

7 April 2011

Ms Tina O'Brien  
Australian Law Reform Commission  
Level 25  
135 King Street  
Sydney NSW 2000

Dear Ms O'Brien

### **Family Violence and Commonwealth Laws**

Thank you for agreeing to accept these late comments in response to Issues Paper 36 regarding employment and superannuation law. These comments have been prepared by the Law Council's Family Law Section and the Superannuation Committee of the Legal Practice Section.

The Family Law Section's (FLS) role is to positively influence the development and practice of family law for the benefit of its members and the general community, and to promote professional excellence and influence decision making, so that the family law system in Australia is fair, respected, functional and responsive to community needs.

The objective of the Legal Practice Section (LPS) is to ensure that the law relating to superannuation in Australia is sound, equitable and demonstrably clear. LPS fulfils this objective in part by making submissions and providing comments on the legal aspects of proposed legislation, circulars, policy papers and other regulatory instruments.

The following comments respond directly to a limited number of questions raised in Issues Paper 36.

**Question 26** Are the powers of the court to set aside a superannuation agreement—whether a financial agreement or a Part VIIIAB financial agreement—under the *Family Law Act 1975* (Cth) adequate to protect people experiencing family violence? If not, how might these provisions be improved?

The current powers of the courts to set aside superannuation agreements are adequate. As noted in the Issues Paper, these powers have been successfully used by a victim of family violence to set aside an agreement (*Moreno v Moreno* – referred to on page 37 of IP36).

To the extent that superannuation agreements can be set aside by the courts, however, consideration should be given to how an order to this effect will affect actions previously taken by third parties, particularly trustees, in accordance with the superannuation agreement. Where an agreement is set aside by a court order, the order will not of itself undo any previous actions taken in accordance with the agreement.

If a court is considering making an order to set aside a superannuation agreement, it should be required to consider whether a superannuation trustee has transferred a benefit to another superannuation fund, cashed a benefit, or created a new superannuation interest in reliance upon the superannuation agreement. The provisions in the *Family Law Act 1975* which currently give the court power to make orders with respect to superannuation, which require a trustee to act in accordance with such an order and protect trustees against a breach of the *Superannuation Industry (Supervision) Act 1993* and its trustee duties do not readily extend to orders made in relation to the setting aside of a superannuation agreement.

If the court is to be provided with powers to undo acts taken in accordance with a superannuation agreement, the court's powers may need to be extended and further protection will need to be provided to superannuation trustees which act upon an order setting aside a previous superannuation agreement.

**Question 27** Should a trustee have any obligation to consider whether a request to transfer an amount to a spouse under the superannuation contribution splitting regime is being made as a result of coercion?

It would not be appropriate for a trustee of a superannuation fund in receipt of a contributions splitting application to determine whether the request was made as a result of coercion. Beyond requiring a declaration from the applicant member, it is unclear how a trustee (other than the trustee of a self-managed superannuation fund) could identify a contributions splitting request which was made as a result of coercion. Trustees will not have the resources or expertise to make such a determination. For the reasons identified in the Issues Paper, a declaration to the effect that there has not been coercion is unlikely to be helpful.

It is also noted that trustees are not required to invite contributions splitting applications from members. If trustees were required to assess contributions splitting applications to determine whether they were made as a result of coercion, it is extremely unlikely that they would continue to offer this service to their members. It would be administratively burdensome, expensive and expose them to liability in the event that the trustee made what was ultimately established to have been the wrong determination.

**Question 28** Should a 'claw-back' provision be introduced so that a victim of family violence may seek to recover benefits that they have been coerced into transferring to their spouse under the superannuation contribution splitting regime?

While this is a matter of Government policy, it is noted that if such a provision was introduced, amendments to the *Superannuation Industry (Supervision) Act and Regulations* would be required to allow trustees to adjust members' benefits.

**Question 29** What mechanisms should be established to provide better protection to people experiencing family violence from financial abuse in the context of self-managed superannuation funds (SMSFs)? For example, should the jurisdiction of the Superannuation Complaints Tribunal be extended to cover complaints concerning SMSFs?

Family violence is a matter most appropriately dealt with by courts with criminal and family law jurisdiction. It would not be appropriate for the Superannuation Complaints Tribunal to

be extended responsibility for dealing with complaints about the conduct of trustees of SMSFs, particularly where those complaints involve family violence.

The Superannuation Complaints Tribunal was established to resolve complaints about the decisions of trustees of superannuation funds. Where the trustee is the trustee of an SMSF, the trustee will also be a member and a relative of the complainant. Any complaint about the trustee's decision, particularly where family violence is in issue, will, very rarely be limited to its decision or conduct as trustee. It is very likely that any such complaint or dispute will also raise matters which would generally be dealt with by the criminal or family courts.

It is noted that, under its enabling legislation, the Tribunal is to attempt to resolve a dispute by conciliation. It is unlikely that conciliation would be appropriate where family violence is an issue. Members of the Tribunal are also unlikely to have the relevant expertise.

It is also noted that the Review into the Governance, Efficiency, Structure and Operation of Australia's Superannuation System recommended against extending the jurisdiction of the Tribunal so as to deal with SMSFs.

**Question 30** Should the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to require that an applicant, as part of satisfying the ground of 'severe financial hardship', has been receiving a Commonwealth income support payment for 26 out of a possible 40 weeks (or some other period)?

This is a matter of Government policy. The Law Council has no comment at this stage.

**Question 31** Should the *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide a specific 'compassionate ground' to enable the early release of superannuation benefits to a victim of family violence?

While this is a matter of Government policy, the Law Council believes there is scope for further work in this area which may assist victims of family violence.

**Question 32** Are there any other ways in which Commonwealth employment, occupational health and safety or superannuation law could be improved to protect the safety of those experiencing family violence?

The Law Council has no other suggestions for improvements at this stage.

The Law Council looks forward to contributing further to the ALRC's inquiries with the proposed release of the Discussion Paper in mid-2011.

Yours sincerely



Bill Grant  
Secretary General