Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
By fax: 02 6277 5794

25th July 2008

Dear Senator Crossin and Committee members,

Submission in relation to the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008

I am making this submission as an individual to suggest three specific adjustments to the above Bill to enhance the operation of the legislation.

Before doing so I would like to acknowledge the work undertaken over many years by the Commonwealth, States, Territories, stakeholders and informed groups to bring about the possibility of federal legislation of this kind.

While the passage of the Bill will result in landmark changes to the Family Law Act the Bill draws strongly on existing State and Territory legislation in relation to de facto financial matters and existing provisions of the Family Law Act which currently do not extend to de facto couples.

Over the years the changes will benefit millions of Australians because the Bill will establish clear, accessible, flexible, dignified and non-discriminatory processes for de facto couples to manage their financial affairs and relationship transitions.

Three suggested adjustments to the Bill

1. Proving a de facto relationship

The meaning of *de facto relationship* is in item 21 which would insert a new clause 4AA. Clause 4AA(1) provides 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.

It is submitted that where a relationship is or was registered as described in (g) that 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 adjustment will promote certainty, reduce dispute, save legal costs and court time. It is also more dignified and less intrusive.

If this is not acceptable, it is submitted that the Bill should be amended so that registration of the kind described in (g) is prima facie proof that a couple relationship existed for the purposes of the new Act.

2. Geographic connection – financial agreements after the breakdown of a de facto relationship

Clause 90UA of the Bill provides:

> **90UA Geographical requirement for agreements made in participating jurisdictions**
> Two or more people can make a Part VIIIAB financial agreement under section 90UB, 90UC or 90UD only if the spouse parties are ordinarily resident in a participating jurisdiction when they make the agreement.

Clauses 90UB, 90UC and 90UD respectively relate to financial agreements before, during and after a de facto relationship.

The reference in clause 90UA to 'a participating jurisdiction' results in an ambiguity whereby it is not clear whether the parties must be ordinarily resident in the same participating jurisdiction when they make the agreement or can be in different participating jurisdictions.

This contrasts with:

- Clause 90RG which provides that a court may make a declaration about the existence of a de facto relationship where *one or both* people 'were ordinarily resident in a participating jurisdiction when the primarily proceedings commenced'

- Clause 90SD which provides that the court may make an order regarding maintenance if *either or both* of the parties were resident in a participating jurisdiction when the application was made, and

- Clause 90SK which contains the same provision applicable to proceedings for declaration in relation to property interests or division of property interests

The ambiguity in clause 90UA can be resolved by inserting the words underlined in the following adjusted version:

> '... are ordinarily resident in a participating jurisdiction, <u>being the same or a different participating jurisdiction</u>, when they make the agreement'.

3. Opt in for certain cases

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.

While this has the advantage of being a clear demarcation it is also very harsh. The referring States, the Territories and the Commonwealth agree that the family law system will be far more accessible and suitable for de facto relationship financial matters compared to the existing State and Territory options.

It is recommended that the provisions be adjusted so that de facto 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*.

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 (matters not already finalised, geographic connection with a participating jurisdiction etc.) and they both choose to opt in.

Safeguards should apply to avoid uninformed and pressured decisions to opt in. That is, an eligible party should be required to certify in writing that they have given their informed consent after receiving independent legal advice about the legal implications of choosing to opt in. This certification should be a mandatory part of any binding financial agreement which the parties wish to enter. 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 de facto 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 self support.

Yours sincerely

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