with an opportunity to comment on the regulation, and take into account any such representations. While there is currently no committee established for that purpose, the referral of the draft Regulation to this Committee is intended to satisfy the requirement in section 14A(5) in relation to the Legislative Council.

Conduct of the inquiry

- 1.4 On 22 June 2010 the Committee met to consider the inquiry terms of reference. At that meeting, the Committee resolved to adopt this report.

Structure of this report

- 1.5 Chapter 2 outlines the main reforms introduced by the *Relationships Register Act 2010*, the amendments proposed by the draft Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010, and the Committee’s views with regard to the proposed regulatory amendments.

Chapter 2 The draft Regulation and related legislative changes

As discussed in Chapter 1, the disclosure of members' interests in New South Wales is governed by the *Constitution (Disclosures by Members) Regulation 1983*. That Regulation is proposed to be amended by the Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010, a draft of which has been referred to the Committee by the House for inquiry and report. The proposed amendments to the Regulation are consequential on changes made by the recently enacted *Relationships Register Act 2010*.

This chapter begins with an overview of the changes introduced by the *Relationships Register Act 2010*. It then outlines the nature of the amendments proposed by the draft Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010, and the Committee's views with regard to the proposed amendments.

The *Relationships Register Act 2010*

2.1 The *Relationships Register Act 2010* Act was passed by both Houses of Parliament, and assented to, in May 2010. The object of the Act is to provide for the legal recognition of persons in a relationship as a couple, regardless of their sex, by registration of the relationship.¹ The Act achieves this object by means of the following twin reforms:

- The establishment of a mechanism which gives de facto couples the option to register their relationships on the Register of Births, Deaths and Marriages maintained by the Registrar of Births, Deaths and Marriages
- The creation of a new definition of 'de facto partner' which includes a registered relationship.

2.2 The key provisions of the Act concerning each of these measures are summarised in turn below.

The registration of relationships

2.3 Under the new *Relationships Register Act 2010*, two adults who are in a relationship as a couple may apply to the Registrar of Births, Deaths and Marriages for registration of their relationship on the Register of Births, Deaths and Marriages kept under the *Births, Deaths and Marriages Registration Act 1995*. At least one of the adults must reside in New South Wales. A relationship cannot be registered if the adults are related by family, if either adult is married, or if either adult is in a previously registered relationship with another person. It is not a requirement for registration of a relationship that the couple live together.

¹ *Relationships Register Act 2010*, section 3.

- 2.4 An application for registration must be accompanied by a statutory declaration as to the requirements for registration, and evidence of the identity and age of each person in the relationship. The Registrar may require further information to be provided.
- 2.5 If satisfied that the relationship may be registered, the Registrar must register the relationship following a cooling off period of 28 days after the application for registration was lodged provided the application for registration has not been withdrawn.
- 2.6 Registration of a relationship is automatically revoked if one of the parties dies or marries. Registration may be revoked by the Registrar on the application of one or both of the parties.
- 2.7 Regulations may be made declaring registered relationships under the laws of other States or Territories to be interstate registered relationships for the purposes of the Act.

The definition of ‘de facto partner’

- 2.8 Many statutes in New South Wales include provisions which apply to a ‘de facto partner’. Until recently, it was common for such statutes to define ‘de facto partner’ by reference to the definition of ‘de facto relationship’ in the *Property (Relationships) Act 1984*. The *Property (Relationships) Act 1984* provides that a ‘de facto relationship’ is a relationship between two adult persons who live together as a couple and are not married to one another or related by family.² It further requires that all the circumstances of the relationship must be taken into account when determining whether two persons are in fact in a de facto relationship, including such of the following nine matters as may be relevant to a particular case:
- (a) the duration of the relationship,
 - (b) the nature and extent of common residence,
 - (c) whether or not a sexual relationship exists,
 - (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties,
 - (e) the ownership, use and acquisition of property,
 - (f) the degree of mutual commitment to a shared life,
 - (g) the care and support of children,
 - (h) the performance of household duties,
 - (i) the reputation and public aspects of the relationship.³
- 2.9 The *Relationships Register Act 2010* created a new definition of ‘de facto partner’ in section 21C of the *Interpretation Act 1987* (Appendix 2). Under this definition, a person is the ‘de facto partner’ of another person if the person is either:

² *Property (Relationships) Act 1984*, section 4(1).

³ *Ibid*, section 4(2).

- In a registered relationship, or interstate registered relationship, with the other person as registered on the Register of Births Deaths and Marriages within the meaning of the *Relationships Register Act 2010*; or
- In a 'de facto relationship' with the other person.⁴ Under the new section 21C(2) and (3) of the *Interpretation Act 1987*, 'de facto relationship' is defined in a manner which is similar to the definition contained in the *Property (Relationships) Act 1984* including the nine matters which may be taken into account when determining whether a de facto relationship exists, as previously discussed.

Consequential amendments to other legislation

2.10 In addition to establishing a new definition of a 'de facto partner', the *Relationships Register Act 2010* made consequential amendments to 128 New South Wales Acts and instruments in relation to the meaning of 'de facto partner' and/or 'de facto relationship'. Most of these consequential amendments replaced definitions of 'de facto partner' which referred to the *Property (Relationships) Act 1984* with references to the new definition of 'de facto partner' in the *Interpretation Act 1987*.

2.11 A further consequential amendment expanded the definition of 'de facto relationship' in the *Property (Relationships) Act 1984* to include reference to a registered relationship or interstate registered relationship, although that amendment has not yet been proclaimed to commence.⁵

Effect of the new of definition of 'de facto partner'

2.12 As indicated, the *Relationships Register Act 2010* inserted a new definition of 'de facto partner' into the *Interpretation Act 1987*. That definition includes a new definition of a relationship registered with the Registrar of Births Deaths and Marriages. The Act also made various amendments to other New South Wales statutes.

2.13 The main effect of these changes is that couples who register their relationships will not need to establish that their relationship is a 'de facto relationship' for the purposes of the *Property (Relationships) Act 1984*, including possibly by reference to the nine matters cited earlier, in order to meet the definition of 'de facto partner' under most laws in New South Wales. Such couples will be able to access rights and entitlements as de facto partners without having to establish each time that they are in a genuinely committed relationship.⁶ Couples who have not registered their relationship will continue to be able to establish their de facto status by demonstrating the required criteria for a de facto relationship under the new section 21C(2) and (3) of the *Interpretation Act 1987*, as they have hitherto been able to do under the *Property (Relationships) Act 1984*. This was explained by the Minister in his speech to the Legislative Council when introducing the reforms:

⁴ *Interpretation Act 1987*, section 21C(1).

⁵ The *Property (Relationships) Act 1984* was amended by schedule 2.3 of the *Relationships Register Act 2010* which is to commence on a day to be proclaimed.

⁶ *LC Debates* (12/05/2010) 22490.

Registration will not replace the existing framework for recognising de facto relationships. The current system will be preserved as an alternative, based on a requirement that couples live together and an assessment of the nature of their relationship and the degree of their commitment, amongst other factors. For those who choose not to register their relationships, this will not count against them when it comes to establishing de facto status on the existing test.⁷

The draft Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010

2.14 The *Constitution (Disclosures by Members) Regulation 1983* provides for the periodic disclosure of specified pecuniary and other interests by members of Parliament. The disclosure of members' interests is intended to prevent conflicts of interest arising between a member's private interests and public duty.

2.15 The interests which must be disclosed include gifts, contributions to travel, and debts. However, members are not required to disclose gifts received from a 'relative',⁸ travel contributions made by a 'relative'⁹ or debts owed to a 'relative'.¹⁰

2.16 The term 'relative' is defined in the Regulation as follows:

relative, in relation to any Member, means any of the following:

- (a) the parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of the Member or of the Member's spouse or *de facto partner*, or
- (b) the spouse or *de facto partner* of the Member or of any other person specified in paragraph (a).

2.17 The expression 'de facto partner of a member' in the definition of 'relative' above is also defined:

de facto partner of a Member means the other party to a de facto relationship (within the meaning of the *Property (Relationships) Act 1984*) with the member.

2.18 The draft Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010 proposes amendments to the *Constitution (Disclosures by Members) Regulation 1983* to provide that 'de facto partner' is defined by reference to the *Interpretation Act 1987* rather than the *Property (Relationships) Act 1984* as is presently the case. This is to be achieved by omitting the current definition of 'de facto partner' in the Regulation and adding the following note after the definition of 'relative':

Note. "De facto partner" is defined in section 21C of the *Interpretation Act 1987*.

⁷ *Ibid.*

⁸ *Constitution (Disclosures by Members) Regulation 1983*, clause 10(2)(c).

⁹ *Ibid.*, clause 11(2)(b).

¹⁰ *Ibid.*, clause 14(3)(b).

- 2.19** This amendment would alter the meaning of ‘relative’ in the *Constitution (Disclosures by Members) Regulation 1983* to include a person who is in a registered relationship or interstate registered relationship with a member for the purposes of the *Relationships Register Act 2010*, and a person who is in a registered relationship or interstate registered relationship with any of the persons referred to in paragraph (a) of the definition of the ‘relative’. As an example, a ‘relative’ would include a person in a registered relationship with the uncle/brother/nephew of a person in a registered relationship with a member.
- 2.20** This change to the meaning of ‘relative’ would in turn alter the scope of the exemptions from disclosure which currently apply in relation to gifts received from relatives, travel contributions from relatives, and debts owed to relatives under the *Constitution (Disclosures by Members) Regulation 1983*. For example, if the draft amendment were put into effect, a member would not need to disclose a gift or travel contribution received from a person with whom the member is in a registered relationship or an interstate registered relationship, or a debt owed to such a person. Similarly, a member would not need to disclose a gift or travel contribution received from a person who is in a registered relationship or interstate registered relationship with the member’s parent or sibling, for example, or a debt owed to such a person. A member who is currently not required to disclose a gift from a ‘de facto partner’ would not be affected by the change if he or she chose not to register the relationship.

Conclusion

- 2.21** The draft Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010 proposes to amend the *Constitution (Disclosures by Members) Regulation 1983* governing the disclosure of members’ interests to provide that ‘de facto partner’ has the meaning provided by the *Interpretation Act 1987* rather than the *Property (Relationships) Act 1984*. This amendment aims to ensure that the definition of ‘de facto partner’ is consistent with other legislation in New South Wales.
- 2.22** Given that the Parliament has made consequential amendments to 128 New South Wales Acts and instruments in relation to the meaning of ‘de facto partner’ and/or ‘de facto relationship’, there would seem to be little basis for this Committee or the House to object to the application of the proposed new arrangements to the regulation of members’ pecuniary interests. As indicated earlier, the Parliament has amended the *Property (Relationships) Act 1984*, which the *Constitution (Disclosures by Members) Regulation 1983* currently refers to in defining ‘de facto partners’, to also include reference to registered relationships (although that amendment has not yet been proclaimed).
- 2.23** The proposed new definition of ‘de facto partner’ by reference to the *Interpretation Act 1987* largely preserves the meaning of ‘de facto partner’ as it has previously been understood, as key aspects of the definition in section 21C(2) and (3) have been modelled on provisions in the *Property (Relationships) Act 1984*. However, as discussed, the *Interpretation Act 1987* includes an additional basis for identifying a ‘de facto partner’ through a registered relationship. This change does not detract from any existing rights of members or adversely affect the operation of the pecuniary interests regime.
- 2.24** One of the benefits of the proposed amendment would appear to be the provision of greater certainty in the identification of ‘de facto partners’ for members who have registered their relationships. That is, if an issue were to arise as to whether a member had received a gift or

travel contribution from a ‘de facto partner’, or owed a debt to such a partner, the issue could be resolved by the provision of evidence that the relationship had been registered, without further inquiry as to the nature of the relationship. This would avoid the House, or potentially this Committee, having to investigate and assess whether the member’s relationship met the specified criteria for a ‘de facto relationship’ under the current *Property (Relationships) Act 1987* or under the new section 21C(2) and (3) of the *Interpretation Act 1987*.

- 2.25** A further benefit of the draft amendment is that it addresses an apparent loophole in the current Regulation, which contains a definition ‘de facto partner *of a Member*’, but does not include a definition of ‘de facto partner’ of a person referred to in paragraph (a) of the definition of ‘relative’. The proposed definition of ‘de facto partner’ is not restricted to a member and thus would overcome the current anomaly.
- 2.26** In view of these considerations, the Committee recommends that the draft Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010 be supported.

Recommendation 1

That the draft Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010 be supported.

Appendix 1 Draft Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010

consultation draft



New South Wales

Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010

under the

Constitution Act 1902

Her Excellency the Governor, with the advice of the Executive Council and in compliance with the provisions of section 14A (5) of the *Constitution Act 1902*, has made the following Regulation under the *Constitution Act 1902*.

Premier

Explanatory note

The object of this Regulation is to amend the *Constitution (Disclosures by Members) Regulation 1983* to update references to *de facto* partners in that Regulation to include persons who are in a registered relationship, or an interstate registered relationship, under the *Relationships Register Act 2010* by adopting the definition of *de facto* partner in the *Interpretation Act 1987*. The effect of this change is that exemptions from disclosure requirements under that Regulation that apply to gifts received from relatives, travel contributions made by relatives and debts owed to relatives will extend to such *de facto* partners.

This Regulation is made under the *Constitution Act 1902*, including section 14A.

consultation draft

Clause 1 Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010

Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010

under the

Constitution Act 1902

1 Name of Regulation

This Regulation is the *Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010*.

2 Commencement

This Regulation commences on the day on which it is published on the NSW legislation website.

3 Amendment of Constitution (Disclosures by Members) Regulation 1983

(1) Clause 7 Interpretation: Part 3

Omit the definition of *de facto partner* from clause 7 (1).

(2) Clause 7 (1)

Insert after the definition of *relative*:

Note. "De facto partner" is defined in section 21C of the *Interpretation Act 1987*.

Appendix 2 Section 21C of the *Interpretation Act 1987*

21C References to de facto partners and de facto relationships

(1) Meaning of “de facto partner”

For the purposes of any Act or instrument, a person is the ***de facto partner*** of another person (whether of the same sex or a different sex) if:

- (a) the person is in a registered relationship or interstate registered relationship with the other person within the meaning of the *Relationships Register Act 2010*, or
- (b) the person is in a de facto relationship with the other person.

(2) Meaning of “de facto relationship”

For the purposes of any Act or instrument, a person is in a ***de facto relationship*** with another person if:

- (a) they have a relationship as a couple living together, and
- (b) they are not married to one another or related by family.

A de facto relationship can exist even if one of the persons is legally married to someone else or in a registered relationship or interstate registered relationship with someone else.

(3) Determination of “relationship as a couple”

In determining whether 2 persons have a relationship as a couple for the purposes of subsection (2), all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:

- (a) the duration of the relationship,
- (b) the nature and extent of their common residence,
- (c) whether a sexual relationship exists,
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them,
- (e) the ownership, use and acquisition of property,
- (f) the degree of mutual commitment to a shared life,
- (g) the care and support of children,

- (h) the performance of household duties,
- (i) the reputation and public aspects of the relationship.

No particular finding in relation to any of those matters is necessary in determining whether 2 persons have a relationship as a couple.

(4) Meaning of “related by family”

For the purposes of subsection (2), 2 persons are *related by family* if:

- (a) one is the child (including an adopted child) of the other, or
- (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent), or
- (c) they have a parent in common (including an adoptive parent of either or both of them).

This subsection applies:

- (a) even if an adoption has been declared void or is of no effect, and
- (b) to adoptions under the law of any place (whether in or out of Australia) relating to the adoption of children.

Appendix 3 Minutes of proceedings

Minutes No. 23

Tuesday 22 June 2010, Members' Lounge, Parliament House at 6.42 pm.

1. Members present

Ms Griffin (Chair)
Miss Gardiner (Deputy Chair)
Mr Harwin
Mr Veitch
Mr West

In attendance: David Blunt, Stephen Frappell.

2. Apologies

Mr Donnelly
Revd Mr Nile

3. ***

4. Correspondence

The Committee noted the following item of correspondence received and sent:

Correspondence received:

- Letter dated 9 June 2010 from Mr Paul Miller, Acting Deputy Director General (General Counsel), Department of Premier and Cabinet, to the Clerk of the Parliaments concerning the draft Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010.
- Email dated 10 June 2010 from the Secretariat to members of the Committee concerning referral of a new inquiry to the Privileges Committee into the draft Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010.
- Email dated 10 June 2010 from the Secretariat to members of the Committee concerning the conduct of the new inquiry into the draft Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010.
- ***

5. Inquiry into the draft Constitution (Disclosures by Members) Amendment (De Facto Relationships) Regulation 2010

The Chair tabled her draft report entitled Draft Constitution (Disclosures by Members) Amendment (De Facto Partners) Regulation 2010, which, having been previously circulated, was taken as being read.

The Committee deliberated.

Resolved, on the motion of Mr Veitch:

1. That the draft report be the report of the Committee
2. That the Committee present the report to the House, together with minutes of proceedings and correspondence relating to the inquiry
3. That the report of the Committee, on tabling and publication, be forwarded to the Department of Premier and Cabinet in response to the letter received 10 June 2010.

6. ***

7. Adjournment

The Committee adjourned at 6.45 pm *sine die*.

David Blunt
Clerk to the Committee