

15 February, 2016

Committee Secretary
Senate Legal & Constitutional Affairs Committee
PO Box 6100
PARLIAMENT HOUSE
CANBERRA ACT 2600

By Email: legcon.sen@aph.gov.au

Dear Committee Secretary,

SENATE INQUIRY INTO THE FAMILY LAW AMENDMENT (FINANCIAL AGREEMENTS AND OTHER MEASURES) BILL 2015

1. We refer to the appearance by Paul Doolan, the NSW solicitor representative for the Family Law Section Executive of the Law Council of Australia (**LCA**), before the Senate Legal and Constitutional Affairs Committee at Parliament House in Canberra on Friday, 12 February 2016.
2. We note that the LCA was asked by the Committee to provide a short response, on notice, to a one-page BFA Case Study provided to the Committee by the Queensland Women's Legal Service (**QWLS**). Copy **attached** for ease of reference.
3. We understand that the QWLS submits that a specific reference to family violence, as an express ground for the setting aside of Financial Agreements, should be included in ss90K and 90UM of the *Family Law Act 1975*.
4. We have not been provided by QWLS with a draft of any amending legislation to give effect to that proposition.
5. Before turning to the Case Study, we note that there are some matters in the written submission made by QWLS with which the LCA disagrees in terms of the operation of the Bill and which are important to note.
6. On page 3 of the QWLS written submission, it is said that there is a concern "*that [the proposed] 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*". What that QWLS submission has, with respect, overlooked in the view of the LCA, is that the provisions of s90GB(1)(b) essentially mirror (but in a different format) that which is in the existing Section 90G(1A)(b). It could not be a "*watering down*" of the provision, as it really just replicates the existing legislation. What the Bill does is reorganise those provisions in a more logical manner.

7. The QWLS written submission also raises concerns about the proposed s90H maintenance changes, and particularly the lump sum provisions (see page 8 of the QWLS submission). They appear to overlook, with respect, the provisions of s90H(3) of the Bill which permits parties to contract out of those provisions, such that the maintenance provision could continue to have effect despite the death of a party (see Sections 90H(2) and (3) of the Bill) if parties had so agreed in the agreement.
8. The **BFA Case Study** from QWLS submits that there would be no remedy available to a wife in the circumstances of their example. The QWLS refers to the provisions of 90K(1)(e) of the Act which reference unconscionability in respect of "*the making of a Financial Agreement*" and QWLS are concerned that that limitation means that prior acts of violence/assaults and coercive and controlling family violence are not captured by (1)(e) as they were not directed to the making of the agreement *per se*.
9. It is the view of the LCA, that the QWLS Case Study does not take into account the provisions of s90K(1)(b) of the *Family Law Act*.
10. That sub-section has no such limitation which relates to the timing of the "*making of the Financial Agreement*".
11. Section 90K(1)(b) states that a Court may make an order setting aside a Financial Agreement if, and only if, the Court is satisfied that the agreement is "*void, voidable or unenforceable*".
12. That expression "void, voidable or unenforceable", when taken together with Section 90KA of the *Family Law Act*, grants the Courts the power to utilise the entire armoury of equitable remedies.
13. The breadth of those powers was the subject of a paper by the Hon Justice P.L.G Brereton of the Supreme Court of NSW entitled "*Binding or Bound to Fail : Remedies and Rectification of Financial Agreement*" which was presented at the National Family Law Conference held in 2012. Those very broad equitable remedies, which are available by virtue of s90K(1)(b), provide a substantial protection to a wife/mother in the factual scenario as described in the Case Study.
14. On that basis, the LCA respectfully disagrees with the conclusion reached by the QWLS as to the availability of a remedy.
15. The LCA welcomes the opportunity to make this further submission on notice. Please do not hesitate to contact the LCA if any further information, documents or clarification is required.

Yours sincerely,

S Stuart Clark AM
President