SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCE: FAMILY LAW AMENDMENT (DE FACTO FINANCIAL MATTERS AND OTHER MEASURES) BILL 2008

Attorney-General's Department

Question – Hansard, pages 10-11

Senator Barnett asked the following question at the hearing on 7 August 2008: Senate Legal and Constitutional Affairs Committee Inquiry into the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008

Senator BARNETT—There were two parts to the question that we asked you on notice. One was the difference between the bill before us and the evidence, and the reasons for the difference, public policy or whatever reasons there were, and the second question I put to you was what definitions apply to other Commonwealth legislation. At the moment we have two. We have the Evidence Act, the family law de facto bill, and there are two difference definitions. My question was: what other Commonwealth legislation can you refer to that includes definitions of 'de facto relationships' and can you draw our attention to them so that we can compare the definitions, because then we might have three definitions?

The answer to the honourable senator's question is as follows:

(1) **What is the difference between the definition of de facto relationship in the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 and the Evidence Amendment Bill 2008, and the reasons for the difference, public policy or whatever reasons there were?**

Answer: The Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 ('De Facto Bill') provides that a person is in a de facto relationship with another person if the persons are not legally married to each other or related by family and, having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

The Evidence Amendment Bill 2008 provides that a person is in a de facto relationship with another person if the two persons have a relationship as a couple and are not legally married. This also requires a consideration of all the circumstances of the relationship.

Both Bills then provide a list of circumstances to which a court may have regard in determining whether the relationship between the couple falls within the definition.

The definition of 'de facto relationship' in the De Facto Bill differs from the definition of 'de facto partner' in the Evidence Amendment Bill in the following respects.

First, the Evidence Amendment Bill definition requires that the two persons have a relationship as couple. By contrast, the De Facto Bill requires that the persons have a 'relationship as a couple living together on a genuine domestic basis'.

Second, both Bills provide a list of circumstances to guide a court in determining whether the relationship between two persons falls within its definition. In the case of the De Facto Bill, but not the Evidence Amendment Bill, the list includes:

(a) whether a sexual relationship exists between them (section 4AA(2)(c)), and

(b) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship (section 4AA(2)(g)).

Third, the Evidence Amendment Bill, unlike the De Facto Bill, does not include a specific requirement that the persons must not be related by family (section 4AA(6)).

The reason for the difference between the two definitions is that:

- the De Facto Bill's definition limits the application of the Commonwealth's new property settlement and spouse maintenance regime to relationships over which New South Wales, Queensland, Victoria and Tasmania have referred power to the relationships covered by each relevant State Reference Act. Each of the four States has referred power limited to particular matters arising on the breakdown of 'a marriage-like relationship (other than legal marriage) between two persons'.

- the Evidence Amendment Bill's definition implements the Model Uniform Evidence Bill definition of de facto partner, which is defined in terms of a person in a de facto relationship. This definition was developed in consultation with the Standing Committee of Attorneys-General Working Group of State and Territory officials based on recommendations in the Australian, New South Wales and Victorian Law Reform Commissions' report on *Uniform Evidence Law*. They recommended that the class of witnesses who may object to giving evidence against the accused based on their close personal relationship should extend to a persons who have a relationship as a couple who maintain separate residences. Their recommendations were further developed by the Working Group of State and Territory officials so that the resulting definition also reflects State and Territory definitions. The definition was then approved by SCAG as part of a uniform approach on compellability of witnesses.

(2) What other Commonwealth legislation can you refer to that includes definitions of 'de facto relationships?

Answer: The following Commonwealth Acts contain definitions of the term 'de facto relationships':

Family Law Act 1975
s. 4(1)
"*de facto relationship* means the relationship between a man and a woman who live with each other as spouses on a genuine domestic basis although not legally married to each other"

Child Support (Assessment) Act 1989
s.163A(5)
"In this section:
de facto relationship means the relationship between a man and a woman who live with each other as spouses on a genuine domestic basis although not legally married to each other"

A range of other Commonwealth Acts contain definitions of terms other than 'de facto relationships' covering relationships including de facto relationships. Examples include:

- s.995–1 of the *Income Tax Assessment Act 1997* (definition of 'spouse').
- s.4B of the *Parliamentary Contributory Superannuation Act 1948* ('marital relationship')
- s.4(2) to (6A) of the *Social Security Act 1991* ('member of a couple'), and
- s.44-11 of the *Aged Care Act 1997* (definition of 'member of a couple', differently defined).

<u>Additional Questions which Senator Crossin has forwarded to the Department for response</u>

(1) The Western Australian (WA) Attorney-General (sub 3) and the Family Court of WA (sub 10) have asked why the Bill doesn't provide the WA Family Court with power to make superannuation splitting orders. They say that WA has invited the Commonwealth to legislate to provide the WA Family Court with this power. What is your response? Why doesn't this Bill deal with WA's referral?

Answer: WA has given a narrow reference, limited to superannuation matters relating to de facto partners arising out of the breakdown of de facto relationships. Implementation of the WA reference would leave spousal maintenance and non-superannuation property issues, arising between de facto couples on these occasions, as a matter of WA law.

The reference given by WA is a narrower reference than the references given by New South Wales, Queensland, Victoria and Tasmania, which extend to the distribution of

property of de facto partners, and also to the maintenance of de facto partners, arising out of the breakdown of de facto relationships.

While WA law on property settlement and spouse maintenance issues between de facto partners, contained in Part 5A of the *Family Court Act 1997* (WA) is currently in line with the De Facto Bill, it is different from the law in South Australia (SA), which has not referred power. WA law on these issues also differs from the law in the four referring States, each of which can, under its State Reference Act, terminate its reference at some time in the future.

Implementation of the narrower reference from WA would leave jurisdictional issues arising in 'cross-border' cases involving WA and any State outside the scheme, where different laws applying in those States will affect outcomes in cases.

For example, if de facto partners living in WA have lived in both WA and SA for substantial periods of their de facto relationship, and one of them returns to SA after they separate, one partner would have an interest in claiming that SA law should apply, and the other that WA law should apply, to their case.

These jurisdictional issues will not arise with implementation of the full references the other States have given.

With the full references, the Bill provides that the Commonwealth's new property settlement and spouse maintenance regime applies to the exclusion of State regimes (new section 90RC) and that proceedings, if they can be instituted under the Commonwealth's new regime, can not be instituted otherwise than under that regime (new section 39A(5)).

WA is not able, under its own de facto property settlement and spouse maintenance law, to oust the jurisdiction of the other States, as the Commonwealth is able to do, to the extent that it has power to do so.

Implementation of the narrower reference from WA would also require duplication by WA of future amendments to the Commonwealth's regime relating to the making of orders altering interests in non-superannuation property held by de facto partners. Otherwise, the Family Court of Western Australia, in proceedings between de facto partners with superannuation (as most couples will have), would need to take into account one set of considerations, under the *Family Law Act 1975*, in considering whether to make a superannuation splitting order, and another set of considerations, under WA law, in considering whether it is appropriate to make an order altering interests in their other property.

(2) In an article in the Sydney Morning Herald on Monday 4 August (attached) and during Tuesday's hearing in Sydney, Professor Patrick Parkinson raised a number of concerns in relation to the Bill. In particular, Professor Parkinson is concerned about the current differences in law for de facto and marriage couples (particularly when NSW law is compared to the Family Law Act).

(a) What is your response to these concerns?

(b) How much discretion will the Family Court have in relation to the matters raised by Professor Parkinson (such as past contributions, future needs, and property owned before the relationship began) when making decisions under the proposed regime?

Answer:

(a) The desirability of uniformity in the laws applying across the States and Territories on property and spouse maintenance issues between de facto couples was one of the key considerations bearing on the references of power given by the States to the Commonwealth. As Professor Parkinson mentioned in the Sydney hearings on the Bill, the position under those laws varies across the States. NSW was the first State to legislate for a property settlement regime for de facto couples in 1984, but other States which have legislated, including those which have done so more recently (Queensland and Tasmania in 1999, and Western Australia in 2002), have adopted a regime much closer to the one applying for married couples under the *Family Law Act 1975*. Victoria, in its *Relationship Act 2008* (Vic.) passed in April 2008 and yet to be proclaimed, has enacted a new regime, replacing the one it enacted in 1987, continuing this trend. Any single law, enacted by the Commonwealth pursuant to the State references, on financial matters between de facto couples will necessarily depart from one or more of the current regimes, where they vary from State to State.

In relation to the differences between the NSW law and the regime proposed by the Bill, the major feature is that the Bill will require courts to take into account, in deciding what order to make altering property interests, the factors mentioned in new section 90SM(4)(d) to (f) proposed by the Bill. The most significant of these factors in most cases is likely to be the factor mentioned in new section 90SM(4)(e), which picks up, so far as they are relevant, the matters, listed in new section 90SF(3), which must be taken into account by a court in the making of a spouse maintenance order. These are the 'future needs of each partner and their financial resources' matters mentioned by Professor Parkinson in his Sydney Morning Herald article on 4 August 2008. In many cases, the requirement to take into account these matters is likely to result in an adjustment to the proportions in which one of the federal family law courts might divide property, when making an order altering property interests, held by de facto couples, in comparison to how a NSW court might currently divide property under NSW law.

Professor Parkinson, during the Sydney hearings on the Bill, stated that the Bill takes the marriage paradigm and applies it to people who had a free choice whether to choose it and have not chosen it. The primary purpose of the marriage and de facto relationship property settlement regimes in Australia is remedial, addressing injustice if property held by couples at the end of their relationship is distributed according to their rights under the general law. De facto couples are able under the Bill, as they now are under the current State and Territory regimes, to make their own arrangements on property and maintenance matters between them, should their relationship end, under the Bill by making a binding financial agreement under new Part VIIIAB Division 4 (new sections 90UA to 90UN).

Professor Parkinson, in his Sydney Morning Herald article and before the Committee, suggests that there is a case for treating de facto relationships more like marriages where there are children involved. None of the State and Territory property settlement regimes apply only to de facto relationships where children are involved

(b) A court will have the power, under the Bill, to alter the interests of the parties to a de facto relationship in their property and must not make an order doing so unless satisfied that, in all the circumstances, it is just and equitable to make the order. The

court will be required to take into account financial contributions made by a party to a de facto relationship to property jointly or solely owned by each party (see new section 90SM(4)(a)). This will include financial contributions to property owned before the relationship began, and extends to contributions made to property that they no longer own. The court will also be required to take into account non-financial contributions made to property (new section 90SM(4)(b)) and contributions to the welfare of the family constituted by the parties to the relationship and any of their children, including a contribution made in the capacity of a homemaker or parent (section 90SM(4)(c)). As mentioned above, a court will be required to take into account the matters, listed in new section 90SF(3), which a court must take into account in the making of a spouse maintenance order. These matters will concern matters relevant to the current situation and future needs of each party to the de facto relationship, and require the court to take into account the financial resources of each of them.

Definition of de facto relationship

(3) NSW Gay and Lesbian Rights Lobby suggest that the definition of 'de facto relationship' should be amended to clarify that two people may still be in a de facto relationship if they temporarily separate (sub 14, p. 10). What is your response? Is this situation covered by the definition in proposed s 4AA or associated provisions?

Answer: While the concept of two persons 'living together' or who 'live together' is contained within the definitions of the relationships to which the de facto property settlement legislation of five States (NSW, Qld, Victoria (*Property Law Act 1958)*, WA and SA) applies, none of the definitions contain a provision stating that they may still be in a de facto relationship if they temporarily separate.

Two cases decided under the NSW legislation separations (*Hibberson v George* (1989) DFC 95-064 and *Mao v Peddley* (2002) DFC 95-249) indicate that courts have not had any particular difficulty with the issue of temporary separation, and that persons can continue to live together through occasional separations, for example, because of work responsibilities, holidays taken separately or periods in hospital.

(4) Lesbian and Gay Solidarity (sub 9, p. 2) suggest the definition should be amended to provide that a de facto relationship can exist even if one or both of the persons is/are transsexual/ transgender or in the process of realignment. What is your response? Is this situation covered by the definition in proposed s 4AA or associated provisions?

Answer: A de facto relationship can exist even if one or both of the persons are transsexual, transgender or in the process of realignment. The sex of that person or those persons will be determined in accordance with the principles enunciated in the Full Family Court of Australian decision in *In Re Kevin (Validity of marriage of transsexual) (No 2)* [2003] FamCA 94. The sex of the person will be that given at birth or, in the case of post-operative transsexuals, as men or women in accordance with their sexual reassignment.

Other drafting issues

(5) The transitional provisions provide that the new Act will not apply to de facto relationships which broke down before commencement (Schedule 1, Part 2, Div 2).
Women's Legal Services suggested that de facto couples should be able to 'opt in' to the new Act by mutual agreement where their relationship breaks down before commencement and their maintenance or property matters haven't yet been finalised (sub 9, pp 5-6). What is your response to this suggestion?

Answer: The application of the Bill to relationships that have already broken down provides a clear test relating to the relationships to which the new regime will apply. It also reflects the same approach taken by each State and Territory, with the exception of the Northern Territory, when its property settlement regime was introduced. The suggestion that couples should be able to 'opt in' to the new regime by mutual agreement, particularly where they 'opt in' for an adjudicated determination of issues between them, would need to be accompanied by safeguards, to ensure informed choice and also to protect those in an unequal bargaining position.

(6) Section 90SD sets out residence requirements for maintenance orders. The NSW Law Society is concerned that parties to the de facto relationship should be required to be ordinarily resident in a participating jurisdiction for a 'substantial period' of the relationship, rather than at least a third of the de facto relationship (sub 7, p. 3). What is your response?

Answer: It is important, in 'cross border' cases, for legislation to provide certainty on which law applies, particularly where the application of the law of each State in which a couple has lived, or reside after their relationship has ended, would, in a property settlement case, provide a different outcome on issues between them. The residence requirement in the Bill provides a clear test, while the discretion implicit in the test suggested by the Law Society of NSW would not encourage parties to settle outside litigation. The geographical connection in section 90SD reflects the requirements under the property settlement legislation of most jurisdictions (NSW, Victoria, WA, ACT, NT and Norfolk Island). The 'substantial period' test applies in NSW, although couples are taken to satisfy the test if they have lived together in the State for one third of their relationship. SA requires couples to have lived in the State for the whole or a substantial part of the period of their relationship. Queensland and Tasmania do not have a residence requirement.

(7) The NSW Law Society is concerned about the validity of agreements made (under NSW law) before the commencement of the Bill (sub 7, p. 9). They suggest that:

> ***If these agreements are to be treated as Part VIIAB agreements and therefore enforceable…then there should be specific provision to ensure that a party will not be able to set aside the agreement simply because the legislation has changed.***

What is your response to this proposal?

Answer: The Law Society of NSW in its submission to the Committee suggests that the ground in new section 90UM(1)(f) might apply to set aside an agreement made under NSW law. It is difficult to see how a change in the law, subsequent to the making of an agreement, about how property settlements between de facto couples are determined, would make it impracticable to carry it out. New section 90UM(1)(f) is in equivalent terms to sections 90K(1)(c) and 79A(1)(b) of the *Family Law Act 1975*, applying to binding financial agreements and property alteration orders between married couples. The Department notes that the test of impracticability in section 79A(1)(b) of the Act has been discussed in cases before the Family Court of Australia, including *Rohde and Rohde* (1984) FLC 91-592, *La Rocca and La Rocca* (1991) FLC 92-222, *Franklin and McLeod* (1994) FLC 92-481 and *Cawthorn and Cawthorn* (1998) FLC 92-805.