# Chapter 1

# Introduction

1.1 On 3 December 2014, pursuant to a recommendation of the Selection of Bills Committee, the Senate referred the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015 (the Bill) for inquiry and report by 24 February 2016.

## Conduct of the inquiry

1.2 In accordance with usual practice, details of the inquiry, including a link to the Bill and associated documents, were made available on the committee's website.

1.3 The committee invited submissions from a range of organisations. The committee received 19 submissions, listed at Appendix 1.

1.4 A public hearing was held in Canberra on Friday, 12 February 2016; the list of witnesses who gave evidence is at Appendix 2.

## References to the Hansard transcript

1.5 References to the committee Hansard are to the proof Hansard. Page numbers may vary between the proof and the official transcript.

## Report structure

1.6 Chapter 1 provides an overview of the Bill, and briefly outlines the history of amendments to financial agreement provisions.

1.7 Chapter 2 discusses key issues raised during the inquiry, the committee's views on these issues, and the committee's recommendations.

## Overview of the Bill

1.8 The Bill seeks to amend the *Family Law Act 1975* (the Act) across eighteen areas in order to:

> …improve the operation of the financial agreements regime, strengthen laws against international parental child abduction, improve the operation of the family law courts and...enhance protections for victims of family violence.[1]

1.9 In some of these eighteen areas, the proposed amendments are minor. In light of this, and the lack of evidence provided to the committee about some of the proposed amendments, not all of the proposed amendments are discussed in detail in this report.

## Binding financial agreements

1.10 The Bill proposes to amend Parts VIIIA and VIIIB of the Act, which provide for financial agreements relating to marriage and de facto relationships respectively.

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1 Senator the Hon Scott Ryan, Assistant Cabinet Secretary, *Senate Hansard*, 25 November 2015, p. 8969.

1.11 In relation to both marriage and de facto relationships, the Bill seeks to:

- set down objects and principles applying to Part VIIIA;
- amend the provision dealing with maintenance of a party, or child/ren;
- introduce new provisions for where a financial agreement will be binding;
- introduce new provisions dealing with the provision of legal advice in the context of a binding financial agreement;
- introduce new provisions setting out where courts declare a financial agreement or termination agreement to be binding;
- amend provisions dealing with the death of a party to a financial agreement;
- introduce provisions dealing with maintenance of a spouse who remarries or enters a de facto relationship;
- amend provisions dealing with termination of a financial agreement; and
- amend the circumstances in which a court can set aside a financial or termination agreement.

1.12 In relation to marriage, and the power of the court to set aside a financial or termination agreement, the Bill proposes that two different tests apply for determining whether there is hardship:

- for agreements entered into before a separation declaration is made, the test for hardship would be a 'material change in circumstances that relate to the care, welfare and development of the child of the marriage'.
- for agreements entered into at the same time as or after making a declaration of separation, the test for determining hardship would be 'circumstances of an "exceptional nature" that relate to the care, welfare and development of the child of the marriage'.[2]

1.13 The Explanatory Memorandum (EM) explains the reason behind these two proposed tests:

> The difference in tests reflects the possibility that, for agreements made prior to separation, a substantial period of time may have elapsed and the circumstances of the couple have changed in ways not contemplated by the original financial agreement. For example, a couple may have had a child since making the agreement whose needs may not be appropriately reflected in the agreement.
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> For agreements entered into at the time of or after separation, it is appropriate the test be set at a higher bar as the couple should be in a position to anticipate their future financial needs relating to children at the

2 Explanatory Memorandum (EM), p. 30.

> time of making the agreement. This amendment would also improve consistency between section 90K and section 79A of the Act (which provides for the setting aside of court orders altering property interests).[3]

1.14 The EM also notes that in financial agreements between de facto parties:

> A Part VIIIAB financial agreement can only deal with matters after the de facto relationship to which the agreement relates has broken down. This is because the operation of the provisions is confined by the specific terms of referred state powers that provide the Commonwealth with jurisdiction over de facto financial matters.[4]

1.15 These proposed amendments would have retrospective application.

## Background to Binding Financial Agreements

1.16 Provisions dealing with binding financial agreements (BFAs) have been amended a number of times over the past decade. BFAs were first introduced in 2000 as Part VIIIA of the Act.[5] Section 90G of Part VIIIA was then amended in 2003 to change the circumstances in which a financial agreement would be binding:

> The effect of these amendments was to reduce the number of matters on which advice was to be provided to the parties from four to two, and altered the nature of one of the remaining two matters. The requirements that a financial agreement contain a statement about the independent legal advice provided to the parties and that a certificate be attached, were retained.[6]

1.17 In a landmark 2008 case, the Family Court of Australia (FCA) held that strict procedural compliance was necessary in order for financial agreements to be binding.[7] The court stated:

> The Act permits parties to make an agreement which provides an amicable resolution to their financial matters in the event of separation. In providing a regime for parties to do so, the Act removes the jurisdiction of the court to determine the division of those matters covered by the agreement, as the court would otherwise be called upon to do so in the event of a disagreement. Care must be taken in interpreting any provision of the Act so that has the effect of ousting the jurisdiction of the court. The amendments to the legislation that introduced a regime whereby parties could agree to the ouster of the court's power to make property adjustment orders reversed a long held principle that such agreements were contrary to public policy…
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> Strict compliance with the statutory requirements is necessary to oust the court's jurisdiction to make adjustive orders under s 79.[8]

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3 EM, p. 30.

4 EM, p. 21.

5 See, *Family Law Amendment Act 2000*.

6 *Wallace v Stelzer & Anor* [2013] FamCAFC 199, 209.

7 *Black v Black* [2008] FamFCA 7.

1.18 In response to this case, the Act was again amended in 2009, with retrospective amendments to the BFA scheme. The FCA described the purpose of the amendments as:

> …to overcome the effect of the Full Court's decision in *Black v Black* (2008) FLC 93–357…[and to] provide additional protection for parties who enter into financial and termination agreements by enabling a court to declare, in enforcement proceedings, that an agreement is binding despite a failure to meet the procedural requirements relating to the making of the agreement if the court is satisfied that it would be unjust and inequitable if the agreement did not bind the spouse parties (disregarding any change in circumstances from the time the agreement was made)…[9]

1.19 The current regulation of BFAs can be summarised as follows:

> As a result of the amendments in the Amendment Act 2003 and the Efficiency Measures Amendment Act, there are effectively three forms of section 90G that apply to financial agreements depending on when the agreement was made. These are:
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> the first section 90G—applying to financial agreements made from 27 December 2000 to 13 January 2004
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> the second section 90G—applying to financial agreements made from 14 January 2004 to 3 January 2010, and
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> the current section 90G—applying to financial agreements made from 4 January 2010 to present. [10]

1.20 The EM argues that this is 'undesirable and unnecessarily complex. It has led to difficulty in interpreting section 90G and made it difficult for legal practitioners to advise their clients'. [11]

## Interaction between family law orders and family violence orders

1.21 The Act currently allows state or territory courts making a family violence order to revive, vary, discharge or suspend a parenting order, recovery order, injunction or other arrangement to the extent that they provide for a child to spend time with a person.[12] The Act restricts the power of the courts to make such orders where the court proceedings relate only to an interim family violence order, or interim variation of a family violence order.[13] Where a court revives, varies or suspends a parenting order or other arrangement under section 68R of the Act, that variation,

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8 *Black v Black* [2008] FamFCA 7, pp 503-504.

9 *Kostres v Kostres* (2009) FLC 93-420 at [165] in *Wallace v Stelzer & Anor* [2013] FamCAFC 199, 211.

10 EM, p. 13.

11 EM, p. 13.

12 *Family Law Act 1975*, s 68R(1).

13 *Family Law Act 1975*, s 68T.

revival or suspension will cease after 21 days have expired, and the parenting order, injunction or arrangement will be revived. As the EM states:

> The existing strict 21 day time limit can result in inconsistent orders about parent-child contact. For example, if a party is unable to have their parenting matter heard in the family courts within 21 days, the parenting order that was varied or suspended by the state or territory court is revived. This can result in two valid, yet inconsistent, orders—an interim family violence order prohibiting or limiting the other party's contact with a child, and a parenting order providing for the party's contact with the child. This outcome has the potential to put children and their carers at risk of further family violence.[14]

1.22 The Bill seeks to address this issue by removing the 21 day time limit and instead providing that the court's revival, variation or suspension under section 68R will cease at the earliest of:

- when the interim family violence order ceases;
- when the time specified in the interim family violence order as the time at which the variation, revival or suspension will cease; or
- the time at which the order, injunction or arrangement is affected by an order made by the court after the revival, variation or suspension.

1.23 As the EM states,

> This would mean that any revival, variation or suspension of an Order would always cease upon the expiration of the interim protection order, but judicial officers would have the flexibility to determine timeframes and relist matters to manage cases according to their particular circumstances.[15]

1.24 In his second reading speech, the Minister stated:

> Measures in this Bill will enable state or territory courts making an interim family violence protection order to suspend or vary existing parenting orders until either a time specified by the court, or another court order is made. Currently, such suspension or variation expires after 21 days. This has the potential to put at renewed risk those who have been affected by family violence.
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> This amendment represents the first step in responding to the recommendations of the Family Law Council's Interim report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems and is consistent with a similar recommendation made by Victorian State Coroner, Judge Ian L Gray, in the inquest into the death of Luke Batty.
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> Other measures in this Bill will strengthen courts' powers to dismiss applications that are unfounded, an abuse of process, frivolous or vexatious.

14 EM, p. 33.

15 EM, p. 33.

> This will assist in ensuring that the family law system is not used as a mechanism to perpetuate abuse.[16]

## Explanation of certain orders to children

1.25 The Bill also seeks to amend the sections of the Act which deal with the interaction between 'family violence orders', and certain orders, injunctions or arrangements which can be made under the Act. The term 'family violence orders' is a broad one describing the violence protection orders available in each state and territory.[17]

1.26 Section 68P of the Act currently states that where the court is making an order or granting an injunction under the Act which will be inconsistent with an existing family violence order, the court must 'explain (or arrange for someone else to explain) the order or injunction' to the applicant, respondent, person against whom the family violence order is directed, and the person protected by that order.[18] The Bill seeks to amend this requirement. As outlined in the EM:

> In practice it can be difficult for the court to comply with the requirements of subparagraph 68P(2)(c)(iii) and paragraph 68P(2)(d) where the person protected is (or includes) a child. For instance, young children covered by the order or injunction, such as infants and toddlers, are unlikely to be able to grasp the concepts to be conveyed in the explanations. For older children it may not be in their best interest, and indeed may be distressing, to be exposed to the parental controversy to the extent necessary to comply with the requirements.
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> To address this, Item 13 would insert new subsections (2A), (2B) and (2C) into section 68P. New subsection 68P(2A) would specify that the court is not required to provide the explanation mandated by subparagraph 68P(2)(c)(iii) to a child if the court is satisfied that:
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> - the child is too young to understand an explanation of the order or injunction, or
> - it is in the child's best interests not to receive an explanation of the order or injunction.[19]

1.27 The Bill also seeks to alter the requirement for a court to give a detailed explanation of the order or injunction meaning that the court is not required to include a particular matter otherwise required if the court is satisfied that the child is too

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16 Senator the Hon Scott Ryan, Assistant Cabinet Secretary, *Senate Hansard*, 25 November 2015, p. 8969.

17 Family Court of Australia, Family Law Matters, 19 January 2015, http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-violence/family-violence-orders/family-violence-orders (accessed 18 February 2016).

18 *Family Law Act 1975*, s 68P(2)(c).

19 EM, p. 36.

young to understand the matter, or it is in the child's best interests for the matter not to be included.[20]

## Summary dismissal of applications

1.28 The Bill seeks to amend the powers of courts under the Act by allowing them to summarily dismiss applications in which a party has no reasonable prospects of either successfully prosecuting or defending the proceedings or part thereof. The EM states that:

> This amendment would improve outcomes for victims of family violence by strengthening the court's powers to dismiss proceedings where people are using the legal system as a tool of victimisation. It would also improve court efficiency by providing greater clarity on when applications can be dismissed by the court.[21]

## Retaining a child overseas

1.29 The Act currently establishes an offence relating to the removal of a child from Australia to a place outside Australia in certain circumstances. This offence is only enlivened where a parenting order is in place and provides that a child is to live with a person, spend time with a person, or communicate with a person, or that a person is to have responsibility for a child.[22] Where such a parenting order is in force, a person who was a party to those proceedings, or a person who is acting on behalf of or at the request of a party, must not take or send the child concerned from Australia to a place outside Australia, except in certain circumstances.[23] Such a person is, however, permitted to take or send the child concerned outside of Australia where they have written consent from each person in whose favour the order referred, or if the act was done in accordance with an order of a court made at the time of, or after, the making of the relevant parenting order.[24]

1.30 Where proceedings in a parenting order are pending, or an appeal has been made, section 65Y would not apply.[25] Section 65Z would apply instead, although the content of section 65Z is identical to that of section 65Y (in terms of the offence, instances where no offence will have been committed, and the penalty).

1.31 The Act does not currently cover situations where a child has been taken or sent from Australia lawfully, but is not returned to Australia when required. As the EM states, it is not currently an offence under section 65Y to retain a child beyond the expiry of a court order or consent in writing from the other party to the order.[26] The

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20 EM, p. 36.

21 EM, p. 38.

22 *Family Law Act 1975*, s 65X.

23 *Family Law Act 1975*, s 65Y(1).

24 *Family Law Act 1975*, s 65Y(2).

25 *Family Law Act 1975*, s 65X(2).

26 EM, p. 46.

Bill seeks to introduce new offences to cover this situation, 'intended to ensure that parental abduction of a child to another country is a punishable offence, regardless of whether or not the person initially removed the child from Australia lawfully'.[27] The EM states:

> The gravity of the effects of wrongful retention on a child's wellbeing, irrespective of who commits the offence or in which country the child is retained, can be devastating and long-lasting. The new offences are intended to be a deterrent to the wrongful retention of a child and apply to any person (regardless of whether they have Australian citizenship or residency) who wrongfully retains a child, irrespective of whether there is an equivalent offence in the law of the local jurisdiction where the child is being retained.[28]

1.32 The Bill also seeks to empower the court to make 'location orders', which would require a person to provide the court with information that the person has or obtains about a child's location. According to the EM, the proposed provision:

> …clarifies that 'a person' includes a person appointed as the Central Authority (CA) for the Commonwealth, a State or a Territory for the purposes of Article 6 of the Child Abduction Convention. This will assist the CAs in fulfilling their obligations under Article 7(a) of the Child Abduction Convention to discover the whereabouts of a child who has been wrongfully removed or retained.
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> Existing subsection 67K(2) allows a person to apply to a court for a location order for the purposes of the Child Protection Convention but there is no similar mechanism available for the Child Abduction Convention. This amendment will overcome that deficiency.
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> While the CAs already have access to location orders for the purposes of the Child Protection Convention, they currently have limited mechanisms available to them to obtain information from entities and individuals within Australia that could be used to assist in locating children wrongfully removed from, or retained outside Australia. By providing the CAs with the ability to apply for location orders for the purposes of the Child Abduction Convention the CAs would be able to access information that may significantly improve their ability to locate children abducted from Australia, both to convention and non-convention countries.[29]

## Comments by the Scrutiny of Bills Committee

1.33 In *Alert Digest No. 14 of 2015*, the Senate Scrutiny of Bills Committee noted concerns about:

- the retrospective application of proposed amendments dealing with financial agreements and spousal or child maintenance;

27 EM, p. 46.

28 EM, p. 48.

29 EM, p. 49.

- the potential for proposed amendments dealing with financial agreement or termination agreement court orders to be applied retrospectively; and
- the potential for parties to suffer detriment due to the application of amendments to offers of settlement which were made prior to the law commencing.

1.34 The Senate Scrutiny of Bills Committee sought the advice of the Attorney-General with regards to these concerns. The Attorney-General advised that:

- the retrospective application of amendments dealing with financial agreements and spousal or child maintenance were unlikely to negatively affect parties to existing financial agreements which had been made in good faith; and
- the retrospective application of amendments dealing with the disclosure of an offer of settlement are unlikely to have a practical effect on parties to existing cases because under existing law the disclosure of an offer of settlement does not disqualify a judge from sitting, and because disclosure is already made where a court considers costs.[30]

## Comments by the Parliamentary Joint Committee on Human Rights

1.35 The Parliamentary Joint Committee on Human Rights stated that the proposed amendments to the courts' ability to set aside a financial agreement made by couples during or after separation, may limit the courts' ability to act in the best interests of the children of that couple. The *Convention on the Rights of the Child* requires that judicial decisions must consider the best interests of the child as a primary consideration, and this requirement is not reflected in either Part VIIIA or Part VIIIAB of the Bill.[31]

30 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2016*, 3 February 2016, Response provided by Attorney-General The Hon. George Brandis, p. 2.

31 Parliamentary Joint Committee on Human Rights, *Thirty-third report of the 44th Parliament*, 2 February 2016, pp 4-5.