

## CHAPTER 3

### KEY ISSUES

3.1 The committee received one submission from the Law Council of Australia. This submission was made on behalf of the Council's Family Law Section.

3.2 The submission focuses on the amendments proposed in Parts 1 and 2 of Schedule 5 designed to relax the technical requirements in relation to evidence that spouse parties have to provide when entering into financial agreements. While not part of the current inquiry's terms of reference, the submission also recommends consistency between the legal formalities required for binding financial agreements and child support agreements as well as the restructuring and renumbering of the Family Law Act.

3.3 As only one submission was received, this chapter focuses on proposed amendments to the Family Law Act in Schedule 5 of the Bill.

#### *Issues raised in Law Council's submission*

3.4 The submission states that the policy intent of the Bill related to the requirements for evidencing that legal advice has been sought by both parties to a financial agreement is not met by the amendments. The Law Council's submission contends that the way in which the amendments to sections 90G and 90J<sup>1</sup> of the Family Law Act have been drafted, dealing with what needs to be satisfied in order for financial agreements to be made and terminated, creates the potential for disputes to arise that have to be resolved by the Court. This is of course contrary to the intent of the provisions which are designed to allow parties to make agreements without having to use the Court.

3.5 The submission notes that Part VIIIA of the Family Law Act was introduced to allow parties to resolve property and maintenance issues by way of private agreement, providing for greater choice and a more efficient and less costly means of dispute resolution than resort to the Family Court. Prior to the introduction of these provisions, for agreements between parties to be binding they had to be approved by a Judge.<sup>2</sup>

3.6 Part VIIIA allows parties to agree and implement their own agreements and their termination without involving the Court. A key reason for requiring parties to evidence that they have received advice on the legal effect of the agreement before

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1 These amendments are mirrored in Part 2 of Schedule 5 of the Bill dealing with financial agreements between de facto couples and therefore the Law Council's comments in relation to Part 1 of Schedule 5 apply equally to the mirrored provisions in Part 2

2 Family Law Council of Australia, *Submission no. 1*, p.5.

concluding it is that it can only be set aside by the Court in limited circumstances. "The effect of a binding agreement is to extinguish the jurisdiction of the Court in relation to the subject matter of the agreement...".<sup>3</sup>

3.7 The submission endorses the requirement in sections 90G and 90J that before signing the agreement, a spouse party be provided with independent legal advice about the effects of the agreement on the rights of that party and supports the requirement for a legal practitioner to provide a signed statement confirming that the advice was provided to the party.

3.8 The submission states that the drafting of the amendments to sections 90G and 90J has been done in such a way that conflates the following elements:

1. The requirement for the legal advice to be given; and
2. The requirement that the statement of the legal practitioner be provided before the agreement is signed by the party.

3.9 The Law Council suggests that this gives rise to a potential dispute about the order in which the various steps occur and the possibility that the agreement can be found to be invalid 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.

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.<sup>4</sup>

3.10 Rather than relaxing the requirements in relation to evidence of independent legal advice when entering agreements or their termination, the submission states that the amendments add a new hurdle of the signed statement of advice having to be provided to the party before the agreement is signed by that party while the policy objective should be to have evidence that the advice has been given.<sup>5</sup>

3.11 The Attorney-General has responded to the committee by stating that the requirement to obtain a statement evidencing receipt of independent legal advice prior to the signature of an agreement ensures that parties will not be left in an uncertain situation about the binding nature of the agreement which has the potential to occur if it were open to spouse parties to obtain such a statement before, during or at the same time as signing the agreement. It provides a clear direction to spouse parties to obtain legal advice *before* signing an agreement.

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3 Law Council of Australia, *Submission No 1*, page 5.

4 Law Council of Australia, *Submission No 1*, page 5.

5 Law Council of Australia, *Submission No 1*, page 6.

3.12 The submission also raises issues related to the validity of existing agreements. Item 8 of schedule 5 is designed to ensure that the amendments related to financial agreements apply to agreements made on or after 27 December 2000. The submission states that the way in which the amendments are drafted means that they will have to conform to the requirements of the amending provisions.<sup>6</sup>

3.13 The Attorney-General has indicated that he has asked his Department to consider this issue.

3.14 The submission raises several other issues not strictly related to the inquiry's terms of reference but related to the Family Law Act.

3.15 The submission provides information on a number of areas that the Family Law Section of the Law Council believes will improve the operation of the Family Law Act and states that these have been raised with the Attorney-General. The submission advises that the Law Council has previously recommended that these issues be dealt with at the same time as the current amendments.<sup>7</sup>

3.16 The submission also recommends that the *Child Support (Assessment) Act 1989* be amended to ensure that the requirements for child support agreements are consistent with the amendments discussed above in relation to financial agreements in the Family Law Act.

3.17 As this Act is administered by the Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA), amendments to this Act are the responsibility of the Hon Jenny Macklin MP. The committee understands that officers in the Attorney-General's Department are liaising with officers of FAHCSIA to consider the Law Council's suggestion.

3.18 Restructuring and renumbering of the Family Law Act is also recommended by the Family Law Council on the basis that the Act is "so unwieldy as to be impenetrable even to trained lawyers".<sup>8</sup>

3.19 The Committee has previously recommended the renumbering of the Family Law Act in its report of August 2008 on the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 and has been advised by the Attorney-General that this is being considered in accordance with Government priorities and resources.

3.20 The committee looks forward to advice from the Attorney-General on matters raised in the Law Council's submission that are under consideration by the Government.

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6 Law Council of Australia, *Submission No 1*, page 6.

7 Law Council of Australia, *Submission No 1*, page 8.

8 Law Council of Australia, *Submission No 1*, page 8.

**Recommendation 1**

**3.21 The committee recommends that the Senate pass the Bill.**

**Senator Trish Crossin**

**Chair**