

Ref: FLS/5190

1 August 2008

Senator Trish Crossin
Chair
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Senator Crossin

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

1. The Law Council of Australia, through its Family Law Section, welcomes the Government's decision to allow both opposite-sex and same-sex de facto couples to access the federal family law courts to resolve property and maintenance matters both before entering into relationships, and on relationship breakdown.
2. The Law Council is the peak national body of the Australian legal profession. Through its constituent bodies, the State and Territory Bar Associations and Law Societies, it represents more than 50,000 Australian lawyers. The membership of the Law Council's Family Law Section, consists of approximately 2,400 practicing family law practitioners throughout Australia.
3. Members of the Family Law Section represent parents and their children in respect of all issues arising from relationship breakdown – for both married and de facto couples - from the very beginning of the process of separation through to finalisation of family arrangements. In the course of that journey, family lawyers draw on a wide range of dispute resolution options and community based resources, and facilitate an infinite variety of solutions because each family is unique and the needs of each family are different.
4. The Law Council's Family Law Section has long been a vigorous supporter of the objective that family law should apply in a consistent and uniform way to married and de facto relationships nationally (and its submission concerning the inconsistency and inequities resulting from different de facto regimes in the various States and Territories was the catalyst for the issue first being taken up by the Standing Committee of Attorneys-General at its meeting in April 1998).



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5. The Law Council strongly supports this much-needed and socially advantageous legislation which is long overdue given the high and ever-increasing percentage of Australians who live - regardless of gender - in marriage-like relationships in preference to formal marriage.
6. The Law Council also strongly supports equal access to the law for same sex couples. In a recent media release the Law Council President, Ross Ray QC, confirmed the Council's position that 'any step towards eliminating discrimination brings us closer to meeting our international human rights obligations, makes us a fairer, more just community and ought to be greeted with strong approval'.
7. While States and Territories currently have legislation dealing with the financial rights and obligations of unmarried partners on relationship breakdown - including in most instances same sex partners - the Law Council is pleased that the rights of these couples will now be able to be determined in specialist courts on a nationally consistent basis throughout the country rather than by a quirk of geography (dependent upon where they happen to live or where a disputed property is located) or as a consequence of gender.
8. This is particularly so as the States and Territories have long since given their powers over children to the Commonwealth so that all Australian children - regardless of the marital status or gender of their parents - are dealt with under a single set of consistent laws. It has taken a long time to enable these couples to have their financial matters dealt with in the same jurisdiction, and at the same time, as the other issues arising from relationship breakdown.
9. While the Law Council strongly supports the policy objective of the proposed legislation, there are a number of areas where the drafting could be improved to provide greater clarity and to rectify what are largely technical defects which may lead to unintended consequences or unnecessary complication. The following two examples are provided by way of illustration:

Cessation of spousal maintenance

10. The proposed s90SJ provides that a maintenance order ceases to have effect upon:
 - The death of the party (s90SJ(1)(a))
 - The death of the person liable to make payments under the order (s90SJ(1)(b))
 - The marriage of the party, unless in special circumstances a court otherwise orders (s90SJ(2)).
11. Similar provisions exist for married couples by virtue of s82 of the *Family Law Act 1975*. However, s82(4) of the Family Law Act provides that a maintenance order ceases on the *re-marriage* of the party (unless a court otherwise orders in special circumstances). The proposed provisions in relation to de facto couples do not specifically provide for maintenance orders to cease if a party re-partners by entering into another de facto relationship. FLS recommends that entering a new de facto relationship should be included as a terminating event for spousal maintenance (unless a court otherwise orders in special circumstances) in the same way that re-marriage is a terminating event for married couples.

Financial agreements – geographical requirements

12. The proposed s90UA provides that a financial agreement under s90UB (before de facto relationship), 90UC (during de facto relationship) and 90UD (after breakdown of de facto relationship) can only be made if the spouse parties are ordinarily resident in a participating jurisdiction when they make the agreement.
13. It is unclear whether the provision as drafted contemplates the requirement that both parties reside in the same participating jurisdiction; or whether they can be in separate jurisdictions; or if it is necessary for only one party to be in a participating jurisdiction.
14. While the necessity for a geographical connection under the referring legislation is recognized, the requirement as drafted seems unduly restrictive and confusing. It is not uncommon for parties to reside in different locations before they enter their relationship – and some may not even live in the same country when an agreement is made. Similarly, many parties also relocate soon after separation and before settling financial arrangements.
15. FLS recommends that, subject to the restrictions contained in the power conferred by the referring legislation, and assuming that the geographical connection mandates that at least one party must be resident in a participating jurisdiction when the agreement is made, s90UA be amended to make that clear so as to provide greater flexibility to parties seeking to settle their financial arrangements by binding financial agreement rather than having to go to court to obtain orders.
16. Other issues under review by the Family Law Section include:
 - The definition and use of the term ‘financial resources’;
 - The inconsistent use of the term ‘binding financial agreement’;
 - Greater clarity with respect to the relationship between the amending Act and State and Territory laws; and
 - Consistent application of the courts’ powers to make certain declarations.
17. The Law Council’s Family Law Section is working through each provision contained in the Bill and is in communication with the Attorney-General’s Department. The Section has agreed to provide to the Attorney-General’s Department a detailed list of the provisions which require clarification or correction and to work with it in addressing issues of this nature.
18. The Bill also contains a number of miscellaneous amendments in Schedule 3 in relation to financial agreements between married couples and superannuation splitting. The Law Council supports these amendments, many of which are the result of previous Law Council representations. The Law Council’s Family Law Section will again work with the Attorney-General’s Department to address technical issues which arise from these amendments.
19. The Law Council’s Family Law Section also strongly recommends that the Family Law Act be renumbered, and its provisions rearranged in a more logical and accessible form. As a result of numerous amendments over 30 years the structure and numbering in the Act have become unwieldy and unnecessarily complicated and

increasingly difficult to navigate for experienced practitioners let alone the general public.

20. National reform in this important area has been 10 years in the making. The changes have been mooted publicly for more than 2 years and many in the community are anxiously waiting for it to happen. It is time to turn policy into reality; and the Law Council urges the Government to proceed with the legislation as a matter of priority.
21. The Chair of the Family Law Section, Ian Kennedy AM, has agreed to appear before the Committee at its hearing in Melbourne on 6 August 2008, to expand on these comments.

Yours sincerely

A handwritten signature in black ink, appearing to read 'W Grant', with a stylized flourish at the end.

Bill Grant
Secretary-General