Law Council
OF AUSTRALIA

The Committee Secretary
Senate Standing Committee on Legal & Constitutional Affairs
Department of the Senate
PO Box 6100
CANBERRA ACT 2600

Dear Committee Secretary

Inquiry into *Federal Justice System Amendment (Efficiency Measures) Bill 2008*

1. This submission is made on behalf of the Family Law Section of the Law Council of Australia *("FLS").*

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 couples – both married and de facto - and their children in respect of all issues arising from relationship breakdown from the very beginning of the process of separation through to finalisation of financial and family arrangements. In the course of that process, family lawyers draw on a wide range of dispute resolution options and community based resources, and because each family is unique and the needs of each family are different, facilitate a wide variety of solutions.

4. This submission focuses primarily on the amendments proposed in Part 1 of Schedule 5[1] of the Bill which are intended to relax the technical requirements in relation to evidence that spouse parties must provide in relation to the obtaining of independent legal advice when entering into a financial agreement[2]. It also:

   4.1 Recommends (Attachment A) additional amendments which would improve the operation of Part VIIIA [Financial Agreements] of the *Family Law Act 1975*, which FLS considers should be implemented at the same time;
   4.2 Recommends consistency between the formalities required for binding financial agreements and binding child support agreements; and
   4.3 Recommends that the *Family Law Act 1975* be restructured and renumbered.

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1 Part 2 of Schedule 5 makes similar amendments in relation to financial agreements between de facto couples. This submission applies equally *mutatis mutandis* to that Part.

2 The same principles apply to termination agreements made under the Family Law Act.

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5. Financial agreements under Part VIIIA of the *Family Law Act 1975* (FLA) are frequently used to implement financial settlements reached outside the Court system without the need to engage in legal processes (and also before marriage as a way of parties being able to regulate their financial affairs in the event of marriage breakdown).

6. The policy of the existing legislation and the objectives of the amendments proposed in Schedule 5 of the Bill are straight-forward, and are intended to:

   6.1 Facilitate parties entering into an agreement (whether before, during or at the end of a marriage[3]) providing for the resolution of financial issues which is binding on them in the event the relationship fails;
   6.2 Provide a simple process by which this is achieved;
   6.3 Provide a certain measure of protection by requiring each party to have independent legal advice and for the provision of that advice to be confirmed in writing by the legal practitioner providing it;
   6.4 Enable parties who have entered into a financial agreement to be able to rely on it and to be bound to their bargain without fear that the agreement may be found to be non-binding due solely to a failure to meet a technical requirement of the legislation;
   6.5 Validate existing agreements made under Part VIIIA of the FLA which might otherwise be found to be non-binding as a result of a technical defect.

   In the opinion of FLS the amendments as drafted do not meet these criteria.

Background

7. The impetus for the amendments contained in Part 1 of Schedule 5 of the Bill came from a letter from FLS to the Attorney-General of 7 May 2008 drawing attention to the decision of the Full Court of the Family Court of Australia in *Black & Black [2008]* FamCA FC 7, which had the effect of invalidating agreements where any of the technical requirements in Part VIIIA had not been strictly met.

8. In order to resolve the difficulties arising from *Black and Black*, ensure validity of existing agreements and reduce the scope for disputes about formal validity, FLS proposed amendments to subsection 90G(1) of the FLA in relation to:

   - Evidence of independent legal advice; and
   - Provision of copies of the agreement**.**

9. The Attorney-General referred the matter to the Family Law Council, which confirmed that amendments were required to restore confidence in the binding nature of financial agreements.

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[3] Similar provisions will apply to de facto relationships after the commencement of the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008

10. In its letter of 7 May 2008, FLS also raised issues (previously raised with the former Attorney-General) and made recommendations in relation to:

    10.1 The desirability of third parties being able to become parties to financial agreements under the Act; and for agreements to include matters additional to property or maintenance issues between spouse parties or incidental or ancillary to the inter-spousal issues;
    10.2 The statutory requirement for separation declarations under section 90DA where the parties are divorced;
    10.3 The desirability of corresponding amendments to the *Child Support (Assessment) Act 1989*, ("the CSAA") so that identical criteria apply to binding child support agreements as apply to financial agreements under the FLA.

11. The recommendations referred to in paragraphs 10.1 and 10.2 were adopted and implemented by amendments contained in the *Family Law Amendment (Defacto Financial Matters Other Measures) Act 2008*, which amendments commenced upon receipt of Royal Assent on 21 November 2008. The amendments recommended in paragraph 10.3 are the subject of additional consideration in this submission.

Schedule 5 Amendments

12. Item 2 of Schedule 5 of the Bill repeals the existing paragraphs 90G(1)(b) and (c). FLS has a number of concerns with the proposed redrafting of paragraph 90G(1)(b) and the omission of the existing paragraph 90G(1)(c). These issues are discussed at paragraphs 23-28.

13. Item 4 of Schedule 5 of the Bill deletes the existing paragraph 90G(1)(e). This amendment satisfies the recommendation made by FLS with regard to the provision of copies of the agreement to the parties, and is support by FLS.

14. Item 8(1) of Schedule 5 of the Bill deals with the application of the proposed amendments to existing financial agreements and termination agreements. In effect, the amendments will apply to all agreements made on or after 27 December 2000 (the commencement date of Part VIIIA), other than those already set aside by Court order. FLS is concerned that in trying to validate existing agreements, the drafting of the proposed amendments may in fact invalidate agreements made before 14 January 2004 (the commencement date of the changes to sections 90G and 90J). This is discussed at paragraphs 29-30.

15. Section 90G of the FLA currently provides as follows:

> **90G When financial agreements are binding**
>
> (1) A financial agreement is binding on the parties to the agreement if, and only if:
>
> (a) the agreement is signed by all parties; and
>
> (b) the agreement contains, in relation to each spouse party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:
>
> (i) the effect of the agreement on the rights of that party;

(ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and

(c) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; and

(d) the agreement has not been terminated and has not been set aside by a court; and

(e) after the agreement is signed, the original agreement is given to one of the spouse parties and a copy is given to each of the other parties.

Note: For the manner in which the contents of a financial agreement may be proved, see section 48 of the *Evidence Act 1995*.

(2) A court may make such orders for the enforcement of a financial agreement that is binding on the parties to the agreement as it thinks necessary.

16. The technical defect found by the Full Court in *Black and Black* was that although the certificates attached to the agreement contained the specific elements detailed in section 90G, the body of the agreement did not – and the agreement was therefore not binding.

17. The trial Judge in *Black and Black* looked at the purpose of the legislation and held:

> *"The legislative intent is that both of the parties have the benefit of independent legal advice… It is not designed to set up word traps for the unwary…The form should not defeat the substance."*

18. This approach conflicted with that of Collier J in *J & J* [2006] FamCA442:

> *"Compliance must therefore be full compliance, satisfying the statutory requirements… Something approaching full compliance is not enough."*

19. The Full Court took the strict path:

> *"Care must be taken in interpreting any provision of the Act that has the effect of ousting the jurisdiction of the Court. [Part VIIIA]…reversed a long-held principle that such agreements were contrary to public policy.*
>
> *The compromise reached by the legislature was to permit parties to oust the court's jurisdiction to make adjustive orders but only if certain stringent requirements were met."*

20. While the analysis of the Full Court may reflect the law as it is currently written, it does not accurately reflect the legislative intent of Part VIIIA articulated by the Parliament.

21. Part VIIIA was introduced into the FLA to enable parties to resolve property and/or maintenance issues by way of private agreement. The underlying objective was identified by the then Attorney-General, the Hon Darryl Williams MP, in his Second Reading speech to Parliament as being to:

> *provide greater choice for parties in property settlements and to provide a more efficient and less costly means of dispute resolution in property matters than that which is available through the Family Court.*

22. Prior to that, in order for agreements between parties to be binding, they had to be approved by a Judge. The new Part VIIIA enabled parties to reach and implement agreements without the necessity of involving the Court. The Explanatory Memorandum which accompanied the *Family Law (Amendment) Act 2000* declared that:

> *For these agreements to be binding, each party will be required to obtain independent legal advice* ***as to the legal effect of the agreement*** [emphasis added] *before concluding their agreement … Because parties will have obtained prior advice the Court will only be able to set aside the agreement within certain limited circumstances*

23. The fundamental requirement is that both parties should have independent legal advice so that they understand the commitments they are making, the consequences of the agreement, and the effect of the agreement on their legal rights. The effect of a binding agreement is to extinguish the jurisdiction of the Court in relation to the subject matter of the agreement and, because of that, FLS **endorses** the policy considerations underlying the protective provisions of Part VIIIA.

24. It follows that FLS endorses the requirement that before signing the agreement a spouse party be provided with independent legal advice from a legal practitioner about the effects of the agreement on the rights of that party. It also supports the requirement that the legal practitioner provide a signed statement (which FLS **strongly recommends** should continue to be by way of a certificate attached to the agreement) confirming that the advice was given to that party.

25. While reflecting the underlying intentions, the current drafting in Item 2 of Schedule 5 gives rise to the potential for further disputes of a technical nature of the very type that the amendments are intended to overcome.

26. By conflating existing sub-paragraphs (b) and (c), the amendment imposes a requirement that both the advice be given and the legal practitioner's statement be provided before the agreement is signed by the party. That gives rise to the potential for dispute about the order in which the various steps occur; and the possibility of the agreement being held not to be binding if the advice is given prior to signature but the legal practitioner's statement is not provided to the spouse party until after the agreement has been signed. The requirement for temporal juxtaposition of the statement and the execution of the agreement creates a potential mischief. If, as is clearly the case, the intention is to have written confirmation that the required advice has been provided before the agreement is signed, it should not matter whether the statement confirming this is signed before, after, or at the same time as the agreement.

27. The information about the Inquiry posted on the Committee website confirms this. The Bill seeks to respond to and ameliorate the strict technical compliance test imposed by the Full Court in *Black & Black*. The Explanatory Memorandum to the Bill identifies the intention as being to *"relax the requirements in relation to evidence … of independent legal advice when entering into a financial agreement"*. Rather than relaxing the requirements, Item 2 of Schedule 5 adds a new hurdle of the signed statement of advice having to be provided to the party before the agreement is signed by that party (whereas the clear intention is merely to have objective evidence of the advice having been given) - yet provides no obligation to make a copy of the statement of advice available to the other party by way of verification that the requirement has been met.

28. FLS considers that the requirement for a statement (or preferably a certificate) of independent legal advice to be annexed to the agreement, as currently appears in Section 90G(1)(c), is advantageous as providing clear evidence that the advice was given prior to the agreement being signed, and should be retained.

29. In relation to validation of existing agreements [Item 8 of Schedule 5 of the Bill] FLS is concerned to ensure that any agreement which is currently binding under the existing law (save for technical defects, for example, as identified in *Black and Black*) is not inadvertently rendered invalid as a consequence of the proposed amendments. As currently drafted, all agreements will be required to conform with the amending legislation.

30. FLS is also concerned to ensure that agreements made between 27 December 2000 and 13 January 2004 are not inadvertently rendered invalid by the proposed amendments. At the time that Part VIIIA was introduced into the FLA, section 90G provided, *inter alia*, that the independent legal advice addressed whether or not it was "..*to the advantage, financially or otherwise, of that party to make the agreement*." Section 90G was amended in 2004[4] to the effect that the independent legal advice addressed, *inter alia*, "*the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement*". In keeping with the policy intention of the amendments proposed to section 90G in the Bill to relax the requirements in relation to evidence (and to ensure that agreements prior to 14 January 2004 are not inadvertently rendered invalid), FLS **recommends** that the words "***and about the advantages and disadvantages***" be removed from section 90G. These words serve no useful purpose, but if left in may provide potential for disputes of a technical nature.

[4] Section 90G was amended by Act No 138 of 2003 with a commencement date of 14 January 2004.

31. FLS **recommends** that Item 2 of Schedule 5 be redrafted so that section 90G is amended to provide as follows (new text in **bold** font):

90G When financial agreements are binding

(1) A financial agreement is binding on the parties to the agreement if, and only if:

(a) the agreement is signed by all parties; and

(b) ~~the agreement contains, in relation to each spouse party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:~~

~~(i) the effect of the agreement on the rights of that party;~~

~~(ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement~~;

each spouse party before signing the agreement had received independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party; and

(c) ~~the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided;~~ **certificates signed by the legal practitioner for each spouse party confirming that advice in accordance with paragraph (b) was provided to that party before that party signed the agreement (such certificates to be proof of the facts stated therein) are annexed to the agreement**; and

(d) the agreement has not been terminated and has not been set aside by a court.~~; and~~

~~(e) after the agreement is signed, the original agreement is given to one of the spouse parties and a copy is given to each of the other parties~~.

Note: For the manner in which the contents of a financial agreement may be proved, see section 48 of the *Evidence Act 1995*.

(2) A court may make such orders for the enforcement of a financial agreement that is binding on the parties to the agreement as it thinks necessary.

32. FLS believes that these provisions, drafted in this way, will validate existing agreements and clearly establish the protective requirements for independent legal advice prior to the parties entering into a financial agreement (and in addition overcome the subsidiary problem under the present law flagged, but not dealt with, in *Black & Black* that a fresh certificate of advice may need to be given if the parties agree to amendments to the agreement after the statement of advice but before final signature by the parties).

33. The submissions and recommendations of FLS in relation to paragraphs 90G(1)(b) and (c) apply equally to the amendments to paragraphs 90J(2)(b) and (c) contained in Schedule 5; and to the corresponding provisions in relation to de facto relationships in Part 2 of Schedule 5.

Improvements to the operation of Part VIIIA

34. FLS has identified at *Attachment A* to this submission, a number of areas which, while beyond the terms of the current Inquiry, will further improve the operation of Part VIIIA of the FLA. FLS has written separately to the Attorney-General about these issues and requested that they be dealt with at the same time as the amendments proposed in the Bill, to ensure that the end result is a comprehensive and effective statutory scheme which is available to all couples.

Consistency between Binding Financial Agreements and Binding Child Support Agreements

35. Section 80C of the *Child Support (Assessment) Act 1989* ("the CSAA"), which deals with when a child support agreement is binding, is identical in terms to Section 90G of the FLA.

36. FLS believes that this consistency is desirable so that, when Section 90G is amended, the child support legislation should be amended in similar terms.

37. FLS **recommends** that the Minister for Families, Housing, Community Services and Indigenous Affairs and the Minister for Human Services be requested to consider appropriate amendments the CSAA to maintain consistency with the FLA.

Restructuring of Family Law Act

38. Both the Senate and the House of Representatives Legal and Constitutional Affairs Committees have previously recommended that the FLA be renumbered, and its provisions re-arranged and restructured in a more logical and accessible manner.

39. The Act has been amended more than once a year for 32 years. It originally comprised 123 sections (numbered 1 - 123) contained within 80 pages. It is now approaching 700 pages - with an alphabet soup of numbers and letters - and is so unwieldy as to be impenetrable even to trained lawyers (let alone the general public).

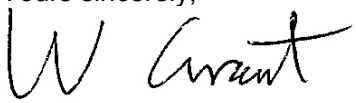
40. The need for it to be reorganised and renumbered in a logical and coherent way is pressing.

41. FLS **requests** that the Committee again consider a recommendation for this to be done.

Hearings

42. FLS is available to give evidence to the Committee at its hearings.

Yours sincerely,



Bill Grant
Secretary General

22 January 2009

Attachment A

PART VIIIA *FAMILY LAW ACT 1975 (FLA)*

Additional areas where FLS recommends amendment

1. *Section 90K(1)(g) - Unsplittable Superannuation Interests*

1.1 Section 90K(1)(g) of the FLA empowers the Court to set aside a financial agreement or termination agreement if a Court is satisfied that the agreement "..*covers at least one superannuation interest that is an unsplittable interest for the purposes of Part VIIIB*", Part VIIIB of the FLA deals with superannuation interests.

1.2 Section 90MH of the FLA enables a superannuation agreement to be included in a financial agreement.

1.3 Section 90MD of the FLA defines *"unsplittable interest"* as *"a superannuation interest described by the regulations for the purposes of this definition"*. Regulations 11(1A) and 11(1B) of the *Family Law (Superannuation) Regulations 2001* include in the meaning of *"unsplittable interest"*:

- A lifetime pension or fixed-term pension that the member is no longer able to commute
- A lifetime annuity or fixed-term annuity
- An interest with a withdrawal benefit in relation to the member spouse of less than $5,000; or an annual benefit of less than $2,000.

1.4 A provision in a financial agreement purporting to split an unsplittable interest would be unenforceable. Such a provision may arise, for example, where an agreement is made before marriage which purports, in advance, to divide superannuation in a certain way. When agreement is activated many years later on breakdown and there is in existence a small superannuation interest (which, if the matter went to court would in all probability be ignored) the existence of this unforseen circumstance should not provide a ground for setting aside the agreement itself.

1.5 Furthermore, it is common for financial agreements to provide for each party to retain their own superannuation interests and to exclude any future claim under Part VIIIB of the FLA. Those interests may include unsplittable interests (and indeed parties will not infrequently have small interests in old superannuation funds relating to previous employment which, in many cases, they may be unaware of or have overlooked). A provision of this nature would, on the face of it, come within the wording *"at least one superannuation interest that is an unsplittable interest"* and give rise to a ground for setting aside the agreement under Section 90K(1)(g) (raising the same technical issues that were confronted by the Full Court in *Black and Black*).

1.6 FLS **recommends** that this paragraph be repealed and (if thought necessary) a provision be inserted elsewhere to provide that a provision of a financial agreement which purports to split an unsplittable superannuation is

unenforceable but it does not otherwise affect the validity or binding nature of the agreement.

2. *Potential conflict between subsection 90K(3) and section 79 of the FLA*

2.1 Subsection 90K(3) provides that "*A court may, on an application by a person who was a party to the financial agreement that has been set aside, or by any other interested person, make such order or orders (including an order for the transfer of property) as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that financial agreement and any other interested persons".*

2.2 If a financial agreement is set aside then, on application, a court may make such orders "…*as it considers just and equitable*". This provision contrasts with orders made in property settlement proceedings set aside under subsection 79A(1) - which provides that a court may then, on application, vary or set aside a property settlement order and … "*make another order under section 79 in substitution for the orders so set aside"*

2.3. Subsection 90G(1)(d) of the FLA (which is not affected by the amendments in the Efficiency Bill) has the effect of restoring the jurisdiction of the court - which is removed pursuant to section 71A of the FLA where a financial agreement is binding on the parties - because when a financial agreement has been set aside by the court, it is no longer binding.

2.4. The lack of uniformity between subsection 90K(3) and section 79A leads to confusion about the jurisdiction which is to be exercised by the court. FLS believes that subsection 90K(3) should be worded in the same terms as subsection 79A(1) namely that if the court sets aside a financial agreement then the orders that it subsequently makes should rely on section 79, rather than some broad undefined equitable considerations.

2.5. FLS **recommends** that that subsection 90K(3) should be amended to be consistent with subsection 79A(1).

3. *Quantification of Maintenance*

3.1. Sections 90E and section 90F were inserted in the FLA to protect the revenue and to ensure that the value of any maintenance provision in a financial agreement is able to be taken into account in assessing eligibility for an income-tested pension, allowance or benefit.

3.2. Section 90E(b) provides that a provision in a financial agreement relating to maintenance is void unless it specifies "the amount provided for, or the value of the portion of the relevant property attributable to, the maintenance of the party…"

3.3. A major advantage of financial agreements is to enable spouse parties to achieve finality in respect of the arrangement of all aspects of their financial relationship including property settlement and spousal maintenance.

3.4. However the potential problem with section 90E(b) is that the value of the proportion of the relevant property may not be known or be able to be specified at the time the agreement is entered into. For example:

- A party may be to receive 70% of the proceeds of a house (of which 10% is attributable to maintenance) but the value of that benefit will not be known until the house is sold.
- A pre-nuptial agreement may apportion future superannuation benefits or property between the spouse parties in an agreed manner (part of which may include a provision for maintenance) but the value of that portion cannot be quantified until the agreement becomes operative on the breakdown of the relationship.

3.5. It is accordingly not possible in many cases to quantify "the value of the portion of the relevant property" until the occurrence of a subsequent event (although the value will then be able to be ascertained) and therefore to comply with section 90E(b) as presently drafted.

3.6. This gives rise to uncertainty as to the binding effect of the agreement in relation to that aspect of the parties' affairs and creates unnecessary potential for dispute.

3.7. The underlying policy objective is easily satisfied by calculating the value of the portion of the property attributable to maintenance at the appropriate time. It is unnecessary, and impractical, to require it to be quantified in the agreement itself provided that the agreement contains a mechanism by which it can be calculated.

3.8. FLS **recommends** that section 90E(b) be redrafted to read as follows:

> "(b) the amount provided for, or the value or the portion of the relevant property attributable to, the maintenance of the party, or of the child or each child, as the case may be."