THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: FamIssues:JFEel1014958

22 June 2015

Public consultation: Binding financial agreements
Family Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email: BFAamendments@ag.gov.au

Dear Sir or Madam,

Proposed amendments to binding financial agreement provisions of the Family Law Act 1975

I am writing on behalf of the Family Issues Committee ("Committee") of the Law Society of New South Wales. The Committee represents the Law Society on family law issues as they relate to the legal needs of people in NSW and include experts drawn from the ranks of the Law Society's membership.

The Committee has reviewed the Exposure Draft Civil Law and Justice Legislation Amendment Bill 2015: family law ("Bill") and accompanying consultation paper.

The Committee is of the view that this reform is long overdue. The Committee welcomes the proposed amendments and the opportunity to comment on them.

1. General comments on the proposed amendments

The Committee is of the view that simplifying the steps to be undertaken to ensure a financial agreement is binding should improve the existing provisions in the *Family Law Act 1975* (Cth) ("FLA").

Comments in this submission relate mainly to the proposed changes to Part VIIIA of the FLA but will apply equally to the commensurate changes to Part VIIIAB.

The Committee has observed that the proposed amendments refer to both "spouse party" and "party". A possible effect of this drafting is to limit the rights of third parties to a financial agreement. For example, it is unclear whether it is intended that a third party to a financial agreement should not be able to rely on proposed section 90GB. The Committee is of the view that references to "spouse party" and "party" should be reviewed to ensure that there is no inconsistency or uncertainty where there are third parties to a financial agreement.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966
T +61 2 9926 0333 F +61 2 9231 5809
www.lawsociety.com.au

Law Council OF AUSTRALIA
CONSTITUENT BODY

2. Specific comments on the proposed amendments

2.1 Section 90AL – simplified outline of this Part

The Committee supports inserting a new provision which seeks to provide an outline of the intended operation of Part VIIIA.

The outline should fulfil the broad function of informing parties who wish to make an agreement, those who draft and advise on agreements, and those who are called upon to interpret these agreements, of the intended principles. The concept of a financial agreement "binding" the parties to it has meant that it ousts the jurisdiction of the Courts to grant relief to the parties under Part VIII of the FLA on matters which are covered in the financial agreement. This may possibly leave some issues still to be determined by a Court if the parties have not sought to "cover the field".

It should be remembered, however, that before the question of whether an agreement is determined to be binding, it should first be a valid agreement under contract law. The Committee suggests the insertion of a statement to this effect in the new section 90AL, possibly at the beginning of the second paragraph which reads as follows "Where parties enter into a valid agreement such an agreement is binding if…".

2.2 Section 90AM – object of this Part and principles underlying it

The consultation paper states that the intention of this new section is to clarify the circumstances in which an agreement is binding on the parties. The need for a statement of object and principles is perhaps unarguable given the development of jurisprudence on Part VIIIA and Part VIIIAB agreements. The Committee notes that the new section 90AM is consistent with section 60B of the FLA.

The Committee has concerns, however, about the introduction of new terms and concepts in this section (such as "informed agreement", "good faith" and "exceptional circumstances"). In relation to the insertion of the term "exceptional circumstances", the Committee notes the intention to amend section 90K(1)(d) to change the threshold from "material change in circumstances" relating to a child to "circumstances of an exceptional nature". The Committee understands the desirability of the use of consistent language in sections 90AM and 90K(1)(d). However, the Committee observes that this subparagraph sets out only one ground for setting aside a financial agreement. The Committee suggests the use of the term "limited circumstances" as set out below.

The Committee suggests that section 90AM(2)(b) be amended to remove the reference to "informed agreement in good faith" and insert the following:

> (2) The principles underlying this object are that:
>
> (a) …
>
> (b) such parties who make a valid agreement after receiving independent legal advice about those matters should have certainty that the agreement will bind those parties and be enforceable unless:
>
> (i) they make another valid agreement to terminate the earlier agreement; or
>
> (ii) a court sets the agreement aside because of certain limited circumstances set out in s 90K(1).

2.3 Section 90E

The Committee notes generally that retrospective laws are commonly considered inconsistent with the rule of law. In general, the Committee would not support amendments to laws that will retrospectively change legal rights and obligations. This is especially the case where those retrospective changes derogate from rights, or as in this case, change contractual entitlements.

The Committee notes, however, that the proposed amendments to section 90E are intended to cure any unintentional failure by parties to an existing financial agreement to specify a dollar amount of maintenance payable, including a nil amount. The Committee supports the amendments to section 90E as the intention is to ensure that any unintended possible non-compliance in existing agreements is cured and are not held to be void because of this non-compliance.

2.4 Sections 90G and 90GA

The Committee notes that the judicial interpretation of section 90G(1) in its various forms and the attempt to amend it with section 90G(1A) has been the nub of the uncertainty around the binding nature of financial agreements.

Where the intention of the proposed amendments is to clarify the requirements for a financial agreement to bind the parties, Committee members have expressed a number of views as to how to best achieve this.

On balance, the Committee suggests that the requirement should be that the parties to the agreement each receive independent legal advice as to:

(a) The rights and obligations created for that party by the terms of the agreement; and

(b) The effect of the agreement on the rights and obligations of that party under the FLA.

The Committee's view is that, whenever the financial agreement was entered into, it should be binding on the parties if it is a valid agreement and, before the parties entered into the agreement, they each received independent legal advice as to the rights and obligations created by the terms of the agreement and the effect of the agreement on their rights and obligations under the FLA. Whether or not they also received advice on other matters should not affect the question of whether the agreement ousts the Court's jurisdiction to deal with the matters covered by the agreement.

Effectively the bar would be set lower for all agreements, including those made before 4 January 2004. The Committee supports there being just one requirement as opposed to different requirements depending on when the agreement was made. This requirement is that the parties enter the agreement after receiving advice as to the obligations and rights created by the agreement and the effect of the agreement on the past, present or contingent rights and obligations of the parties under the FLA.

The purpose of entering into a financial agreement is to contract out of the jurisdiction of the Courts. Some financial agreements are structured so that certain assets are within the terms of the agreement and others are excluded, to be determined by the Court on separation. The proposed wording of the new requirement provides

certainty and would mean that a party would be less likely to have an agreement set aside on a legal technicality.

The Committee supports the new section 90GA. It requires the giving of the independent advice to be certified in a statement which is provided to each party or their legal representative, as well as the requirement that each party sign an acknowledgement that they received the requisite advice. A copy of that acknowledgement must also be given to the other party or their legal representative. This additional requirement of an acknowledgement goes some way to addressing the issue of evidence of the advice having been given and received as discussed in *Hoult & Hoult* [2013] FamCAFC 109.

The Committee supports the insertion of a new subsection to provide further certainty. The new subsection would provide that the existence of the required acknowledgement should be treated as evidence of the requisite advice having been given and received, thereby placing the onus on the person seeking to prove otherwise[1].

2.5 Section 90GB

The Committee supports the intention of the new section 90GB, that is, if the conditions to make a financial agreement binding are met, then the agreement should be enforced.

However, the Committee has concerns with subsection 90GB(2). This provides that, even if the relevant conditions are not fully satisfied, the onus is on the party seeking to avoid his or her obligations under an agreement to satisfy the Court that the failure to meet the relevant conditions are so serious that the agreement should not be enforced. The party must satisfy the Court that the failure to meet the relevant conditions "materially prejudices" the interests of a party to the agreement. The Committee is of the view that the term "materially prejudices" is vague and is open to wide interpretation. It is difficult to imagine a situation where the interests of at least one of the parties to an agreement would not be materially prejudiced at the time of the Court's enquiry, otherwise the parties would not be involved in litigation.

The Committee is of the view that the relevant test should refer back to the circumstances as they existed at the time the financial agreement was made. It should also apply the principles of law and equity to those circumstances to determine whether the agreement should be binding, despite the failure to comply with the relevant statutory conditions.

2.6 Section 90H and 90HA

The Committee supports the inclusion of a provision for ongoing spousal maintenance under a financial agreement to terminate in the event of the death of either party, unless the agreement specifically provides for the maintenance obligation to continue. The Committee also supports the inclusion of new provisions to the effect that ongoing spousal maintenance obligations under a financial

---

[1] The Committee has had the benefit of reviewing the submission of Professor Parkinson AM, dated 12 June 2015 and agrees with Professor Parkinson's suggestion to include a new subsection which reads s 90GA(2) "A written acknowledgement that, before signing the agreement, a party to the agreement was provided with independent legal advice as described in subsection (1)(b) is conclusive evidence that such advice was given".

agreement terminate in the event of the remarriage or de facto partnering of the spouse party receiving the maintenance (payee), unless the agreement specifically provides for the maintenance obligation to continue.

The Committee is also of the view that the prospective application of these new provisions is appropriate.

2.7 Section 90K(1)(d)

The Committee does not support the lifting of the threshold to set aside an agreement on the basis of a "material change in circumstances" to "circumstances of an exceptional nature". The Committee understands the desirability of the use of consistent language in sections 90AM and 90K(1)(d). However, the Committee is of the view that the lower threshold of "material change in circumstances" should remain in section 90K(1)(d).

The Committee does not support this change because of the different circumstances in which a court order and financial agreement are made. A court order is made under section 79 of the FLA after the Court has had regard to what is "just and equitable" in a particular case at the time the court order is made. In these circumstances, it is appropriate that an application to set aside a court order under section 79A of the FLA should only be made where circumstances of an exceptional nature have arisen since the court order was made. However, a financial agreement is a private contract between parties and is not open to judicial scrutiny at the time it is made. It is possible that a financial agreement is made in circumstances where there is a power imbalance between spouse parties or where there is some form of economic abuse. It is for these reasons that the Committee is of the view that the current threshold of "material change in circumstances" is appropriate when seeking to set aside a financial agreement.

The Committee is concerned about the retrospective application of this proposed amendment and, as a general rule, does not support amendments that will retrospectively change legal rights and obligations.

3. Comments on potential amendments to the Family Law Act

3.1 Potential amendment to continue a Part VIIIAB BFA into marriage

The Committee notes that many de facto couples do marry one another and is of the view that it should be possible for parties who make a financial agreement under Part VIIIAB of the FLA to have that agreement continue if the only significant change in their circumstances is their marital status.

The Committee supports the proposition that de facto couples should be able to elect to have their agreement continue if they subsequently marry rather than have the agreement automatically terminated under section 90UJ(1C)(3).

The Committee is of the view that it is not appropriate for this ability to "opt in" to remain effective for an indefinite period of time. In much the same way as many section 90B agreements have a period after which they shall not apply if the parties do not marry within that time, it is recommended that de facto couples be able to "opt in" to the provisions of Part VIIIA by specifically stating in the agreement that it is intended to continue to bind the parties in the event they subsequently marry.

The Committee holds different views about a limit on the length of time for such a provision to be operative. One view is that there should be a limit on the length of time for such a provision to be operative, perhaps no longer than five years from the date the agreement was made. Another view is that there should be no time limit imposed.

A further possible requirement should be a requirement for the statement of advice required for the agreement to be binding to also contain a specific reference to the fact that advice was provided that the agreement is expressed to continue to bind the parties should they subsequently marry within the time stipulated in the agreement.

3.2 Potential amendment to section 90MN

On the basis of having consistent requirements for agreements to be binding, the Committee suggests that the requirements for financial agreements, termination agreements and superannuation agreements to be binding should all be identical.

The Committee also supports a proposal that the essential requirements for financial agreements to be binding should be consistent in the FLA and the *Child Support (Assessment) Act 1989* (Cth)[2]. The Committee also supports the proposition by Professor Parkinson AM that the requirements for a child support agreement to be binding should be identical to the provisions in the FLA.

3. General comments

The Committee observes that the restrictions on the publication of court proceedings under section 121 of the FLA do not apply to financial agreements. The Committee notes that ordinarily, spouse parties who sign a financial agreement agree to confidentiality clauses to restrict the publication of the terms of the agreement. However, such clauses do not bind third parties affected by the agreement. The Committee is of the view that restrictions on publication should be extended to financial agreements.

Thank you for providing the Committee the opportunity to comment on these proposed amendments to the FLA. Any questions about this submission can be directed to Emma Liddle, policy lawyer for the Committee. Emma is available on 9926 0212 or emma.liddle@lawsociety.com.au.

Yours sincerely,

John F Eades
President

[2] This proposal is made by Professor Parkinson AM in his submission dated 12 June 2015 at page 3.