

Dissenting Report from the Australian Labor Party

Overview

1.1 This Bill seeks to amend the *Family Law Act 1975* (FLA) in a number of respects. It attempts to provide greater certainty for couples who have entered into binding financial agreements (BFAs) and claims to enable the courts to offer better protection to victims of family violence.

Introduction

1.2 Labor Senators have significant concerns about some of the amendments included in the Bill and therefore cannot support it in its current form.

Schedule 1 - Binding Financial Agreements

1.3 The first schedule attempts to add certainty to couples who attempt to resolve their financial affairs by entering into a binding financial agreement (BFA). In essence, the amendments being proposed will make it harder to challenge the validity of these agreements, by measures including:

- Adding the ability to waive spousal maintenance by including a ‘nil’ amount. This will apply retrospectively to existing agreements.
- The level of legal advice required before entering a financial agreement has been watered down, reducing the obligation on legal practitioners.
- Spousal maintenance payable under an agreement will cease on the death of a party to the agreement.
- Spousal maintenance payable under an agreement will cease on the party receiving the maintenance entering into a de facto relationship or re-marrying.
- The amendments include the ability to make a claim for overpayments of spousal maintenance.

1.4 The exposure draft of the BFA amendments, released in April 2015, received seven submissions. Six of those submissions were from lawyers or lawyer associations. The seventh submission was from Professor Parkinson from the University of Sydney.

Requirement for Legal Advice

1.5 Two of the submissions received on the exposure draft objected to the watering down of the legal advice required before entering into a BFA. The Law Institute of Victoria was concerned that lawyers would not advise their clients whether the agreement was to their advantage or not and that may prejudice the financially weaker party to the agreement. Professor Parkinson was concerned that limiting the advice to only the effect of the agreement on his or her legal rights under the Act would not be sufficient.

1.6 The Women's Legal Service Queensland (WLSQ) in their submission to the Committee objected to the watering down of legal advice requirements saying that it would lessen the clarity around the nature of the legal advice and protection for vulnerable parties.¹

1.7 In evidence at the public hearing, Mr Doolan from the Law Council of Australia said that lawyers had been declining to give advice to their clients on BFAs. He said that he considered one of the greatest benefits to flow from the Bill was that it would remove uncertainty surrounding BFAs and encourage many lawyers to again offer professional services in this area.

1.8 The Attorney-General's Department in their evidence to the committee suggested that people were not entering into BFAs because of the technical approach taken by the courts in interpreting the legislation which, in turn, was keeping people in the family law system.²

1.9 Labor Senators believe that contracting out of the protections contained in the FLA is a step that should be taken only when fully informed of legal rights, advantages and disadvantages of entering into the BFA. Legal advice, particularly for vulnerable parties, should not be watered down.

Spousal Maintenance Provisions

1.10 The Bill amends the provisions in the FLA that allow spousal maintenance to be included in a BFA. In particular:-

- Including the ability to have a 'nil' value for spousal maintenance included in an agreement;
- Cessation of spousal maintenance on the death of the payer or when the payee re-marries or enters into a de facto relationship;
- Allowing for claims to be made to recover over-payments of spousal maintenance if the payee has entered into a new relationship or remarried without the knowledge of the payer.

1.11 These provisions were much criticised in the evidence given at the public hearing before the Committee. The WLSQ did not believe that the amendments proposed have taken account of the dynamics of family violence and particularly the attractiveness of BFAs to financially abuse victims.³ The Australian Women Against Violence Alliance (AWAVA) agreed with the WLSQ submission and added that the legislation assumes equal contracting parties but for a very large number of women their choices are interwoven with their need to limit the risk of harm to themselves and their children by appeasing their partner.⁴

1 Women's Legal Service Queensland (WLSQ), *Submission 3*, p. 7.

2 Mr Greg Manning, Attorney-General's Department (AGD), *Committee Hansard*, 12 February 2016, pp 39-40.

3 WLSQ, *Submission 3*, p. 2.

4 Ms Merrindahl Andrew, AWAVA, *Committee Hansard*, 12 February 2016, p. 15.

1.12 The provision allowing for cessation of spousal maintenance on the commencement of a de facto relationship had been criticised by submitters to the exposure draft to the BFA provisions. The Law Institute of Victoria, HHG Legal Group and the Family Law Section of the Law Council in their submissions all expressed concern about the difficulty of establishing when a de facto relationship may have commenced.

1.13 Mr Doolan from the Law Council of Australia in his evidence to the Committee said that establishing when a de facto relationship starts or ends is probably the most difficult family law legal question.⁵

1.14 Labor Senators believe that rather than keeping parties to BFAs out of the family law system, there is real potential for these amendments to create more litigation.

1.15 Spousal maintenance as part of a BFA forms part of the whole bargain between the parties and is often contemplated as being part of the division of assets upon separation. As the WLSQ say in their submission, 'a house may be transferred to the wife and 10% of its value be attributed to spousal maintenance. The reason for this is to decrease the likelihood of a later spousal maintenance claim being made'.⁶

1.16 Labor Senators are of the view that these amendments will have perverse consequences for women and particularly victims of family violence.

Family Violence and BFAs

1.17 The WLSQ expressed their concern that the current provisions for setting aside BFAs do not adequately protect a victim of family violence who has entered into a BFA after 'years of conditioning and living with violence'.⁷ The Attorney-General's Department in its submission to the committee asserted that 'where serious family violence surrounded the making of a financial agreement the agreement could be set aside on one of the existing statutory grounds'.⁸ The Department cited as an example *Saintclair v Saintclair* [2015] FAMCAFC 245 and said that 'if a party established that she was not exercising her free will in making the agreement (for reasons such as family violence), then the agreement could be set aside on the basis of undue influence'.⁹ However, in that case, the trial judge actually found that the relationship was very volatile and on two occasions there was physical violence. The agreement was signed within five months of the second family violence incident occurring. Although the trial judge at first instance set the BFA aside on the grounds of undue influence and unconscionability, the Full Court of the Family Court overturned that decision and held:

5 Mr Paul Doolan, Law Council of Australia (LCA), *Committee Hansard*, 12 February 2016, p. 24.

6 WLSQ, *Submission 3*, p. 8.

7 Ms Angela Lynch, WLSQ, *Committee Hansard*, 12 February 2016, p. 10.

8 AGD, *Submission 20*, p. 7.

9 AGD, *Submission 20*, p. 7.

In our view, the evidence before her Honour fell a long way short of establishing that the wife was 'incapable of making a judgment as to ... her own interests' or that she was suffering from any condition, disability or circumstance which "affect[ed] [her] ability to conserve [her] own interests."¹⁰

1.18 The factual circumstance of the case cited by the Department is in fact, the type of scenario contemplated by the WLSQ in their submission and seems to underscore their concerns.

Schedule 2 – Other Measures

State and Territory courts varying parenting orders (section 68T)

1.19 Although there is widespread support for this amendment to the Act, state courts from South Australia and Victoria giving evidence to the Committee expressed their concern about the possibility of this amendment causing an extra workload in their courts and the difficulties in exchanging information between the state and federal jurisdictions.

Summary decrees (section 45A)

1.20 Evidence was given to the Committee from both the WLSQ and the AWAVA that this amendment may have unintended consequences.

1.21 The WLSQ said to the Committee:

...we have serious concerns that this provision will not achieve its policy objective and will, in fact, lead to injustice and be used against victims of violence. Again, 90 per cent of our clients who are victims of violence and are acting for themselves in court do not have paperwork of a high standard and can present badly because of fear and trauma.¹¹

1.22 The AWAVA had similar concerns:

I can speak more generally about the evidence that we now have about the cognitive, emotional and functional effects of being traumatised and how they permeate every aspect of a person's life, especially in cases where someone is trying to take steps to extricate themselves from a control and abuse situation.¹²

1.23 Although the Explanatory Memorandum asserts that this amendment will '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',¹³ Labor Senators believe the concerns of frontline service providers should not be taken lightly.

10 *Saintclair v Saintclair* [2015] FAMCAFC 245, [68].

11 Ms Lynch, WLSQ, *Committee Hansard*, 12 February 2016, p. 10.

12 Ms Andrew, AWAVA, *Committee Hansard*, 12 February 2016, p. 17.

13 Explanatory Memorandum (EM), p. 38.

New offence of retaining a child overseas (section 65YA)

1.24 The evidence of the Commonwealth Director of Public Prosecutions (CDPP) to the Committee identified a potential problem with this proposed amendment. The new offences have a specified geographical jurisdiction contained within the legislation but the current offences relating to taking a child overseas do not. As Mr Adsett from the CDPP explained to the Committee:

...if the existing offences are used – and they are from time to time used in prosecutions – there is an argument that parliament’s silence on this meant that there must be some intention to restrict the geographical application of the existing offences.¹⁴

1.25 Labor Senators believe that this omission from the amendments should be corrected in the Bill.

Conclusion

1.26 Labor Senators have significant concerns that Schedule 1 of this Bill will impact adversely on women, particularly those who are victims of family violence. It is important that adequate protections remain a feature of the legislation when the object of these provisions is to allow a person to oust the jurisdiction of the family courts.

1.27 Whilst some of the measures in Schedule 1 are intended to encourage people to enter into BFAs, thereby relieving pressures on the court, other measures in the Bill may actually cause more litigation, creating further stresses on court resources.

1.28 Some of the amendments contained in Schedule 2 to the Bill are also of concern to Labor Senators. It appears from the evidence given to the Committee that prior to the drafting of the Bill there had been no direct consultation with family violence advocates or frontline service providers. The amendments which are purported to assist victims of family violence, may well have been drafted differently if that consultation had occurred.

Recommendation 1

1.29 Labor Senators recommend that Schedule 1 be excised from the Bill.

Recommendation 2

1.30 Labor Senators recommend that consideration be given to the recommendation from the Women's Legal Service Queensland (WLSQ) that 'a better balance be obtained in the legislation between contractual certainties on the one hand and upholding principles of justice, equity and the protection of the vulnerable on the other, particularly protecting victims of family violence from ongoing financial abuse and harm'.

14 Mr David Adsett, CDPP, *Committee Hansard*, 12 February 2016, p. 30.

Recommendation 3

1.31 Labor Senators recommend that Item 15 (new section 45A for summary decrees) be deleted from Schedule 2 of the Bill.

Recommendation 4

1.32 Labor Senators recommend that the amendment to create the new offence of retaining a child overseas be amended to correct the omission that the current offence of taking a child overseas does not have a specified geographical jurisdiction.

**Senator Jacinta Collins
Deputy Chair**

Senator Catryna Bilyk