Family Law Amendment (Financial and Other Measures) Bill 2015

Submission to the
Senate Legal and Constitutional Affairs
Legislation Committee

Responses to submissions on financial agreements

Legal advice requirements

A number of submissions to the inquiry raised concerns that the revised legal advice requirements for agreements made after commencement were too narrow, and that the current test should be maintained.[1]

Currently, for a financial agreement to be binding, legal advice must be provided about 'the effect of the agreement on the rights of [the] party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement' (existing paragraph 90G(1)(b)).

The current matters about which legal advice must be provided are broad and unspecific, and potentially encompass advice that cannot be characterised as legal advice. For example, 'the advantages and disadvantages, at the time that the advice was provided, to [the] party of making the agreement' potentially includes financial and other advice. This is outside of the scope of advice that legal practitioners can reasonably be expected to provide.

For agreements made on or after commencement, the Bill would change the matters about which legal advice must be provided to 'the effect of the agreement on the rights of [the] party under [the] Act'. This is the appropriate advice for parties who are contracting out of their rights under the Act, and is clearly within the scope of the matters on which legal practitioners may advise.

Legal practitioners are subject to a range of legislative and professional obligations and rules. Where a party has not been provided with independent legal advice (despite a statement of advice to that effect), or has been provided with inadequate advice, there is potential for a party to bring a professional negligence claim against the legal practitioner. In circumstances where a spouse party has not been provided with adequate advice, through no fault of the other spouse party, there is therefore potential for the agreement to be enforced and for the party who was provided with inadequate advice to seek damages from the legal practitioner.

Spousal maintenance

Nil maintenance

The submission of Graham Perrett MP, Shadow Parliamentary Secretary to the Attorney-General, raised concern about the explicit provision that would be made for maintenance to be nil, or of nil value.

Special requirements apply when maintenance provisions are included in financial agreements. These requirements are set out in existing section 90E.

There is uncertainty around whether the provisions, as currently drafted, allow parties to specify an amount or value as 'nil', thereby waiving their maintenance entitlements and obligations. We understand that many financial agreements have been made on the assumption that it is possible to specify nil maintenance. This assumption is consistent with the position in relation to consent property orders, under which parties may agree that there shall be no maintenance.

The Bill would clarify that a financial agreement may specify nil maintenance, where this would not cause the party to become dependent on Government assistance. The amendment is intended to ensure that where parties to an existing financial agreement have either not specified an amount of maintenance, or have specified a nil amount, this will not result in that provision of the agreement

[1] Women's Legal Service Queensland; Anne Sheehan, Soroptimist International; and Office of Graham Perrett MP, Shadow Parliamentary Secretary to the Attorney-General.

being void. This is intended to cure unintended technical non-compliance in existing financial agreements.

The retrospective application of the amendment is unlikely to negatively affect parties to existing financial agreements that have been made in good faith. One of the requirements for an existing financial agreement to be valid is that each party must have received a signed statement from a legal practitioner that they provided the party with independent legal advice as to certain matters. Given this requirement, there is limited potential for the retrospective application of this amendment to cause detriment to, or have unforeseen consequences for, parties who have entered into a financial agreement in good faith.

Any potential for parties to be disadvantaged is further mitigated by the ability of the court to set aside a financial agreement in certain circumstances (as provided for in section 90K). In particular, existing paragraph 90K(1)(d) will continue to apply to agreements made prior to commencement. This paragraph provides that a court may set aside a financial agreement if satisfied that, since the making of the agreement a material change of circumstances has occurred (relating to the care, welfare and development of a child of the marriage/relationship) and, as a result of that change, the child or a party to the agreement with caring responsibility for the child, will suffer hardship if the court does not set the agreement aside. The court may also set aside an agreement in cases of fraud (including non-disclosure of a material matter) (paragraph 90K(1)(a)) or unconscionable conduct (paragraph 90K(1)(e)).

A further safeguard is provided by existing section 90F, which provides that no provision of a financial agreement excludes or limits the power of a court to make an order for maintenance if the court is satisfied that, when the financial agreement comes into effect, the circumstances of the party are such that they are unable to support him or herself without an income tested pension, allowance or benefit.

Cessation of maintenance

Submissions to the inquiry also raised concerns about provisions in the Bill relating to cessation of maintenance upon death, or entry into a new relationship.[2]

Existing section 90H provides that financial agreements continue to operate despite the death of a party to the agreement.

The Bill would insert new provisions to provide that a provision in a financial agreement for the maintenance of a spouse party ceases to have effect on the death of either spouse party (unless the agreement provides otherwise). This would not prevent the recovery of arrears due immediately before a party's death. Maintenance paid after the provision for the payment of maintenance ceases to have effect would be recoverable. These changes are consistent with the rules applying to court ordered spousal maintenance. Existing subsections 82(1) and (2) of the Act provide for cessation of court-ordered maintenance payments upon the death of the payee and payer respectively. No provision is made for agreement for maintenance to continue after death.

The Bill would also provide that spousal maintenance obligations under a financial agreement terminate in the event that the payee remarries or enters into a de facto relationship with a person other than the other party to the agreement.

Section 4AA of the Act defines de facto relationship. Subsection 4AA(1) provides that a de facto relationship exists if, having regard to all the circumstances of their relationship, two people 'have a

[2] Women's Legal Service Queensland; and Office of Graham Perrett MP, Shadow Parliamentary Secretary to the Attorney-General.

relationship as a couple living together on a genuine domestic basis'. Subsection 4AA(2) provides a list of nine circumstances that may assist in working out if persons are in a de facto relationship:

- the duration of the relationship
- the nature and extent of common residence
- whether a sexual relationship exists
- the degree of financial dependence or interdependence
- the ownership, use and acquisition of property
- the degree of mutual commitment to a shared life
- whether the relationship is or was registered under a state or territory law
- the care and support of children, and
- the reputation and public aspects of the relationship.

None of these factors is either necessary or sufficient for a de facto relationship, and it is not an exhaustive list (subsection 4AA(3)). Ultimately, whether a de facto relationship exists is a matter of evaluation taking into account the facts and circumstances involved. However, in many circumstances (such as where a relationship is registered, or where all the other factors are present), it will be clear that a relationship exists. Conversely, if only one or two of the factors are present, it is doubtful that a de facto relationship would be found to exist.

It is longstanding Commonwealth policy that married and de facto relationships are treated equally wherever possible to avoid marital status discrimination. Moreover, providing that marriage terminates maintenance without making similar provision in relation to de facto relationships would create a perverse incentive for those receiving maintenance not to marry.

However, the re-entry of a party into a de facto relationship with the other spouse party would not terminate ongoing maintenance obligations under a financial agreement because it is not uncommon for parties to resume cohabitation in an attempt to reconcile. If this resumption of cohabitation extinguished ongoing maintenance obligations, and the couple then separated again, the payee would have no remedy by virtue of his or her maintenance being an issue dealt with by a financial agreement.

These amendments would not apply retrospectively. This means that maintenance provisions in existing financial agreements will continue to have effect on the death of a spouse party (unless the agreement provided otherwise), or on the re-partnering of a spouse party (unless the agreement provided otherwise).

For agreements made on or after commencement, parties are able to agree to spousal maintenance continuing after death or re-partnering, by providing so in the agreement.

Family violence and setting aside financial agreements

At the Committee hearing on 12 February 2016, we were asked to consider the hypothetical case study provided by the Women's Legal Service Queensland. As addressing the issues in the case study would likely involve the provision of legal advice, we have limited our comments to those of a general nature.

The Committee also suggested that the Department look at modernising safeguards around the setting aside provisions for financial agreements. In particular the Committee was interested in whether it would be possible to introduce a set aside provision relating specifically to a person who

has experienced family violence. Such an amendment would raise complex policy and drafting issues which are beyond the scope of this submission.

The Act contains protections for vulnerable parties, including victims of family violence, who enter into financial agreements:

- Parties must consent to a financial agreement
- The requirement for independent legal advice aims to ensure each party enters the agreement in an informed manner, and
- The court can set aside financial agreements in a range of circumstances.

The setting aside provisions for property orders (section 79A) are substantially the same as the set aside provisions for financial agreements (section 90K). We note that paragraph 90K(1)(a), which provides that an agreement can be set aside on the basis that the agreement was obtained by fraud including non-disclosure of a material matter, is intended to ensure that material matters are disclosed.

The statutory grounds to set aside a financial agreement under section 90K include:

- The agreement was obtained by fraud, including non-disclosure of a material matter
- The agreement was void, voidable or unenforceable
    - This is determined according to the same principles of law and equity as apply to ordinary contracts (section 90KA), and includes:
        - Lack of certainty
        - Lack of intention to enter legal relations
        - Duress
        - Undue influence
        - Unconscionability
        - Misrepresentation
        - Mistake
- Circumstances have arisen since the agreement was entered into that make it impracticable for all or part of that agreement to be carried out
- A child of the relationship or a party with caring responsibility for a child of the relationship would suffer hardship, and
- With respect to making the agreement, one of the parties engaged in unconscionable conduct.

It has been submitted that section 90K is substantially different from section 79A because section 79A allows property orders to be set aside where there has been a 'miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance'. We understand that the submission is that financial agreements should also be able to be set aside on the basis of a 'miscarriage of justice'. However, 'miscarriage of justice' in this sense refers to circumstances either before or at the time when the property order was made, which affected the operation of the judicial process with the result that the order was obtained unjustly (*In the Marriage of Holland* [1982] F.L.C. 91-243; *In the Marriage of Stuart* (1991) 101 F.L.R. 244; *In the Marriage of Gilbert* (1991) 103 F.L.R 282). That is, it refers the integrity of the judicial process, and not whether an order itself is just or fair.

The set aside provisions for financial agreements focus on the capacity and ability of a person to enter into and participate on an equal basis in the making of a financial agreement. Depending on the circumstances, where serious family violence surrounded the making of a financial agreement, the agreement could be set aside on one of the existing statutory grounds, including duress, undue influence, or unconscionable conduct. For example, 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 (*Saintclaire v Saintclaire* [2015] FAMCAFC 245).

Parties to marriages and de facto relationships have access to both common law remedies and state-based compensation schemes to seek compensation for the results of family violence. This is especially relevant to situations where family violence occurs after a financial agreement has been entered into. To allow the court to set aside a financial agreement in a manner that is compensatory or punitive could be a significant departure from the no fault framework for resolving disputes relating to relationship breakdown provided by the *Family Law Act 1975*.

Family Law Section of the Law Council of Australia submission

The Family Law Section (FLS) has submitted that three matters have not been addressed by the Bill. These matters are outlined at paragraphs 35.1 to 35.3 of their submission and we address each matter below.

35.1 Whilst the provisions of s90GA and 90UJA go a long way to preventing agreements being the subject of attack in respect of the content of the legal advice provided, FLS had submitted that matters would be made clearer, by the legislation containing a ***deeming provision*** *that once a signed statement of independent legal advice has been provided, the requirements are met and the legal advice cannot be further scrutinised as a basis for declaring an agreement non-binding.*

The Bill contains new section 90GA(5), which provides that in determining whether an agreement is binding, the court is not to consider whether the legal advice described in new subsection 90GA(2) has actually been provided. New section 90GA(5) would make it clear that if the conditions relating to statements about legal advice (as well as the extra conditions if applicable) are met, then the legal advice is taken to have been provided.

35.2 Section 90K(1)(d) and the similar provision in the de facto sub-section of s90UM relates to circumstances where a court can set aside a financial agreement in circumstances relating to the care, welfare and development of a child. The FLS had submitted that the threshold should be uniformly lifted from the current "material change" of circumstances test, to an "exceptional circumstances" test. That would be consistent with s79A of the Family Law Act and s136(2)(d) of the Child Support (Assessment) Act 1989, and further lessen the likelihood of agreements being set aside by courts.

Existing paragraph 90K(1)(d) currently provides that a court can set aside a financial agreement if, since making the agreement, there has been a material change in circumstances relating to the care, welfare and development of the child, and, as a result, a child would suffer hardship if the court does not set the agreement aside.

The exposure draft of the Bill proposed amending the provision to change the test for establishing hardship from 'material change in circumstances' to 'exceptional circumstances' (in line with FLS's submission). However, public consultation on the exposure draft indicated opposition to raising the threshold in this way. For example, the Law Institute of Victoria submitted that the change may prejudice parties, and the Law Society of NSW submitted that the 'material change' test was appropriate because of the different circumstances in which court orders and financial agreements are made. The amendment was therefore redrafted so that the threshold would only be lifted for agreements entered into after a relationship has broken down.

The Bill currently provides that:

- 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'.

This reflects the possibility that, for agreements made prior to separation, a 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. 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 the time of making the agreement.

The amendment improves the consistency of section 90K and section 79A of the Act (which provides for the setting aside of court orders altering property interests) only where appropriate. The Bill would mean that the higher test is applied only where the situation surrounding the making of a financial agreement and the making of a court order are similar—that is, after relationship breakdown.

Paragraph 136(2)(d) of the *Child Support (Assessment) Act 1989*, referred to by FLS, provides that a court can set aside a binding child support agreement if 'because of exceptional circumstances, relating to a party to the agreement or a child in respect of whom the agreement is made, that have arisen since the agreement was made, the applicant or the child will suffer hardship if the agreement is not set aside'. We note that, binding child support agreements are generally made in situations where parties already have a child and are not in a relationship, and should therefore be in a position to make an agreement appropriately providing for the child's financial needs.

35.3 The FLS has submitted that the Outline and Object sections of the amending legislation, should recognise that financial agreements can deal with property acquired after relationship breakdown or divorce, and not just property and financial resources received or acquired prior to that time.

The Bill would insert outline and object sections into the Act that are intended to:

- instruct legal practitioners in developing the scope and content of their advice to their clients
- inform parties who turn to the Act as part of the process of investigating the possibility of developing a financial agreement
- remind parties that financial agreements, which are entered into in accordance with the requirements of the Act, are binding, and
- guide the court's consideration of financial agreements that are under challenge.

Both the outline and the object sections refer to the fact that prospective, current, or former parties to a marriage or de facto relationship may agree on how the property or financial resources either or both parties had before divorce or relationship break down are to be dealt with upon relationship breakdown. This is consistent with the substantive provisions in the Family Law Act that outline what matters parties can include in a financial agreement.

When making a financial agreement under the Family Law Act, parties must comply with the formal requirements set out in existing sections 90B (financial agreements before marriage), 90C (financial agreements during marriage), and 90D (financial agreements after divorce order is made) (or the equivalent de facto provisions). These sections set out the matters about which financial agreements may be made:

- Financial agreements made before or during a marriage may deal with 'how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties at the time when the agreement is made, or at a later time and before divorce, is to be dealt with' (paragraphs 90B(2)(a) and 90C(2)(a)), and
- Financial agreements made after divorce may deal with 'how all or any of the property or financial resources that either or both of the spouse parties had or acquired during the former marriage is to be dealt with' (paragraph 90D(2)(a)).

We note that financial agreements can also contain incidental or ancillary matters (subsections 90B(3), 90C(3) and 90D(3)), which could include property or financial resources acquired after a relationship has broken down. However, this is not the primary purpose of financial agreements.

Responses to submissions on other amendments

Variation of parenting orders by interim family violence orders

Existing section 68R of the Act provides that a state or territory court making a family violence order may revive, vary, discharge or suspend a parenting order, recovery order, injunction or other arrangement (together, 'Order') to the extent to which they provide for a child to spend time with a person.

Existing section 68T places a strict 21 day time limit on the operation of a state or territory court's revival, variation or suspension of an Order under section 68R, where that revival, variation or suspension occurs in the context of proceedings to make an interim family violence order or an interim variation of a family violence order. No such time limit applies where such an order is made in a final hearing for a family violence order.

The amendments proposed in Division 1 of Part 1 of Schedule 2 to the Bill would remove the 21 day time frame for variations in interim proceedings, allowing a family violence order to amend an Order made under section 68R until a time specified in the family violence order itself, or until a court makes a further order that affects the family violence order.

Effect on individuals accused of family violence

The Non-Custodial Parents' Party (NCPP) submission argued that amending section 68T to remove the 21 day time-frame would remove a safeguard for a person who is falsely accused of family violence. The submission also asserts that the purpose of the amendment is to provide equal pay to women.

The purpose of the amendment to section 68T is to protect people who have experienced family violence. To the extent that this may disadvantage persons who are falsely accused of family violence this disadvantage is balanced by the objective of protecting vulnerable people, including children, from family violence.

A person who is the subject of an interim family violence has a number of options available to them to challenge the order:

- The person can request leave from the court to apply for the interim family violence order to be varied or revoked, in accordance with the legislative requirements of each state and territory.
- The person can seek either a further family violence order or a parenting order which overrides the existing family violence order.

A person who is found to have falsely claimed family violence in order to receive an interim family violence order may also be prosecuted under relevant State or Territory offences, such as perjury.

The suggestion that the 21 day time frame was a safeguard for a person wrongly accused of family violence appears to be based on the assumption that after 21 days the family violence order would cease. This is not correct. Under current section 68T, after the 21 day period any revival, variation or suspension of a family law order would cease, but the rest of the interim family violence order would continue. The result is that the two orders continue in existence but conflict in their terms, leaving parties uncertain as to how to resolve any contradiction between the two orders, and creating unsafe situations. The intention of the amendment is to avoid these undesirable consequences.

In any event, it is still open to the court to impose a time limit where it thinks it appropriate to do so. The time limit is no longer mandatory, which will assist in situations where it was unrealistic that a hearing could be brought within 21 days.

Resource implications for State and Territory courts

The submission of the Chief Magistrate of the Magistrates Court of South Australia notes a concern that amendments to section 68T may have resource implications for the Magistrates Court, by encouraging forum shopping by people who want amendments to orders made under the Family Law Act. The submission also notes practical difficulties for the Magistrates Court in obtaining parenting orders.

By contrast, the submission of the Chief Magistrate of the Local Court of New South Wales is that the amendment to section 68T is unlikely to have a significant impact on the Local Court because:

- few applications are made to vary, revive or suspend a parenting order by way of a family violence order, and an order would usually only be made usually on application by one of the parties
- when an application for a variation is made, the court requires the party seeking the change to provide a copy of the parenting order to the court and give appropriate notice to the other party
- in practice most applications for parenting orders made to local courts are made in regional areas, and most of these transferred to the Family Court or Federal Circuit Court under subsection 69N(5), and
- the existing situation of variations expiring every 21 days encourages people to apply to the courts with shorter waiting times (ie the local courts) as they are more likely to get their matter heard before the 21 days expires.

The Department considers it unlikely that the amendment will have a significant impact on State and Territory courts. The capacity for a Court making a family violence order to vary, suspend or revive a parenting order permanently already exists, as the 21 day time limit only applies to interim family violence orders, not final orders. As such any preference of applicants to apply for an order from a local or magistrates court after the commencement of the amendments, would equally apply under the existing law. It is therefore unlikely that the removal of the 21 day limit would materially change the existing preference of applicants for State courts of summary jurisdiction. Moreover, the power to vary parenting orders is only available where the relevant court's jurisdiction in relation to domestic violence orders has been invoked. It appears unlikely that there are significant numbers of individuals who do not seek such orders would now do so in order to seek variations to parenting orders.

Additionally, the removal of the 21 day limit will mean that parties will no longer have to return to the relevant court every 21 days for a new family violence interim order, which is likely to offset any increase in workload.

In addition to the consultation undertaken by the Family Law Council in developing its recommendation upon which this amendment is based, the Department consulted with State and Territory Departments of Justice. The responses from NSW, Victoria and Queensland were supportive of this amendment. No other comments were received.

Use of the term 'affected' in the amendments to section 68T

The submission of the Director-General of the Department of Justice and the Attorney-General, Queensland raised a technical point about the amendment to section 68T.

New paragraph 68T(1)(c) provides that:

> If, in proceedings to make an interim family violence order or an interim variation of a family violence order, the court revives, varies or suspends an order, injunction or arrangement

> under section 68R, that revival, variation or suspension ceases to have effect at the earlier of: … the time the order, injunction or arrangement is affected by an order (however described) made by a court, under section 68R or otherwise, after the revival, variation or suspension.

The submission argues that the use of the word 'affected' may be interpreted in such a way as to cause amendments to family law orders to be unintentionally and prematurely ended by an order of a court which affects, but did not intend to cease, an existing order.

The intended effect of this term is set out in the Explanatory Memorandum at paragraph 249 on page 33, as follows:

> The use of the term 'affected' in new paragraph 68T(1)(c) is intended to include orders made by a court that directly impact on the relevant Order or interim family violence order. The paragraph is not intended to include orders, injunctions or arrangements involving the parties that do not have direct relevance to the Order or interim family violence order.

Interpretation of legislation is ultimately a matter for the courts. However, the Department considers it likely that if this expression is considered ambiguous, in accordance with sections 15AA and 15AB of the *Acts Interpretation Act 1901*, an interpretation would be preferred that:

- is consistent with the intention identified in the extrinsic materials (such as the explanatory memorandum), and
- fulfils the purpose of the amendment.

Summary decrees

Submissions by Women's Legal Service Queensland and Australian Women Against Violence Alliance raised concerns in relation to the revised summary dismissal provision in proposed section 45A. In particular, these submissions were concerned that:

- the new provision could be misused by the more powerful party
- litigants in person may make mistakes that make their cases appear unmeritorious, and
- a party who withdraws their case but later reintroduces it may be characterised as vexatious.

New section 45A would allow the court to make a summary decree in favour of one party, in relation to the whole or part of a proceeding, if satisfied that the proceeding or part of the proceeding has no reasonable prospect of success, is frivolous or vexatious, or is an abuse of process.

These grounds for dismissal reflect the existing powers to summarily dismiss proceedings in section 118 of the Family Law Act (in relation to frivolous and vexatious claims), and in Rule 10.12 of the Family Law Rules (in relation to abuse of process and reasonable prospects of success). Such powers are common for courts. For example, under Rule 26.01 of the Federal Court Rules, the Federal Court may give summary judgement against a party where:

- the applicant has no reasonable prospect of successfully prosecuting or defending the proceeding or part of the proceeding
- the proceeding is frivolous or vexatious
- no reasonable cause of action is disclosed, or
- the proceeding is an abuse of the process of the Court.

By consolidating and modernising these powers in the Family Law Act, and better harmonising them with the powers of other courts, the provision is intended to strengthen the power of courts exercising jurisdiction under the Family Law Act to dismiss clearly unmeritorious claims, and to

enhance the ability of courts to protect vulnerable parties from the family law system being used by perpetrators as a means of perpetuating abuse.

The court has strict parameters around when an application may be dismissed. The court may only dismiss an application if it is satisfied that the application has no prospect of success, is clearly vexatious or frivolous, or is clearly an abuse of process.

There is a high rate of litigants in person in the family law system, and the family law courts have significant experience in working with litigants with limited legal backgrounds. The courts are well placed to identify the difference between an litigant in person who is underprepared due to inexperience and a litigant whose case should be dismissed as an abuse of process or because it has no prospect of success.

As noted above, the amendment would clarify and modernise existing powers of courts exercising jurisdiction under the Family Law Act. The Department does not consider that there is a significant risk of people who have experienced family violence being adversely affected by this amendment, and any such risk is outweighed by an improved ability for the courts to dismiss claims brought to harass them.

Supervision of final parenting orders by family consultants

The Women's Legal Service (Queensland) submission argues that ongoing supervision of parenting orders should in certain complex cases be the norm rather than the exception.

Existing subsection 65L(1) of the Act allows the court, when making a parenting order, to make either or both:

- an order requiring compliance with the parenting order, as far as practicable, to be supervised by a family consultant, or
- an order requiring a family consultant to give any party to the parenting order such assistance as is reasonably requested by that party in relation to compliance with, and the carrying out of, the parenting order.

Division 14 of Part 1 of Schedule 2 to the Bill would insert a new subsection 65L(3) to provide that the court may only make an order under subsection 65L(1) in respect of a final parenting order where the court considers there are 'exceptional circumstances' which warrant the order being made.

It is necessary to limit the court's power in subsection 65L(1) to ensure that the courts are not unduly burdened with an ongoing and onerous obligation to supervise compliance with court orders after final orders have been made. Compliance with parenting orders is managed through the separate compliance regime in Part VII, Division 13A of the Act. It is highly unusual for courts to have any role in supervising or assisting compliance with orders other than by considering contravention applications. The courts are not resourced to undertake this function.

The amendment would only apply where final orders are made. It would not limit the ability of the court to order supervision of interim orders. Interim orders are temporary and limited in operation. The court is still involved in these matters pending a final order. Given the limited evidence available to courts at interim hearings, it is appropriate that the ability to supervise compliance should continue to be available for interim orders.

Importantly the court will retain the ability to supervise compliance in exceptional circumstances. In deciding whether to make a supervision order under subsection 65L(1) the court must regard the best interests of the child as the paramount consideration. The court will also retain the ability to

refer parties to services such as family counselling, family dispute resolution, post-separation parenting programs, and other family services.

Explanation of parenting orders inconsistent with family violence orders

The submission by the National Children's Commissioner suggested that the amendments made by Division 7 of Part 1 of Schedule 2 to the Bill would deny children visibility and agency in the Family Court proceedings by disempowering and silencing them. She was concerned about the Family Court's capacity to interpret best interests in a way that aligned with a child's actual best interests.

Existing section 68P sets out the obligations of a court when making an order, or granting an injunction under the Act, that is inconsistent with an existing family violence order.

Existing subparagraph 68P(2)(c)(iii) requires the court, to the extent to which the order or injunction provides for the child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with a child, to explain the order or injunction to the person protected by the family violence order (if that person is not the applicant or respondent). In some circumstances the person protected by the family violence order may be a child.

Existing paragraph 68P(2)(d) sets out the matters that the court must include in the explanation.

Division 7 of Part 1 of Schedule 2 to the Bill would insert new subsections 68P(2A), (2B) and (2C).

New subsection 68P(2A) and (2B) would together specify that the court is not required to provide the explanation mandated by subparagraph 68P(2)(c)(iii) or to include any particular matter to a child if the court is satisfied that:

- the child is too young to understand the explanation, or
- to do so would not be in the child's best interests.

New subsection 68P(2C) would provide that in determining whether it is satisfied as to the matters described above, the court may have regard to all or any of the matters set out in subsections 60CC(2) or (3), which provide detailed considerations to be taken into account in determining the best interests of the child.

This amendment is not intended deny children agency, but is intended to protect them. The amendment gives the court the ability to exercise discretion around explaining certain details when either the child is too young to understand, or it would not be in the child's best interests to know.

The purpose of the exception from this requirement where the child is too young to understand to understand an explanation is to avoid the existing situation where at times the provision is impossible to comply with. Paragraph 68P(2)(d) requires that the explanation be 'in language [the child is] likely to readily understand'. In a range of situations, such as where the child has not yet developed the skills required to comprehend language, this provision cannot be fulfilled.

The purpose of the best interests exemptions is to avoid scenarios where it would be actively harmful to the child to receive the explanation. To the extent that this would override a child's agency, it is necessary and proportionate to protecting the best interests of the child.

A key consideration when determining the child's best interests would be protecting the child's psychological well-being.

The Magellan program

The submission by the National Children's Commissioner's noted that:

> Amending the criteria for access to the Magellan program has resource implications for child protection agencies and the family law system. However, broadening the Magellan program also has the capacity to promote and protect the wellbeing of significantly more children affected by family violence.

As the Magellan program was not established by statute, but is rather an interagency collaborative model of case management, any expansion of the program is a matter for the courts.

Consultation of the proposed amendments to the financial agreements regime

Public consultation on the proposed amendments to the financial agreement provisions was conducted between 30 April 2015 and 19 June 2015.

To facilitate the consultation the Department publically released:

- a media release
- an exposure draft of the amendments, and
- a consultation paper which explained the proposed amendments.

The public was invited to email or call the Family Law Branch (a dedicated phoneline was provided for this purpose) with any queries. No calls were received

The submissions were broadly supportive of the amendments. The submissions did not raise any concerns about family violence. Although the submission by David Burrell & Co. Divorce Lawyers (Attachment A) did raise the issue of people with limited English communication skills, it did so in the context of challenges faced by the lawyer rather than in the context of one party having an advantage over another.

Submissions received in response to exposure draft

Attachment	Correspondent	Date
A	David Burrell & Co. Divorce Lawyers	11 May 2015
B	Chris Turnbull, Solicitor & Mediator	11 June 2015
C	Professor Patrick Parkinson AM	15 June 2015
D	The Family Law Section of the Law Council of Australia (FLS)	19 June 2015
E	Law Institute of Victoria (LIV)	19 June 2015
F	HHG Legal Group	19 June 2015
G	The Law Society of NSW (LSNSW)	22 June 2015

The approach to a number of the issues raised by the submissions has already been discussed in this submission. These include:

- legal advice requirements, including the desirability of a deeming provision
- property acquired after relationship breakdown or divorce
- nil value maintenance
- the test for setting aside a financial agreement on the basis of hardship, and
- cessation of maintenance on entry into a de facto relationship.

Other issues that were raised by the submissions that are not otherwise discussed in this submission were either minor, or informed the final Bill. The remaining issues are as follows:

Whether it is necessary to specify in the outline (new section 90AL) that a financial agreement must also be a valid contract

It is not necessary to specify that a financial agreement is a valid contract. Existing section 90KA imports the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts and applies them to financial agreements.

The difference between treatment of financial agreements and court orders (including consent orders) in relation to maintenance and entry into new relationships

Under the amendments, a maintenance clause in a financial agreement will cease on the relevant party remarrying or entering into a de facto relationship. A court order (including an order by consent) for spousal maintenance only ceases on remarrying, not on entry into a de facto relationship (existing section 82).

This distinction is acceptable as existing section 83 provides a mechanism for modifying a spousal maintenance order, but there is no similar mechanism for financial agreements as they are private agreements and not court orders.

Whether the Act should allow for de facto financial agreements to remain in force if the de facto partners subsequently marry

The consultation paper accompanying the exposure draft sought comment on whether the Family Law Act should provide that parties may make provision for their de facto financial agreement to continue in force and effect notwithstanding they subsequently marry each other, if this is expressly agreed to in the financial agreement.

After considering the submissions received, the Department's current position is that a decision to enter into a marriage represents a significant change to the relationship and it is therefore appropriate for the financial agreement to be re-examined. Allowing parties to agree that their de facto agreement will transition automatically to a married agreement could also leave couples with agreements that no longer reflect their relationship or circumstances.

Harmonising child support agreements

Child support arrangements are out of scope for this Bill. Child support agreements raise different policy considerations to financial agreements, and should be considered separately.

CEDAW and the Family Law Amendment (Financial and Other Measures) Bill 2015

The Convention

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides for key principles of equality which broadly cover many aspects of women's lives, including political participation, health, education, employment, marriage, family relations and equality before the law.

In particular:

- Article 2 urges parties to CEDAW to work towards eradicating discrimination against women, including by introducing new laws or policies, changing existing discriminatory laws and providing sanctions for discrimination where appropriate.
- Article 3 requires parties to promote actively women's full development and advancement, so they can enjoy human rights and fundamental freedoms on the same basis as men.
- Article 15 requires parties to treat women and men equally in all matters relating to the law, including civil matters, contractual matters, and property ownership.

For the purposes of CEDAW, 'discrimination against women' means any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field (Article 1 of CEDAW).

Family Law Amendment (Financial and Other Measures) Bill 2015

The *Family Law Amendment (Financial and Other Measures) Bill 2015* (the Bill) does not engage the rights enshrined in CEDAW. This does not mean that the Bill itself, or the Act as amended by the Bill, would be inconsistent with the obligations in CEDAW. Rather, the Bill interacts with existing provisions in the Family Law Act to ensure protection of vulnerable parties and maintain Australia's compliance with CEDAW obligations.

The provisions relating to financial agreements in the Bill would apply equally to all persons irrespective of sex.

The Bill would not have a disproportionate or unintended negative impact on women. The financial agreements framework, as proposed to be modified by the Bill, provides appropriate safeguards to ensure that the regime does not have a negative impact on women or vulnerable parties. For example:

- an agreement can only be entered into with the consent of both parties
- each party to an agreement is required to receive independent legal advice before entering into the agreement (currently under sections 90G and 90UJ of the Family Law Act and included in new sections 90GA and 90UJA proposed to be inserted by the Bill), and
- a court can set aside a financial agreement if the agreement was obtained by fraud, duress, due to non-disclosure of a material particular, or on a range of other equitable bases for setting aside contracts, such as unconscionability and undue influence, and in certain circumstances involving hardship (under existing sections 90K and 90UM of the Family Law Act).

For these reasons, the provisions in the Bill do not engage the human rights enshrined in CEDAW and the broader financial agreements framework remains compatible with the obligations in CEDAW.

Clarifications of evidence given to the Committee

In reviewing the Hansard, the Department has identified three issues it would like to clarify with the Committee.

Summary decrees

The Department incorrectly represented that the amendments to do with summary decrees was requested by the Federal Circuit Court. In fact, the Family Court requested that the Act be amended to move the ability to dismiss proceedings that have no likelihood of success or are an abuse of process from the Rules to the Act, to remove any doubt as to their validity.

In consultation on the draft, the Federal Circuit Court suggested that the revised provision be harmonised with the FCC provisions and the provision was redrafted accordingly.

Both courts agreed to the harmonised provision.

Other

The Department incorrectly stated that the amendment to section 68P, the amendment relating to the explanation of certain orders to minors, was requested by the Family Court. The amendment was requested by the Federal Circuit Court.

Nil maintenance

The Department incorrectly stated that the amendment to subsection 90E(2) which would allow maintenance provisions in financial agreements to specify an amount or value as nil, was inserted in response to submissions related to the exposure draft. This is incorrect, the provision allowing nil maintenance was present in the exposure draft. The policy rationale behind this amendment, that it is a clarification of the existing position, not a substantive policy change, remains the same.