25 July 2008

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Women's Legal Services Australia
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Dear Senator Crossin and Committee members,

Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008

Women's Legal Services Australia (WLSA) thanks the Committee for the opportunity to provide our views in relation to the landmark Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (the Bill).

In summary, WLSA supports the Bill on the basis that there are significant benefits in ensuring that all separating couples have the option of accessing a nationally-consistent financial settlement regime. However, we call for amendments to the Bill to recognize the unique status of registered relationships and to ensure that the maximum number of recently-separated couples have the option of accessing the family law system if they wish to do so.

WLSA is a national group of Community Legal Centres specialising in women's legal issues. WLSA regularly provides advice, information, casework and legal education to women on family law and family violence matters. We have a particular interest in ensuring that women experiencing domestic violence are adequately protected in the family law process, and that disadvantaged women, such as those from culturally and linguistically diverse backgrounds, Indigenous women, women with disabilities and rural women are not further disadvantaged by the process.

WLSA members provide advice and information to women on a daily basis regarding their legal rights upon relationship breakdown. At present, advice about property settlement and maintenance entitlements differs depending on whether or not the woman was married and which jurisdiction she lives in. As outlined below, this inconsistent approach has meant that many women in de facto relationships have suffered significant disadvantage compared to married women.

WLSA supports the draft bill for reasons including the following:

Promoting equity and efficiency
WLSA submits that the Family Court is the appropriate institution to resolve all property and spousal maintenance disputes, as opposed to State and Territory Supreme Courts. Family Court judges and other personnel have experience and expertise in relationship matters. Further, the Family Court's processes and procedures provide the most efficient pathway for resolution of disputes following relationship breakdown. In particular, the conciliation and mediation procedures of the Family Court have traditionally been effective in resolving the vast majority of such disputes at a relatively early stage, avoiding the need for litigation.

Superannuation
Since December 2002, the Commonwealth Superannuation Splitting regime has allowed separating married couples to divide their superannuation interests in a similar way to their other assets. The scheme recognises the increasing importance of superannuation as a form of wealth, particularly for individuals nearing retirement age. Women's Legal Services frequently provide advice in circumstances where a couple's assets consists primarily—or solely—of superannuation savings. In many cases, a woman's male partner will have greater superannuation savings than she will given that women are still more likely to take time out of the paid workforce to care for children. In this context, women in de facto relationships who cannot obtain a superannuation splitting order suffer considerable disadvantage compared to their married counterparts. WLSA submits that providing de facto couples with access to the Act's Superannuation Splitting regime will provide parties with maximum flexibility in structuring their property settlements, promoting the likelihood of settlements that are 'just and equitable' in all the circumstances.

A Children's Rights Perspective

Property Settlement
Research indicates that children's rights are placed at an increased risk when their family unit breaks down due to parental separation.[1] We note that aspects of the Act's property distribution scheme are specifically oriented towards protecting a child's right[2] to an adequate standard of living. When considering a property adjustment application, a Federal Magistrate or Family Court judge is directed to consider (amongst other things) the existing and future needs of both parties, with particular reference to the financial needs of a parent who has assumed care and control of children of the marriage.[3] The

[1] R Weston "Income Circumstances of Parents and Children: A Longitudinal View" in Funder, Harrison & Weston (eds), *Settling Down* (1993) at 139; P Amato & A Booth, *A Generation at Risk* (1997).
[2] Article 27, *The United Nations Convention on the Rights of the Child,* opened for signature 20 November 1989, entered into force 2 September 1990, ratified by Australia on 17 December 1990.
[3] *Family Law Act* 1975 (Cth) s 79(4)(c), 75(2)(c).

Court must determine what property arrangement is 'just and equitable' in light of the resources required by the primary caregiver to support the separating couple's child or children.[4]

At the state and territory level, all jurisdictions have legislative schemes which provide for the distribution of property (excluding superannuation) upon the separation of de facto partners.[5] However, the limited coverage and inconsistent features of these schemes mean that children of de facto couples currently receive less protection compared to children of married couples.

State and Territory schemes currently adjust the parties' rights *differently* when there are children of the relationship.[6] Varying the financial interests of de facto partners where children are involved reflects the profound impact of parenthood upon the economic interests of the parties, as Parkinson states:

> We are entitled to treat theirs as a socio-economic partnership with wealth-transferring consequences whether or not this was their intention, and whether or not they made a commitment to partnership, because parenthood has effected a change in their relationship which requires limitations to be placed upon their assertion of individualised financial autonomy.[7]

Yet at present, the extent to which decision-makers are directed to consider the needs of children when de facto couples separate varies with jurisdiction. In 3 jurisdictions, de facto property division is very similar to the process set out for married couples in the Act. There, the court is directed to consider the present and the future needs of the parties, including needs related to the provision of care for children of the relationship.[8] Elsewhere, the court is restricted to examining the contributions made by the parties during their relationship, without reference to their future needs.[9] Legislation in the ACT and South Australia does not specifically refer to the future needs of the parties, but the court is directed to broadly consider other 'relevant matters' which would reasonably include the needs of any children of the relationship.[10] From a children's-rights perspective, it is essential that courts examine the future needs of the parties to ensure primary caregivers have access to the resources necessary to care for children on a long-term basis.

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[4] *Family Law Act* 1975 (Cth) s 79(2).

[5] *Property Law Act* 1974 (Qld); *Relationships Act* 2003 (Tas); *Family Court Act* 1997 (WA); *Domestic Relationships Act* 1994 (ACT); *Property Law Act* 1958 (Vic); *Property (Relationships) Act* 1984 (NSW); *De Facto Relationships Act* 1996 (SA);*De Facto Relationships Act* 1991 (NT).

[6] *Property (Relationships) Act* 1984 (NSW) s 17; *Domestic Relationships Act* 1994 (ACT) s 12; *Property Law Act* 1974 (Qld) s 287; *Property Law Act* 1958 (Vic) s 281; *De Facto Relationships Act* 1996 (SA) s 9(2).

[7] P Parkinson, 'Quantifying The Homemaker Contribution In Family Property Law' (2003) 31 *Federal Law Review* 1 at 14.

[8] *Property Law Act* 1974 (Qld) ss 291, 292, 297-309; *Relationships Act* 2003 (Tas) ss 40, 47; *Family Court Act* 1997 (WA) s 205ZG.

[9] *Property (Relationships) Act* 1984 (NSW) s 20; *De Facto Relationships Act* 1991 (NT) s 18; *Property Law Act* 1958 (Vic) s 285.

[10] *Domestic Relationships Act* 1994 (ACT) s 15(1)(e); *De Facto Relationships Act* 1996 (SA) s 11(1)(d).

Spousal Maintenance

We also note that under the Act, a party to a marriage is liable to maintain the other party financially after separation if they are unable to support themselves adequately because they have care and control of a child of the marriage.[11] Whilst spousal maintenance orders are only made in a small minority of cases, such orders nonetheless have the potential to support a child's right to care[12] upon separation by providing the primary caregiver with additional income.[13] Yet at present, a de facto partner who has care and control of such children cannot access maintenance payments from their ex-partner in three states, whilst in two other jurisdictions, maintenance support is only available until the child reaches the age of 12 (or 16 if the child is physically or mentally disabled).[14] Limiting access to maintenance in this fashion only contributes to the financial difficulties faced by primary caregivers and their children following relationship breakdown.

WLSA makes the following 2 recommendations regarding amendments to the bill:

1. *Definition of 'de facto relationship'*

The Bill proposes a new clause 4AA(1) which would provide that a person is in a de facto relationship with another person if they are not legally married to each other, are not related by family and:

> (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.
> ….. .

Clause 4AA(2) contains 9 factors (numbered (a) to (i)) to be taken into account to work out if 'persons have a relationship as a couple'. Clause 4AA(2)(g) is:

> (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship

Clause 4AA(4) provides that:

> … a court determining whether a de facto relationship exists is entitled to have regard to such matters, and attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

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[11] *Family Law Act* 1975 (Cth) s 72.
[12] Articles 7 and 27, *The United Nations Convention on the Rights of the Child* above n1.
[13] Family Law Council *Spousal Maintenance: Discussion paper* (Canberra: AGPS, 1989) at para 6.3.
[14] Spousal maintenance is not available to de facto partners in South Australia, Queensland and Victoria. Limited spousal maintenance is available under the following legislation: *Property (Relationships) Act* 1984 (NSW) s 27; *Domestic Relationships Act* 1994 (ACT) s 19.

WLSA submits it is inappropriate that relationships which have been registered under a prescribed law of a State or Territory be subsumed back into the category of 'de-facto' relationships under federal law. As stated by former Family Court Chief Justice Alastair Nicholson, such an approach: '…is inappropriate as a matter of policy as those couples who have formalised their relationships have positively chosen not to simply be regarded as "de facto" partners under … law.'[15] WLSA submits that registered relationships should be recognised as an independent, third category of relationship under federal law, along with marriage and de facto relationships. In the words of former Chief Justice Nicholson: 'To do otherwise is to denigrate the commitment of those entering into these formalized relationships that have been recognized by the law of the States and Territories concerned.'[16]

At the very least, where de facto partners have decided to place their relationship on a registry under a state or territory scheme (as described in (g)) this should be *conclusive* proof that there has been ' a relationship as a couple living together on a genuine domestic basis' as required by s. 4AA(1)(c). This approach would promote certainty and reduce the court resources and legal costs that might otherwise be required to determine the legal status of the registered relationship.

2. Retrospective Application

The transitional provisions in Division 2 of Part 2 of Schedule 1 provide that the new Act will not apply to de facto relationships which broke down before commencement. WLSA recognises that it is desirable to clearly demarcate the commencement of the new scheme. However, given the significant advantages offered by the family law system in comparison to State and Territory Supreme Courts, WLSA submits that the provisions should be adjusted so that de facto or registered couples:

- whose relationship broke down before commencement; and
- whose maintenance or property matters have not been finalised by the making of a final order or agreement before commencement

may opt in to the new Act *by mutual agreement*. This may include couples who already have proceedings on foot in State or Territory Courts, or couples who have not yet made an application.

Opt-in of the type suggested will not unsettle finalised matters or result in prejudicial retrospective operation because opt-in would only be available if the parties were eligible and they both chose to opt-in.

Safeguards could apply to avoid uninformed and pressured decisions to opt-in to the Family Law System. For example, an eligible party could be required to certify in writing

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[15] Public letter from The Hon. Alastair Nicholson AO RFD QC to the Federal Attorney-General, The Hon. Robert McClelland dated 19 May 2008.
[16] Ibid

that they have given their informed consent after receiving independent legal advice about the legal implications of choosing to opt-in. If parties who seek to opt-in wish to finalise their financial arrangements by filing an application for orders by consent or by adjudication, the certification should accompany the application.

If the opt in provision is included, it would not be necessary to limit this to parties whose relationship ended within a specified time before commencement because this is already achieved by item 36 which would amend section 44 of the Act. The new section 44 would in effect provide that an application can be made to the court within a period of 2 years from the date the relationship ended and an application can only be made after that date if the court grants leave based on hardship or inability to support themselves. WLSA submits this approach would increase the number of recently separated couples who could access the family law system to resolve their disputes, rather than having to resort to less preferable State and Territory options.

Resource Implications

WLSA submits that allowing opposite-sex and same-sex de facto and registered couples to access the family court for property and maintenance matters will substantially increase demand in the family law system. Under the new scheme, de facto or registered couples who would have made applications in their appropriate State or Territory court will now be applying to the Family Court. Further, we believe there is likely to be a substantial increase in the *proportion* of de facto and registered couples who will consider using the courts to resolve their disputes. This is because parties may have more confidence in the family law system and more to gain from the range of expert services and outcomes available under the Act, in comparison to those available in state and territory courts.

WLSA calls on the Government to allocate appropriate resources to address this increase, to ensure that parties and practitioners do not face a ‘blow out’ in local registry waiting times for appointments with family court consultants, court dates and judicial decisions. WLSA notes that the new Act is also likely to increase demand on community-based family dispute resolution services (FDR). Family Relationship Centres and other FDR providers must be adequately resourced to ensure that all parties can access dispute resolution and obtain the requisite FDR certificates in a timely way.

Summary

WLSA recognises that there are significant benefits in ensuring that all separating couples have the option of accessing a nationally-consistent financial settlement regime. However, we call for amendments to the Bill to recognize the unique status of registered relationships and ensure that the maximum number of recently-separated couples have the option of accessing the family law system if they wish to do so.

If you would like to discuss any aspect of this submission, please contact Heidi Yates at the Women's Legal Centre in Canberra on (02) 6257 4377 or hyates@womenslegalact.org or WLSA's Law Reform Coordinator, Edwina MacDonald, on (02) 9749 7700 or Edwina_MacDonald@clc.net.au.

Yours Sincerely,

signed

Heidi Yates
Committee Member
Women's Legal Services Australia