



THE LAW SOCIETY  
OF NEW SOUTH WALES

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16 April 2024

Dr James Popple  
Chief Executive Officer  
Law Council of Australia  
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By email: [nathan.macdonald@lawcouncil.au](mailto:nathan.macdonald@lawcouncil.au)

Dear Dr Popple,

### **Exposure draft Family Law (Superannuation) Regulations**

Thank you for the opportunity to provide feedback on the exposure draft Family Law (Superannuation) Regulations 2024. The Law Society's Family Law and Human Rights Committees contributed to this submission.

We note that the draft Regulations concern a highly specialised area, and that many of the consultation questions primarily raise accounting or actuarial issues. To the extent that they raise legal questions or legal practice issues, overall we have few concerns.

We provide below our responses to selected questions.

**Question 10 – Do you have any concerns with the new and updated methods and factors being used to calculate a non-member spouse's entitlement, where an order or agreement has been made based on the superannuation interest being valued using the existing methods and factors? Please expand on your response.**

The updated methods and factors should only be used to calculate a non-member spouse's entitlement in matters listed for hearing after the commencement date of the new Regulations. We otherwise have no concerns.

**Question 18 - Are there other superannuation plans or annuities which should be exempted from the operation of section 14? Which other plans or annuities, and why?**

Where both spouses have an interest in a self-managed superannuation fund, each spouse will remain a director of the fund post-separation, unless their interest is rolled out to a separate fund. This may be problematic, particularly if one party's interest in the fund is of relatively low value. We suggest the parties should be permitted to agree, or the Court should be able to order, that one spouse's interest in a self-managed superannuation fund is assigned wholly to the other spouse.

**Question 21 - Do you have any concerns about the 2-year time limit in paragraph 12(1)(c)(i) of the existing Regulations, which has been replicated in paragraph 16(2)(c)(i)**

**of the new Regulations? If so, please expand on what your concerns are.**

We do not have concerns about the 2-year time limit. We note that, in any case, in the interim period before the interest becomes splittable, the other spouse may seek orders for spousal maintenance.

**Question 30 - What are your experiences with compliance with regulations 70 and 71 of the existing Regulations?**

The experience of our members is that funds corresponding with solicitors who represent a non-member spouse generally comply with the requirements of regulations 70 and 71.

**Question 34 - Should the new Regulations provide guidance, or prescribe an approach, in relation to superannuation interests of members who have variations of sex characteristics or who are intersex, whose sex has changed from their sex recorded at birth, whose gender has changed from the gender they were assigned at birth, and/or who do not identify as either male or female? If so, what should the new Regulations provide or prescribe? Please provide any other relevant comments or observations.**

The Law Society supports measures that respect the preferences and needs of persons with innate variations in sex characteristics and transgender people. We appreciate that difficulties may arise from an approach to valuation factors that rely on a binary male / female categorisation of life expectancy.

It is well established that the determinants of life expectancy include gender as well as socio-economic and cultural factors, such as levels of infant mortality, a safe living environment, a good health care system, sufficient food, cultural behaviours and the use of preventative health measures.<sup>1</sup> Any prescribed approach to superannuation splitting of members with innate variations in sex characteristics and transgender people should be based on robust statistical or actuarial data as to the determinants of life expectancy of people in those cohorts. Ideally, it should also be consistent with approaches in other contexts, such as life and health insurance.

Thank you once again for the opportunity to contribute to a Law Council response to this consultation. If you have any further questions in relation to this letter, please contact Sue Hunt, Senior Policy Lawyer on (02) 9926 0218 or by email: [sue.hunt@lawsociety.com.au](mailto:sue.hunt@lawsociety.com.au).

Yours sincerely,



**Brett McGrath**  
**President**

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<sup>1</sup> Australian Bureau of Statistics, Australian Social Trends March 2011: Life Expectancy Trends Australia, <https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10Mar+2011>.