

Women's Legal Service Queensland
Submission on the
FAMILY LAW AMENDMENT (FINANCIAL AGREEMENTS AND OTHER MEASURES) BILL 2015

Introduction

The Women's Legal Service Queensland (WLSQ) is a community legal centre that provides Queensland wide specialist legal information, advice and representation to women in matters involving domestic violence, family law and child protection. We also employ allied domestic violence social workers who assist clients to obtain a holistic response from our service. We offer a range of services including domestic violence duty lawyer services at Holland Park, Caboolture and Ipswich, family law advice at two family relationships centres at Logan and Mt Gravatt and outreach to the Brisbane Women's Correctional Centre. We also employ a specialist rural, regional and remote lawyer who operates a RRR telephone line one day per week. WLSQ has been in existence for 31 years. In 2014/15 we assisted 3700 clients.

In addition to these services, we also provide community legal education on topics including domestic violence and family law to community workers in metropolitan Brisbane and, with the assistance of corporate grants and charitable trusts, to workers in rural and regional Queensland. In 2015, WLSQ provided education forums and client clinics in Mt Isa, Bundaberg, Hervey Bay, Rockhampton and St George.

We thank the committee for the opportunity to provide feedback on the *Family Law Amendment (Financial Agreements and other Measures) Bill 2015*.

In relation to the specific amendments contained in the bill we make the following comments.

Binding Financial Agreements (BFAS)

Overall concerns

WLSQ recognises that adults can and should be able to enter into agreements and contracts as they see fit, if they are satisfied about their rights including their right to obtain legal advice and there is full disclosure. We are aware that many women, especially those who are entering into relationships for the 2nd or 3rd time want to enter binding financial agreements with their new partner in an attempt to protect their assets, especially for their children. These are generally in fairly equal bargaining positions with their new partners. They are not the clients of WLSQ.

WLSQ therefore supports the upholding of binding financial agreements in circumstances where:

- The parties have an equal or fairly equal bargaining position;
- The parties obtain independent legal advice;
- The parties are able to negotiate around terms and conditions;
- There has been full disclosure and the parties are fully aware of their rights and risks;
- There are hardship provisions that can be accessed to avoid injustice, including if the person was a victim of family violence.

Our clients who seek advice about property settlements and binding financial agreements are generally vulnerable – financially and in other ways, can be victims of family violence and there are usually clear power differentials between the two parties.

Overall, WLSQ is concerned that these proposed changes:-

- have not appropriately taken into account the issues for vulnerable people, particularly women or
- appropriately protected their interests;
- give precedence to commercial contractual principles over the principles of justice and equity; and
- have failed to take into account the dynamics of family violence and how bfas can be used as a tool of financial abuse against victims of violence.

We are experts in relation to family violence and the law and the use of power and control tactics by perpetrator. We are particularly aware of how perpetrators can use the legal system to exert ongoing control and domination to exploit their victims.

There is little doubt, in our opinion these proposed changes will make bfas an even more attractive option for use by perpetrators of violence and will be a particularly useful tool to financially exploit vulnerable women. Our practice knowledge tells us that bfas are particularly used against culturally and linguistically diverse women, who have limited or no English, little understanding of their legal rights, have limited support and no understanding of the Australian legal system or laws.

Unfortunately, we believe the proposed legislation requires a rethink.

Recommendation 1

That the proposed legislation be reconsidered in light of its impact on vulnerable women, especially those who have experienced family violence and/or are victims of financial abuse.

CEDAW

We note the explanatory memorandum fails to consider the impact of the proposed legislation on Australia's obligations under the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). This seems to be a clear oversight. *CEDAW Committee General Recommendation No 19 (General Comment No 19)* makes clear that gender-based violence is a form of discrimination within Article 1 of CEDAW¹ and Article 2 of CEDAW obliges state parties to legislate to prohibit all discrimination against women. Such violence is a violation of the rights to life, to equality, to liberty and security of person, to the highest standard attainable of physical and mental health, to just and favourable conditions of work and not to be subjected to torture and other cruel, inhuman, or degrading treatment or punishment.²

Recommendation 2

That the Explanatory Memorandum be amended to include an explanation about how all aspects of the legislation (but especially those provisions relating to binding financial agreements) comply with the Convention of the Elimination of Discrimination against Women, in particular rights in relation to the protection from gender based violence.

¹ CEDAW Committee, *General Recommendation No. 19: Violence against Women*, UN Doc A/47/38 (1992), para 7.

² *CEDAW Committee General Comment No 19*, para 7. See also: *International Covenant on Civil and Political Rights (ICCPR)* ratified by Australia on 13 August 1980, Articles 2, 3, 7 and 26; *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, ratified by Australia on 10 December 1975, Articles 3 and 10.

Strict compliance with procedural issues

The current legal requirement for strict compliance with entering bfas, protects our clients to some extent and can allow the agreements to be set aside in certain circumstances. Therefore, allowing some women the opportunity to access the justice and equity provisions of property division under the Family Law Act.

We are concerned that Section 90GB (1) (b) will allow an order for validity of a bfa to be made when all the relevant conditions of Section 90GA for the agreement to be binding are not met. This waters down the protections for vulnerable parties. Because parties are basically being allowed to contract out of the justice and equity provisions contained within the Family Law Act, we believe it is only right, proper and equitable that strict procedural compliance be adhered when entering into a bfa.

There is also no certainty about full disclosure having being made or that the agreements are just and equitable.

In addition, we believe that strict compliance with process is appropriate especially when the hardship provisions for setting aside agreements are so narrowly defined.

Case example

WLSQ provided advice to a woman from a non-English speaking background who had married an Australian businessman with numerous and significant properties. He had sponsored her to Australia and she had worked for years unpaid in his business and also in the house. There was a 20 year age difference. She was unaware of his full name and had signed a bfa. He would not provide a copy of the bfa for her or her advisers to consider. She said she had received legal advice over the telephone but not in person before signing the bfa. She was unaware of his full legal name (only knowing him by his nickname) and not surprisingly she was also unaware of the asset pool or whether full disclosure had been made.

Recommendation 3

WLSQ does not support the proposed changes in relation to binding financial agreements (bfas) and recommends 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.

Hardship, disclosure and just and equitable outcomes?

We note that the bill proposes the adoption of a dual approach to the setting aside of agreements in circumstances of hardship, distinguishing between agreements entered prior to relationship breakdown and those entered after relationship breakdown. The proposed new laws would make it more difficult to set aside a bfa entered into post separation. See Explanatory Memorandum paragraph 142 and 143 that explains:

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.

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 time of making the agreement. This amendment would also improve consistency between section 90

K and section 79 A of the Act (which provides for the setting aside of court orders altering property interests).

Consistency in legislation is important. It is interesting however, that the bill seems to pick and choose when it is consistent and when it is not between legislation covering bfas and the property division under the Family Law Act.

In our opinion, consistency could also be improved by:-

- stricter requirements about disclosure before entering bfas,
- requiring bfas to be just and equitable; and
- for the hardship provisions to be extended to cover situations more consistent with S. 79 (A) eg. That bfas be able to be set aside in cases of serious injustice.

The existence of “hardship provisions” promote the entering of fair and just agreements. As the explanatory memorandum itself argues – *it can be difficult for parties to anticipate their future financial needs especially at the beginning of a relationship substantial period of time may have elapsed and the circumstances of the couple may have changed in ways not contemplated by the original financial agreement.* Despite the government’s own words the hardship provisions in bfas are narrowly defined and now these amendments seek to make it even more difficult to establish hardship in cases post separation. Why wouldn’t the government want to promote the making of fair and just agreements, especially when it is for the benefit of vulnerable women?

Recommendation 4

WLSQ agrees that consistency between the property division provisions of the Family Law Act and provisions regarding bfas are important and in particular, that consistency could be improved by:-

- **stricter requirements about disclosure before entering bfas;**
- **requiring bfas to be just and equitable; and**
- **for the hardship provisions in bfas to be extended to cover situations more consistent with S. 79 (A) of the Family Law Act. Eg. That bfas be able to be set aside in cases of serious injustice.**

Recommendation 5

WLSQ does not support the proposed amendment to S. 90K to make it more difficult to set aside bfas post-separation, until consistency is improved in relation to the matters set out in Recommendation 4 above.

Hardship provisions - What about family violence?

It is common for perpetrators of family violence to be charming at the beginning of a relationship and ‘sweep women off their feet’ by their romantic gestures, attention and caring nature. When the perpetrator has assessed that he has control of her for example, when she becomes pregnant or when they get married, when they enter a bfa then for many women his true nature is revealed. That is, she becomes aware or gains insight into extent of his violent, dominating and controlling character.

Although these new proposed amendments give a lot of time and thought to increasing the binding nature of financial agreements, little thought has been given to the protection of victims of family violence, despite the prevalence of family violence in the Australian community and its prevalence in the family law system. We now know:

- Four out of ten women have experienced at least one incident of violence since the age of 15.³
- Financial abuse within family violence relationships is common.
*"Although there is no exact measure, research indicates that financial abuse in intimate relationships is widespread and common. It is known that a majority of women (between 80 – 90 %) seeking support for domestic and family violence have experienced financial abuse....it has been conservatively estimated that around two million Australian women have been financial abused."*⁴
- Family violence is prevalent in the family law system.
*"It is also important to note that cases involving allegations of family violence and child abuse comprised the majority of parenting matters that came before the family courts even before the 2006 amendments, reflecting the prevalence of domestic and family violence and safety concerns in the population of separated parents. Two studies by AIFS show consistent levels of these issues among two annual cohorts of separated parents, suggesting pre-separation violence is experienced by just over 60% of parents".*⁵
For many separated parents the violence extended well beyond the post-separation period with 45% reporting violence before/ during and since separation.⁶
The families with the most complex issues to resolve in parenting matters are high users of formal legal mechanisms for example, over 25% of parents who reported physical violence used FDR, 40% use lawyers and more than 50% use the family courts.⁷
- Family Violence is significantly under reported.
The extent of violence in the family law system is significantly under reported with 29% of parents reporting they never were asked about family violence or safety concerns.⁸
- Family and domestic violence, homelessness and women's poverty
Family and domestic violence is the single largest driver towards women's homelessness in Australia and when women are forced to leave their homes they inevitably become poorer and their housing conditions deteriorateTherefore it is important to highlight that violence is a strong push factor which significantly contributes to women and children becoming homeless and subsequently forced into poverty.⁹

³ Australians National Research Organisation for Women's Safety, October 2015, *Violence against women: Additional analysis on the Australian Bureau of Statistics Personal Safety Survey 2012*, Alexandria, NSW.

⁴ See Relationships and Money: Women talk about Financial Abuse, Research Report WIRE Women's Information 2014.

⁵ See Family Law Council Interim Report to the Attorney-General *In response the first two terms of reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, June 2015. P.4.

⁶ Australian Institute of Family Studies, Evaluation of the 2012 family violence amendments, Synthesis report p.18

⁷ Ibid. p. 17

⁸

<http://www.thewomenscentre.org.au/assets/files/factsheets/Fact%20Sheet%20Women%20Violence%20Homelessness%20and%20Poverty.pdf>

⁹<http://www.thewomenscentre.org.au/assets/files/factsheets/Fact%20Sheet%20Women%20Violence%20Homelessness%20and%20Poverty.pdf>

“Domestic violence directly affects women’s financial security in key areas of life: debts, bills and banking, accommodation, legal issues, health, transport, migration, employment, social security and child support.”¹⁰

“Women affected by domestic violence are also more likely to have a disrupted work history and are more likely to occupy casual and part-time work than women with no experience of violence. In short, women escaping and experiencing domestic violence are often the most disadvantaged and vulnerable in the labour market”.¹¹

- Domestic violence and property settlements

“Abused women are at a distinct disadvantage when negotiating property settlement, whether or not they access legal assistance. However, pursuing settlement through the legal system does result in a more equitable result.”¹²

Victims of family violence are 3 times more likely to receive a minority share of the assets of the relationship.¹³

The research confirms strong support for Sheehan and Smyth’s (2000) finding that *“a party’s experience of violence puts them at a disadvantage when dividing the matrimonial property”*.¹⁴

- The division of property after separation can go some way to redressing economic disadvantage of victims of violence after separation.

“A transfer of resources, property or income (where available) may go some way to help balance the living standards of the parties after separation.”¹⁵

Section 90K (circumstances in which bfas and termination agreements can be set aside) makes no provision for the setting aside an agreement in circumstances where a woman may have endured family violence in a relationship.

So, a woman can enter into a bfa, all the procedural requirements are met, she might not know he is violent or the extent of his violent nature, but then endure years of horrific violence. However, this would not be taken into account in the property division, as it probably would not be contemplated by the agreement and there is no provision allowing the setting aside of the agreement on these grounds.

There are also specific requirements under the proposed Section 90GB (when a court declares financial agreements or termination agreements to be binding) that the court disregard any changes in circumstances, from the time the agreement was made. This requires the court to specifically disregard any violence experienced the relationship.

¹⁰

http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/DVAustralia#_Toc309798394

¹¹ Ibid.

¹² Key Finding from *Battle Scars: the Long-term Effects of Prior Domestic Violence*, Dr Illsa Evans, Centre for Women’s Studies and Gender Research, Monash University, 2007

¹³ Key finding from *Stepping Stones: Legal Barriers to Economic Equality after Family Violence*, Women’s Legal Service Victoria, 2015.

¹⁴ Fehlberg B and Millward C “Family Violence and financial outcomes after parental separation” in *Families, Policy and the law* p. 235.

¹⁵ G Sheehan and J Hughes, *Division of Matrimonial Property in Australia*, Research Paper 25 (Australian Institute of Family Studies) 2001.

Is this fair and equitable and consistent with the government's strong public stance policy on making family violence a priority and protecting victims of family violence from ongoing violence and abuse? The evidence is clear that family violence entrenches women in poverty and these provisions, unfortunately facilitate this.

Recommendation 6

That consistent with the government's strong policy and stance against family violence, and given the strong connection between family violence and the poverty of victims, Section 90 L be amended to allow the setting aside of agreements in circumstances where there was family violence and allows the victim access to a property settlement in accordance with Section 79 of the Family Law Act.

Recommendation 7

That funding of women's legal services, community legal centres and legal aid be increased to allow victims of family violence to access legal advice, assistance and representation for property settlement claims.

Legal advice – Section 90 GA

WLSQ does not support the watering down of the legal advice requirements as this lessens clarity around the nature of the legal advice that is being sought and protection for vulnerable parties. It also encourages solicitor to adopt a simplistic or "lowest common denominator" approach. We support the current arrangement for the parties to be provided with advice about the effects of the agreement on their rights and the advantages and disadvantages to the party of making the agreement. In addition, we believe that the advice should be given, as much as practicable in a face to face manner, be written and communicated in way the client understands. We believe that the party relying on the agreement should be required to provide a copy of the agreement to the other party within a specified time frame after formal request, enabling them to obtain legal advice about the validity of the agreement. This would promote negotiation and avoid unnecessary court applications.

The specific requirement contained within Section 90 GA (5) that a court not consider whether the legal advice as outlined in Section 90 GA was actually provided, in determining whether a bfa is binding, is overly restrictive and against notions of an independent, open and accountable legal system. A court should be able to determine all relevant evidence to assist its decision making and should not be limited in this role by parliament.

Recommendation 8

That the legal advice provisions contained in Section 90 GA not be adopted and the current law remains in force that requires legal advisers to advise (1) about the effect of the agreement on the rights of that party and (2) the advantages and disadvantages, at the time the advice was provided, to that party of making the agreement.

Recommendation 9

That this legal advice should be provided, as far as practicable in a face to face manner to allow for appropriate assessment of vulnerability, that the legal advice be provided in writing and communicated in a way that is understandable to the client and that the party who is relying on the agreement provide a copy of the agreement to the other party within a specific time frame after formal request, and consideration be given to that party losing their ability to rely on the agreement, if this request is not met within a reasonable time frame.

Recommendation 10

That Section 90 GA (5) not be adopted.

Spousal Maintenance – death of a party – Section 90 (H)

The explanatory memorandum at paragraph 114 provides that the any provision for maintenance to be paid for a spouse would cease upon the death of the other party spouse. This contemplates the ongoing or regular payment of amounts that meet the living expenses of the other spouse. However, this is not the only circumstances that maintenance is paid. Often lump sum or period payments are provided for as part of property settlement agreements. For example, a house may be transferred to the wife and 10 % of its value be attributed to spousal maintenance. This reason for this is to decrease the likelihood of a later spousal maintenance claim being made.

It would be unfair in these circumstances if a bfa was entered into and the husband dies and the wife is required to pay 10 % of the value of the house to his estate. We do not think that this is what was contemplated but the drafting needs to take into account these scenarios.

Recommendation 11

That Section 90 H be amended, so it is clear that the spousal maintenance in this section only relates to ongoing and regular maintenance payments paid for the day to day needs of the other spouse and not lump sum amounts attributable to spousal maintenance, as part of property settlements.

Section 68T

WLSQ supports amendments to this provision and thanks the government for taking quick and decisive action on this.

Summary dismissals

WLSQ supports provisions that prevent systems abuse by family violence perpetrators and this is why we support legislative protection that stop perpetrators of family violence directly cross examining their victims in the family courts. WLSQ also supports provisions that strengthen the court's ability to dismiss unmeritorious claims. However, because of the numbers of litigants in person in the family law system there should be careful consideration about whether this provision will achieve its policy objective. WLSQ has serious concerns it may be misused by the more powerful party and further injustice.

Many of our clients who are victims of family violence are also litigants in person. Often their paperwork is not of a high standard and they can present badly because of their fear and trauma. They can often be facing their perpetrator on the other side who is at times legally represented, as he can afford this. Her claims may seem on their face unmeritorious. In many instances her case, with assistance, could be substantially improved with the gathering of evidence and assistance with affidavit materials.

We are concerned however that this provision can be misused by perpetrators or their lawyers to threaten her that her case is without merit and they will seek to dismiss it and seek costs against her. We have concerns that if she withdraws and then seeks legal assistance and files again later with a stronger case, she may still be perceived as vexatious for making multiple applications.

We believe there are other ways that victims of family violence can be protected in the family law system.

Recommendation 12

WLSQ does not support the proposed amendment because of its ability to be misused by perpetrators of family violence to further injustice.

Recommendation 13

That victims of family violence be protected against systems abuse by the introduction of legislative protections to stop family violence perpetrators from directly cross examining their victims in family law.

Recommendation 14

That victims of family violence be protected against systems abuse through the development of a specialised legal aid decision making pathway for family law matters that appropriately takes into account the dynamics of family violence and would assist more victims to be successful in their applications and obtain legal assistance.

Recommendation 15

That victims of family violence in family law be protected against systems abuse by increasing funding to women's legal services, community legal centres and legal aid to allow for appropriate legal representation of them in the family law courts.

Recommendation 16

Change the Family Law Act to remove the emphasis on shared parenting to de-incentivise perpetrators of family violence using legal processes to intimidate and control their victims.

Supervision orders and exceptional circumstances

We note that Section 65 (L) proposes to introduce ongoing supervision of orders where there are 'exceptional circumstances'.

Our comment in relation to this is that for some families (especially those whose children have grown up in the family courts) that these sort of orders should be more the norm than otherwise. These families obviously need ongoing support and are possibly dealing with complex underlying issues such as violence, abuse, possibly mental health and other issues. They need more support than less. It is a concern that this amendment seeks to take away at least some level of support these families may need.