Chapter 2

Key issues

2.1 During the course of the inquiry, a number of issues were raised with regards to the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015 (the Bill). These key issues were:

- the operation of the proposed Binding Financial Agreement (BFA) scheme in relation to particularly vulnerable parties, and the impact of the proposed amendments on family lawyers advising clients in this area;
- the impact removal of the 21 day expiry of parenting order variations, suspensions or revivals would have on clients and courts;
- whether the proposed amendment regarding summary dismissal of particular applications is appropriate;
- the efficacy and appropriateness of the proposed new offence provisions dealing with retaining a child overseas; and
- the Bill's compliance with the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW).

2.2 This chapter discusses these issues, outlines the committee's views, and sets out the committee's recommendations.

Binding Financial Agreements

Vulnerable parties

2.3 The committee received evidence arguing that the proposed amendments to the BFA scheme would operate unfairly against particularly vulnerable parties, including women affected by family violence. The Women's Legal Service Queensland (WLSQ) raised concerns that the proposed amendments did not take into consideration the difficulties faced by vulnerable individuals. WLSQ indicated that it did not support measures that would uphold BFAs where parties were in an unequal bargaining position and could not negotiate terms and conditions, stating:

> Unfortunately, we believe that these provisions require a complete rethink. We believe this is absolutely necessary because of the extent of family violence in the community and, in particular, in families that use the family law system, that protective provisions in the legislation be introduced, including full and frank disclosure, requiring binding financial agreements to be just and equitable, at a minimum retaining the current requirement that solicitors provide advice about the benefits and detriments of entering a binding financial agreement, that the legal advice be provided in writing, that the setting-aside provisions be extended to include more categories to those at least set out in section 79A of the Family Law Act and the equivalent de facto section and that an extra provision is added, importantly, covering family violence. Having undertaken a case review of

> case law, it is clear that the categories in the current section 79A of the Family Law Act do not cover family violence and that section 79A should be amended to do so.[1]

2.4 WLSQ also submitted that:

> 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.[2]

2.5 The Australian Women Against Violence Alliance (AWAVA) agreed with these concerns, stating:

> We understand the benefit to individuals and to government of people being able to resolve their own disputes without going to court, and we acknowledge that there are some women with assets who may benefit from entering such agreements. However, binding financial agreements do not properly account for issues such as the erosion of self-esteem and the lack of consent that are key to the dynamics of family violence.
>
> While the legislation assumes equal contracting parties, we know that 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. In these cases, there is a very high risk that women will sign agreements even if their legal advice cautions against it—as we heard in the case study just given. These women understandably see the alternative as worse. For this reason, we agree with Women's Legal Services Queensland that the legislation should adopt a specific setting-aside provision for circumstances where there is family violence. In the absence of such a provision there is a high risk that outcomes will place women in poverty and reward perpetrators of violence.[3]

2.6 Soroptimist International (SI) submitted that:

> The prohibitive cost of proceedings and the frequent lack of legal aid funding to assist in the financial negotiations process results in many self-represented litigants navigating the process themselves.
>
> In the case of those who experience domestic and family violence, there often exists a power imbalance and this creates a situation where the domestic and family violence is exacerbated by the court process.

---

1 Ms Angela Lynch, Community Legal Education and Law Reform Lawyer, Women's Legal Service Queensland (WLSQ), *Committee Hansard*, 12 February 2015, p. 9.

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

3 Ms Merrindahl Andrew, Program Manager, Australian Women Against Violence Alliance (AWAVA), *Committee Hansard*, 12 February 2015, p. 15.

> This is because the negotiations are often undermined because of the greater position of power enjoyed by the perpetrator of the domestic and family violence over the victim or survivor.[4]

2.7 Specific concerns were also raised with regards to the circumstances in which the courts could set aside financial or termination agreements under the proposed amendment to section 90K. WLSQ stated:

> Section 90K…makes no provision for setting aside an agreement in circumstances where a women (sic) 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 90GB (when a court declares financial agreements or termination agreements to be biding) that a court disregard any changes in circumstances, from the time the agreement was made. This requires the court to specifically disregard any violence experience [in] the relationship.[5]

2.8 SI echoed these concerns, submitting that the Bill should be amended so that mandatory consideration would be given to any domestic or family violence allegations before a judicial officer exercised their power to set aside or terminate a BFA.[6] SI stated:

> Where women are the victims or survivors of domestic and family violence, there are considerable disadvantages suffered from participating in the negotiation process to enter into binding financial agreements.
>
> Because of the out of court processes enjoyed by entering into binding financial agreements, and the difficulty of setting those agreements aside once made, under the proposed Bill, the process is likely to be highly utilised.[7]

2.9 The WLSQ also raised concerns with regards to the capacity for financial agreements to be set aside where a party was the victim of domestic violence. The WLSQ raised both 'unconscionable conduct' and 'duress' in the context of financial agreements, stating:

> …it was put to the Senators that section 90K (and mirroring de facto section) provides a sufficient level of protection due to the existence of subsections (1)(b) and (1)(e). We respectfully disagree.

---

4 Soroptimist International (SI), *Submission 9*, p. 3.

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

6 SI, *Submission 9*, p. 5.

7 SI, *Submission 9*, p. 2.

> …'unconscionable conduct' as provided for in subsections (1)(b) and (1)(e) will be found where a person knows or [ought] to know of a disabling condition or circumstance, and its effect on the innocent party, and takes advantage of that disabling condition or circumstance. A mere difference in the bargaining power of the parties does not constitute a special disadvantage or disability. The disabling condition or circumstances must seriously affect the ability of the weaker party to judge that party's own best interests.[8]

2.10 The WLSQ also submitted that judicial interpretation of 'duress' connects it with the definition of 'unconscionable conduct'. WLSQ referred to the judicial interpretation of 'duress' in the context of section 79A (setting aside of orders altering property interests), in the case of *SH and DH* (2003) FLC 83-164, where the court stated:

> The proper approach…is to ask whether…pressure went beyond what the law is prepared to countenance as legitimate. Pressure will be illegitimate if it constitutes unlawful threats or amounts to unconscionable conduct.[9]

2.11 The Law Council of Australia (LCA) disagreed with WLSQ, arguing that the proposed requirements in section 90GB (court declaring a financial agreement to be binding):

> …[E]ssentially 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 provisions, as it really just replicated the existing legislation. What the Bill does is recognise those provisions in a more logical manner.[10]

2.12 The LCA further stated that:

> The idea in some of the other submissions is that there should be a greater role for judges and scrutiny of the fairness of the deal. We say that ignores the reality of the fact that there is independent legal advice as a requirement of these agreements being made, so it should not be open to the courts to judge the fairness of the agreements. That, in fact, is the approach that the courts are taking at the moment. Parties are free to make a bad bargain if they wish to if they have had independent legal advice. If they go through the process, meet the requirements and get independent legal advice, then that is the whole purpose of this agreement: to allow people, if they wish to, to make a voluntary decision to contract out of their rights.[11]

2.13 The LCA also disagreed with WLSQ's interpretation of section 90K, stating:

> 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'.

---

8 WLSQ, *Supplementary Submission 9*, pp 1-2.

9 WLSQ, *Supplementary Submission 9*, p. 2.

10 Law Council of Australia (LCA), *Answer to question on notice*, 12 February 2016, (received 16 February 2016).

11 Mr Paul Doolan, NSW Representative, LCA, *Committee Hansard*, 12 February 2016, p. 20.

> That expression 'void, voidable or unenforceable', when taken together with Section 90KA of the *Family law Act*, grants the Courts with power to utilise the entire armoury of equitable remedies.[12]

2.14 The LCA argued that the proposed amendment of paragraph 90K(1)(d), which deals with the setting aside of a financial or termination agreement in the event of 'hardship':

> …does not in fact go far enough. The Law Council have made a submission that the level of the test should be increased uniformly from being simply a 'material change' to one which requires a 'change of an exceptional nature' test to be applied. This would be similar to the tests that apply under the Child Support (Assessment) Act with binding child support agreements, and it would be similar to the test that is in section 79A of the Family Law Act, which deals with applications to set aside property orders.
>
> The amendment that has been proposed to section 90K(1)(d) effectively leaves the tests of material change the same where the financial agreement has been made prior to the breakdown of the relationship. So the test is unchanged for what we might call prenuptial agreements or cohabitation agreements. The harder test—the one of exceptional change in circumstances—by the amending bill will only apply where people make a financial agreement after the breakdown of the relationship. So they are really just doing a financial settlement. The position of the Law Council is that the higher test—the test of the exceptional change—should apply uniformly.[13]

2.15 In respect of section 90K, the Attorney-General's Department (AGD) similarly stated:

> 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

12 LCA, *Answer to question on notice*, 12 February 2016, (received 16 February 2016).

13 Mr Doolan, LCA, *Committee Hansard*, 12 February 2016, p. 21.

> 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*.[14]

2.16 With regard to the scope of the 'material change' test, the AGD advised the committee that the proposed amendment:

> …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.[15]
>
> …[E]ssentially the aim is to have a balance whereby the higher test is for those agreements where all of the relevant circumstances are known, whereas in those other ones it is thought more appropriate to have a slightly different test.[16]

Independent legal advice in the context of a BFA

2.17 Some submitters raised concerns with regards to the proposed amendments to legal advice requirements where parties would be contemplating signing a financial agreement. WLSQ stated:

> At the moment the current provisions are still far away from the requirements that are set out in the four-step process for property settlements dealing with property settlements only. We have serious concerns about watering that down, because we are unsure about the quality

14 Attorney-General's Department (AGD), *Submission 20,* pp 6-7.

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

16 Mr Greg Manning, Acting Deputy Secretary, AGD, *Committee Hansard,* 12 February 2016, p. 39.

> of the advice that will be given to clients and what the advice about the effect of the agreement, in terms of what they may be able to receive through other means of property settlement, could be. There are concerns about parties entering into those arrangements without full awareness of what their actual rights may be. The consequences of that are extreme for parties who are vulnerable and who do not have a fair bargaining position.[17]
>
> The issues that we have raised with the proposed amendment do not take away from a party's contractual rights. What they do is provide safer mechanisms that recognise the power imbalance and issues of violence within our community, which are trying to be addressed by the courts and by the legislation. We are saying—and this is crucial to understand—that the current proposals water-down the requirements for legal advice. This means that intelligent people are not able to make a good assessment about their rights and responsibilities and, therefore, make an informed decision about what is best for them.[18]

2.18 The LCA disagreed, submitting that uncertainties surround the current BFA scheme have meant that people do not utilise them:

> The reality is, in the view of the Law Council, that whilst prenuptial agreements and cohabitation agreements—what are known in the legislation as binding financial agreements—have been provided for within the Family Law Act for over a decade [and] a half, their take-up by members of the public has not been as great as it could and perhaps should have been. There are probably many reasons that contribute to that, but one of them is the problems within the legislative framework of the Family Law Act. That, in turn, has led to lawyers—particularly in Sydney, Melbourne and Brisbane—declining to advise clients about them. One of the greatest benefits that the Law Council sees with the proposed amendments is that they may help remove a great deal of uncertainty surrounding financial agreements and hopefully encourage many lawyers to again offer professional services in this area where previously they have steered away from doing so.[19]

2.19 The LCA further stated that lawyers have been hesitant to provide advice on these matters because:

> …[T]he legislation has been very unclear. That dates back to 2000. There have been a series of landmark cases, some of which have then lead to legislative amendments because of the way the law has worked in an unintended way, which invalidated a number of the agreements. That also led to concern about the difficulties of giving advice to clients. One of those areas is because of the scope of the financial agreement advice that had to be given [was] so broad that it was almost impossible to define what it was that a lawyer was [supposed] to advise upon. It has been a comment by

17 Ms Phoebe Kahlo, Rural, Regional and Remote Lawyer, WLSQ, *Committee Hansard*, 12 February 2016, p. 11.

18 Ms Lynch, WLSQ, *Committee Hansard*, 12 February 2015, p. 13.

19 Mr Doolan, LCA, *Committee Hansard*, 12 February 2016, p. 18.

some judges in judgments that in fact with the way the provisions about what legal advice should be provided was worded it was almost impossible to say what should or should not have been said to clients.

That, in turn, leads to a professional negligence issue for lawyers of, "Why would I potentially open myself up to a very significant law claim in future based upon legislation that is unclear and in circumstances where we do not know what that legislation will be in five, 10 or 20 years time when this marriage might breakdown, or this de facto relationship might breakdown, or as to how the courts might then interpret that legislation in five, 10 or 20 years time?".[20]

2.20 The AGD likewise stated:

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.[21]

…[T]here is no intention in this to somehow undermine the requirements for people to be properly advised and to be able to consent. It is more about trying to get away from the case law, which seemed to put up an overly

20 Mr Doolan, LCA, *Committee Hansard*, 12 February 2016, p. 18.

21 AGD, *Submission 20*, p. 3.

> technical approach that meant that these were not able to be used. The aims of the regime were not being met, because people were reluctant to use them for those reasons and so, in fact, could potentially be kept in that system and unable to resolve these things sooner…[22]

Committee view

2.21 The committee is convinced by the evidence that BFAs have not been utilised broadly, and that the primary reasons for this are the uncertainty around their enforceability, and the unwillingness of lawyers to advise on them as a result of that uncertainty. The committee is of the view that out-of-court arrangements should be facilitated where possible to ease the burden on the family court system. The committee accepts the evidence that vulnerable parties, particularly victims of family violence, may face particular difficulties negotiating a BFA independently, however the committee believes that the BFA scheme, particularly section 90K as amended by this Bill, provides adequate recourse.

Removal of the 21 day expiration period

2.22 The Act currently allows state or territory courts making a family violence order to revive, vary, discharge or suspend a parenting order, recovery order, injunction or other arrangement to the extent that they provide for a child to spend time with a person.[23] The court's power is restricted where proceedings relate to an interim family violence order, or interim variation of a family violence order.[24] Where a court revives, varies or suspends a parenting order or other arrangement under section 68R of the Act, that variation, revival or suspension will expire at the time the interim order stops being in force, or after 21 days.[25] After the revival, variation or suspension ceases, the parenting order, injunction or arrangement will be revived. This revival, variation or suspension cannot be appealed.[26] Where a state or territory court is making an interim family violence order or interim variation to such an order, it only has the power to revive, vary or suspend such an order, and only to the extent that the order, injunction or arrangement expressly or impliedly requires or authorises that a person spend time with a child.[27]

2.23 Submitters and witnesses were overwhelmingly in favour of the proposed amendments. The Magistrates Court of Victoria agreed that the current legislative arrangement is problematic:

> What happens with the lapsing after a 21-day period where an applicant has not managed to get on in the federal jurisdiction is that there is real confusion and uncertainty about care arrangements for children after the

22 Mr Manning, AGD, *Committee Hansard,* 12 February 2016, p. 40.

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

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

25 *Family Law Act 1975*, s 68T(1).

26 *Family Law Act 1975*, s 68T(2).

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

> initial 21-day period lapses. This exacerbates safety concerns. Even in the most serious cases, the state or territory court is hamstrung and unable to effectively protect a child at real risk of harm. Often the affected family member is forced to, effectively, breach the family law order by denying visitation so as to act protectively of their children. Understandably, this aggravates an already potentially volatile alleged perpetrator of family violence further.[28]

2.24 Victoria Legal Aid (VLA) likewise stated:

> In our significant practice experience, section 68T incorrect assumes that a 21 day period is sufficient time for the Family Law Courts to list and consider allegations and vary an existing family law order if required. By contrast, for various reasons it is rare that a matter would be listed within 21 days of the making of a family violence order.
>
> This means that currently, if the matter does not return to the relevant Family Law Court within 21 days, there is confusion and uncertainty about care arrangements for children. Importantly, this can elevate and escalate safety concerns. The proposed amendment would ensure that family violence and family law orders in relation to the one family remain consistent and endure or lapse together, while still providing judicial officers with the flexibility to determine timeframes, vary orders and relist matters to manage cases according to their particular circumstances.[29]

2.25 However, concerns were raised in relation to the removal of the 21 day expiration period and its impact on the workload of courts, and on the information sharing arrangements between courts.

2.26 Chief Magistrate Hribal of the Magistrates Court of South Australia submitted that the courts currently face problems where defendants in family violence proceedings appear unrepresented and without court issued copies of Family Court orders:

> Presently there is no mechanism for the direct electronic transfer of orders between the Magistrates Court and the Family Court or the Federal Circuit Court ('FCC'). If a Magistrate requires this information they must initiate a manual request from our registry to the registry of the Family court or FCC. We are required to supply the parties' names and dates of birth as a minimum. Assuming this information is readily available, the order will be provided to us in up to 10 days.
>
> In this context, making orders to revive, vary or suspend a Family Law order during proceedings for an interim intervention order in our court, will create delays and difficulties.[30]

2.27 She also stated:

---

28 Magistrate Kate Hawkins, Supervising Magistrate for Family Violence and Family Law, Magistrates Court of Victoria, *Committee Hansard*, 12 February 2016, p. 3.

29 Victoria Legal Aid (VLA), *Submission 8*, p. 2.

30 Magistrates Court of South Australia (SA Magistrates Court), *Submission 2*, p. 1.

> The proposed amendments in my view will further exacerbate the demand to share information between the Family Court, the FCC and the Magistrates Court. As it currently stands the exchange of information relies on manual effort of employees to provide requested materials. This is a resource intensive and time consuming process, which contributes to unnecessary delays.[31]

2.28 The Chief Magistrate was also concerned about the court responsible for considering applications to amend orders made under the Act:

> Presently, the order to revive, vary or suspend has a short-term effect and the protected person is compelled to have their matter relisted expeditiously before the Family Court and/or FCC for a permanent variation…There is a significant risk that if the present 21 day period is removed, parties may choose to lodge their matter at the Magistrates Court instead of the Family Court or FCC. The risk is heightened in regional areas where the Magistrates Court may have a shorter waiting time. This change may involve a substantial shift of the work from the Commonwealth jurisdiction to the State jurisdiction and should this occur a budgetary adjustment would need to occur to ensure that the Magistrates Court is sufficiently resourced to discharge this responsibility.
>
> Legislative reform in South Australia has led to a substantial increase in the number of family violence matters listed before the court. This has resulted in additional family violence lists and increased pressure on existing resources.[32]

2.29 South Australian Deputy Chief Magistrate Doctor Cannon agreed that the proposed legislative amendments, coupled with the current delays in the Family Court system, would mean an increase in work coming to the Magistrates Courts. He submitted that:

> …[I]n our court you can get on in a week. So there is no doubt that, if we have an open-ended time limit on the orders we make varying Family Court orders, very quickly the legal profession and others will use our court as the first place where they can get a variation if they are unhappy or if circumstances change affecting any orders in relation to children. They will do it because we are much quicker and able to it because they can get the police to do their work for them, so [it is] much cheaper for them. So there will be a lot of work coming to us. We will need funding for social workers and for psychologists to advise on the best interests of children. Legal aid will require additional funding to fund the men and to fund legal representation for children in our courts, and police will require funding for preparing the applications.
>
> We will need more magistrates. This work represents about 10 per cent of our list at the moment—less than that in numerical terms, but a lot of these

31 SA Magistrates Court, *Submission 2*, p. 2.

32 SA Magistrates Court, *Submission 2*, p. 2.

> are contested, so it is probably about 10 per cent of our work. There is a real potential here that you will double our work…[33]

2.30 The Magistrates Court of Victoria raised similar issues, but with particular regard to the sharing of information between courts, stating:

> …[N]early 70 per cent of applications for intervention orders in Victoria are made by Victoria Police on behalf of affected families members…Often, that is initiated because the police attend an incident at a home. The evidentiary basis upon which intervention orders have been made is changing very significantly. My experience is—and, I think, that of my colleagues—a lot of that information just does not get to the federal system. There is a real disjunct in relation to the level of police attendance, investigation and response. The information sharing about the presence of children and what has gone on certainly is not happening. The landscape in relation to these types of matters and the risks that are involved with them are very significant. In Victoria, if there are family law orders, the court is required under our legislation pursuant to section 90 of our Family Violence Protection Act:
>
> … to the extent of its powers under section 68R of the Family Law Act, revive, vary, discharge or suspend the Family Law Act order to the extent that it is inconsistent with the family violence intervention order.
>
> Clearly, it is a mandatory provision within our legislation…[W]e do endorse the recommendations that came out of the interim report and the proposed legislation, but there needs to be a lot more consideration of the resources needed to improve the information flow between both the federal and the state systems. There needs to be a coordinated response to be able to deal with these matters and a timely way of dealing with Family Law Act orders so that families can in a timely way adjust the orders so that the families are kept safe.[34]

2.31 In contrast, the AGD stated:

> 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

---

33 Dr Andrew Cannon, Deputy Chief Magistrate, SA Magistrates Court, *Committee Hansard*, 12 February 2016, p. 2.

34 Magistrate Felicity Broughton, , Supervising Magistrate for Family Violence and Family Law, Magistrates Court of Victoria, *Committee Hansard*, 12 February 2016, pp 4-5.

> 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.[35]

2.32 The AGD tabled two reports by Professor Richard Chisolm AM dealing with the role information sharing plays in the context of child protection.[36] While these reports focused on the sharing of information, including experts reports, between courts and child protection agencies, some of the recommendations made were relevant to this inquiry. Professor Chisolm highlighted the Western Australian system as a valuable model for information sharing where child protection and family violence are involved:

> Western Australia is unique in having an information-sharing protocol relating to matters involving family violence, the parties being the Family Court of Western Australia (here the 'Family Court'), the Magistrates Court of Western Australia (here the 'Magistrates Court'), which deals with family violence matters under state law, the Department of Attorney-General (which provides the family violence service), the Department of Corrective Services, and Legal Aid Western Australia. The measures in the agreement relate mainly to the two courts.
>
> The Protocol refers to common aims of the parties 'to protect victims of violence and to provide the best possible outcomes for children', and embraces the goal of information-sharing ('as far as is practicable, and permissible under the relevant statutory provisions, the parties should share and exchange information and resources in individual cases where in individual cases where to do so would assist in achieving these aims'). It notes that the Family Court and the Magistrates Court may share common clients, and that in such cases exchange of information 'will better facilitate the interests of justice and the best interests of children'. It specifies a method by which each court can access information from the other to identify cases in which the two courts have a common client. In such cases, it provides that judicial and other officers of each court may request information of the other, noting in each case the laws that allow such information to be provided.[37]

2.33 Professor Chisolm concluded:

> The recent family violence amendments to the Family Law Act provide a strong incentive to emulate the Western Australia model. The amendments seek to ensure that the family courts have information relating to family violence (as well as Child Protection involvement), and an agreement along

35 AGD, *Submission 20*, p. 11.

36 Professor Richard Chisolm AM, *Information Sharing in Family Law and Child Protection – Enhancing Collaboration* (Enhancing Collaboration), March 2013; *The Sharing of Experts' Reports Between the Child Protection System and the Family Law System*, March 2014.

37 Professor Chisolm, *Enhancing Collaboration*, March 2013, p. 107.

> the lines of the Western Australia model would be entirely consistent with this approach. More specifically, family courts must now take into consideration, in determining the child's best interests, the inferences to be drawn from a family violence order, having regard to the circumstances in which it was made. It is obviously important in this connection for the family court to have information about those circumstances. It seems desirable, therefore, that there be information-sharing protocols between the family courts and the courts dealing with family violence, so that relevant material in each court can be accessed by the other. Of course it will be a matter for the judge to determine the admissibility of any material that is tendered.[38]

Committee view

2.34 The committee believes that removal of the 21 day expiration period would be beneficial to victims of family violence, because it would help to ensure that they, and/or their children, are not subject to conflicting court orders. The committee is persuaded that consistent court orders are a key element in facilitating protection from violence.

2.35 The committee is also persuaded that access to timely information in matters involving children and victims of violence is crucial for the court system to be able to respond effectively. On that basis, the committee recommends that the Commonwealth government, in conjunction with the states and territories, consider the practicality of developing a protocol for information sharing between courts.

Recommendation 1

2.36 The committee recommends that the Commonwealth government, in conjunction with states and territories, consider the practicality of developing a protocol for sharing information between state, territory and federal courts where matters involve the protection of children and victims of family violence.

2.37 While the committee acknowledges the concerns raised by judicial officers with regards to information sharing and a potential shift in the flow of matters between state, territory and federal courts, it does not regard them as being sufficient to dismiss these amendments.

Summary dismissal

2.38 The committee heard evidence suggesting that the proposed introduction of a provision enabling judicial officers to summarily dismiss some applications could be problematic. AWAVA stated that:

> …[A]n increasing number of people appearing before the family law courts are self-represented, because they lack the financial means to engage a lawyer. This particularly affects women who on average have lower incomes, fewer assets and more dependants. Being self-represented can increase the likelihood of a claim being seen as unmeritorious, especially for victim survivors of domestic and family violence who may be less able

38 Professor Chisolm, *Enhancing Collaboration,* March 2013, p. 109.

> to fully identify or disclose their experience of violence compared with a woman who has legal representation. We, therefore, caution against strengthening the capacity for summary dismissals in the absence of extra measures to support victim survivors to obtain the legal assistance they need.[39]

2.39 WLSQ also stated:

> Women's Legal Service Queensland is supportive of the policy behind this amendment, which is to stop perpetrators of violence using litigation as a way of continuing their abuse of their victims by wearing them down financially and emotionally. However, 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…We are concerned that perpetrators and their lawyers may misuse the provision to threaten that a victim's case is without merit and, unless she withdraws, costs would be awarded against her. Her claims, on their face, may appear unmeritorious, but with assistance they could be substantially improved.
>
> The suggested provision could actually be a barrier and deter women from raising protective and safety concerns about their children in the court...[40]

2.40 The LCA pointed out that judges already have the ability to remove cases which 'should not be there', and that this power may not be 'set out as clearly as in the draft bill'.[41]

2.41 The AGD confirmed that:

> In a sense, the summary dismissal provisions clarify and make substantially clearer existing powers of the court. I think the first point to make is that those amendments bring together a number of existing powers that are in the act and in the rules and reformulate them in a more modern way that is more consistent with the powers of the other courts and is easier to use…The other point to make is that at present there are a large number of litigants in person in the family law courts generally, and no concern has been raised with us about whether those summary dismissal powers that already exist are being used inappropriately, and I do think that the courts are likely to take summary dismissal very, very seriously because of its access-to-justice implications.[42]

Committee view

2.42 Courts already have the power to assess the merit of individual cases and, where appropriate, summarily dismiss applications. The proposed amendment merely seeks to clarify that power.

---

39 Ms Andrew, AWAVA, *Committee Hansard*, 12 February 2015, p. 15.

40 Ms Lynch, WLSQ, *Committee Hansard*, 12 February 2015, p. 10.

41 Mr Doolan, LCA, *Committee Hansard*, 12 February 2016, p. 24.

42 Mr Stephen Still, Principal Legal Officer, Family Law Policy and Legislation Section, AGD, *Committee Hansard*, 12 February 2016, p. 40.

Retaining a child overseas

2.43 The committee received a submission outlining the difficulties women fleeing domestic violence or the abuse of their children face where they may be charged with a child abduction offence:

> The proposed amendments concerning international parental child abduction focuses on the minority of cases in which a parent wrongfully removes a child from the jurisdiction and fails to introduce additional defences which were recommended by the Family Law Council to address the majority of parental child removals – women fleeing domestic violence and abuse.[43]

2.44 This submitter highlighted a submission made by the Family Law Council (FLC) in March 2011. In that submission, the FLC recommended that exceptions and defences including fleeing from violence, protecting the child from danger of imminent harm should apply to criminal offences involving child abduction.[44]

2.45 The submitter also highlighted a report in 2005 which discussed the 'changing face' of child abductors since the 1970s. That report stated:

> While many elements remain the same in abductions over a thirty year period, there is one striking difference in the face of abductions in recent times. In 1999, an analysis of 1080 return and access applications in Contracting States under The Hague Convention revealed that 70% of abductors were women. The most common reason for the abduction was fleeing from domestic violence…It is apparent that it is now much more likely here and in other parts of the world, to be the mother who abducts.[45]

2.46 The Australian Federal Police (AFP) did not raise concerns with regards to the proposed new offence provisions; however, it did raise practical issues which could arise in enforcing them. The AFP noted that these proposed provisions would not aid them in the retrieval of children from foreign jurisdictions, 'as the AFP will still need to rely on cooperation and assistance from the local jurisdictions, which may be challenging, particularly when dealing with non-convention countries'.[46] The AFP also noted that this could be particularly problematic in war-torn countries.[47]

Committee view

2.47 The committee notes the evidence submitted, which indicates that many people (particularly women) may flee Australia with their children in order to escape

---

43 Name withheld, *Submission 19*, p. 1.

44 Name withheld, *Submission 19,* Attachment 3, Law Council of Australia, *Submission to the Attorney-General*, 14 March 2011, p. 13.

45 Name withheld, *Submission 19,* Attachment 4, International Social Service Australian Branch (ISSAB), *Living in Limbo – the experience of international parental child abduction – the call for a national support* service, February 2005, p. 8.

46 Mr Shane Connelly, Assistant Commissioner and National Manager, Crime Operations, Australian Federal Police (AFP), *Committee Hansard,* 12 February 2016, p. 32.

47 Mr Connelly, AFP, *Committee Hansard*, 12 February 2016, p. 32.

violence or to protect their children from abuse. The committee agrees that, for many, these actions are born of desperation, and a genuine wish to protect the children involved. However, the committee still believes that the legislative gap, which this Bill intends to close, should indeed be closed. While some individuals who remove children from Australia may be women escaping domestic violence or abuse, some are not. The committee feels strongly that Australian law must enable authorities to take action and recover children being retained overseas, a situation already fraught with practical difficulties and complications. The committee also believes that complex situations where family members are fleeing with children to escape violence or abuse should be dealt with in Australia.

2.48 Furthermore, the committee agrees with the EM where it states:

> The gravity of the effect of wrongful retention on a child's wellbeing, irrespective of who commits the offence or in which country the child is retained, can be devastating and long-lasting. The new offences are intended to be a deterrent to the wrongful retention of a child and apply to any person (regardless of whether they have Australian citizenship or residency) who wrongfully retains a child, irrespective of whether there is an equivalent offence in the law of the local jurisdiction where the child is being retained.[48]

2.49 The committee notes the comments of the AFP and is of the view that the problems identified are the natural consequence of Australia's law enforcement capabilities being extended extra-territorially. The committee does not regard these potential problems as reasons to leave open the current gap in the law wherein children can be retained overseas unlawfully, and notes that the AFP has also expressed its support for the proposed amendments.[49]

Explanation of orders to children

2.50 The National Children's Commissioner indicated that she was concerned about the proposed amendment to section 68P, describing the proposed changes were a 'retrograde step'.[50] She stated:

> Children routinely tell me that they feel disempowered and silenced in Family Court proceedings. They also say they are not given information about outcomes or consulted on decisions about them.[51]
>
> …There is some discussion in the statement of compatibility with human rights that it is sometimes in the best interests of the children not to understand, not to be exposed to, the controversy surrounding the case and that there should be discretion given to the judges to make that call. But, as I said, I am not convinced that there is a demonstrated understanding of

48 EM, p. 48.

49 Mr Connelly, AFP, *Committee Hansard*, 12 February 2016, p. 32.

50 Commissioner Megan Mitchell, National Children's Commissioner, Australian Human Rights Commission (AHRC), *Committee Hansard,* 12 February 2016, p. 27.

51 Ms Mitchell, AHRC, *Committee Hansard,* 12 February 2016, p. 26.

> what 'best interest' is or of children's rights generally. In my experience, many children are able to comprehend and in fact benefit from comprehending the situation they are in—even quite young children.[52]

2.51 In response to this concern, the AGD informed the committee:

> The purpose of the exception from this requirement where the child is too young to understand to understand (sic) 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.[53]

Committee view

2.52 The committee acknowledges the Commissioner's comments, and agrees that if the proposed amendments were applied too broadly, this could indeed lead children to feel as though they do not have a voice in legal proceedings which affect their lives. However, the committee believes strongly that the family law sector is one in which judicial officers are already required to make assessments as to the best interests of a child, and have the requisite expertise to do this in an appropriate manner.

Compliance with the CEDAW

2.53 Submitters raised the question of the Bill's compliance with human rights measures. Both SI and the WLSQ submitted that the government had failed to consider the impact of the Bill on Australia's obligations under the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW).[54] WLSQ stated:

> 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 *CEDAW* 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.[55]

2.54 In contrast, the AGD stated:

---

52 Ms Mitchell, AHRC, *Committee Hansard*, 12 February 2016, p. 27.

53 AGD, *Submission 20*, p. 14.

54 WLSQ, *Submission 3*, p. 2, and SI, *Submission 9*, p. 4.

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

> 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.[56]

Committee view

2.55 The Bill deals with matters which explicitly concern family violence. It makes amendments to the interaction between family violence prevention orders and parenting or similar orders, as well as creating the new offence of retaining a child overseas. The Bill also deals with BFAs which some evidence suggested can be used in a coercive manner.

2.56 The committee acknowledges the department's comments (at paragraph 2.58) but notes that the statement of compatibility with human rights in the EM does not include reference to CEDAW. The committee recommends that the government consider amending the EM to include reference to the interaction between the provisions of the Bill, and Australia's CEDAW obligations.

Recommendation 2

2.57 The committee recommends that the government consider amending the EM to include reference to the interaction between the provisions of the Bill, and Australia's *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW) obligations.

56 AGD, *Submission 20*, p. 18.

2.58 On the basis of the preceding recommendations, the committee recommends that the Senate pass the Bill.

Recommendation 3

2.59 On the basis of the preceding recommendations, the committee recommends that the Senate pass the Bill.

Senator the Hon Ian Macdonald
Chair