

Arbitration in Family Law

FAMILY LAW COUNCIL

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The Hon Daryl Williams AM QC MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General,

Your Department recently forwarded to me details of proposed amendments to the Family Law Act 1975 relating to arbitration in family law and sought Council's advice on the proposed changes. Council considered this matter at its meeting in Sydney on 19-20 February 1998 and I have set out below Council's comments.

In considering these matters Council was assisted by its discussions with Mr Garry Watts, a family law practitioner who is on the executive of the Family Law Section of the Law Council of Australia. Mr Watts is an approved arbitrator in property matters under NSW legislation as well as being a family law practitioner over many years.

Council agrees with the general thrust of the proposed legislation and comments made below are in the nature of fine tuning. In making its comments Council has kept in mind the recommendations made in its report *Arbitration in Family Law* (March 1988) and other Council reports.

Amendment No 1

This amendment involves the removal of the reference in section 19D(2) to non-consensual arbitration.

Council appreciates that following the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission* [1994] 69 ALJR 191, non-consensual arbitration is of doubtful Constitutional validity. In its report *Arbitration in Family Law* (1988) Council had a number of concerns about non-consensual arbitration and sought to overcome these by restricting its use to specified circumstances. The proposed amendment, by removing non-consensual arbitration completely, overcomes those problems.

Consensual arbitration would appear to have some support from the High Court decision in *The Minister for Home Affairs v Teesdale Smith and Others* [1924] 35 CLR 120.

Some concerns were expressed on Council that the types of threshold checks that are made by mediators in relation to domestic violence do not appear to apply to arbitrators.

Council supports Amendment No 1.

Amendment No 2

At present section 19G(2) provides that reviews of registered awards are by way of re-hearing questions both of fact and law. The proposed amendment is that reviews of arbitral awards will be on questions of law only.

Council wishes to see arbitration become a substitute for the more costly court process in appropriate cases, rather than a mere additional tier in the process, and Council therefore appreciates the aim of this amendment.

Council suggests that there will be a need to make new rules in relation to the arbitral process. For example, there will be a need for a new rule in relation to the issue of subpoenas by arbitrators. Other questions relating to rule making are made later in this advice.

Amendment No 3

This amendment provides that review of awards by arbitrators will be by a single judge instead of by a Full Court as at present.

In Recommendation 37A of its Arbitration report Council recommended that appeals from an arbitrator's decision should be to a single judge. Council also recommended, in its report *Family Law Appeals and Review* (June 1996), that the Family Court should examine developments in other courts with a view to adopting acceptable changes which would reduce costs (Recommendation 2). One area suggested for the court's consideration was using courts of appeal of less than 3 judges in appropriate cases.

Council supports this recommendation.

Amendments Nos 4-5

These amendments propose inserting new provisions in the Act designed to (a) enable an arbitrator to refer a question of law to the court for determination and remittal back to the arbitrator and (b) to do so on the arbitrator's own motion.

Council sees no objections to these proposed amendments.

Amendment No 6

A provision is to be drafted which gives the court power to set aside an award where the arbitration process was affected by fraud, duress, bias, the suppression of evidence or the giving of false evidence.

In its Arbitration report Council suggested such a provision, but it also included the words "or in any other circumstance". In doing so Council had in mind similarly strong reasons for setting aside an arbitrator's award, such as in the event of an error of law, the drawing of a wrong inference by an arbitrator, when there is no evidence to support the arbitrator's findings or where the findings are not supported by evidence. It is difficult to predict such possibilities and, therefore, Council considers that a discretion needs to be given to the court to ensure that such instances are covered.

Council agrees with the proposed amendment subject to the addition of the words "or in any other circumstances".

Amendment No 7

This amendment relates to costs.

Council has no comment on the proposed amendment.

Amendment No 8

This amendment sets out a self-regulating system for appointing arbitrators and removes the need for the term "approved arbitrator".

Council notes that the proposed system is consistent with the system for the appointment of mediators in family law and has no objections to the proposal.

Amendment No 9

This is a consequential amendment under which the definition of "approved arbitrator" will be removed. Council has no objections to the proposal.

Amendment No 10

This amendment also involves consequential amendments under which the word "approved" will be removed.

Council has no objection to the proposed amendment.

Amendment No 11

Section 67ZA of the Act currently requires certain persons to notify reasonable suspicions of child abuse and this amendment proposes including arbitrators among those required so to notify.

Council has no objections to this amendment.

Amendments Nos 12-14

These amendments involve changes to section 125 (the making of Regulations) to facilitate introduction of the proposed arbitration system.

Council has no comment to make on the proposals.

Section 123 - Rule making power

Council has some concerns about whether the existing power to make rules (section 123) will be adequate to do what is required in relation to rules about arbitration. In some areas section 123 may need to be broadened and in others they may need to be made more specific.

A member of Council, the Hon Justice Michael Hannon, is also Chairman of the Rules Committee and Council suggests that the Department may wish to consult Justice Hannon on these matters. His Honour has indicated that he would be happy to assist the Department in this matter.

I am also providing a copy of this advice to your Department.

Council notes that the Family Court has not been consulted to date on this matter and suggests that in view of its direct interest in the issue of arbitration the court would wish to be consulted about the proposals.

Council wishes to express its thanks for the opportunity to comment on the proposed amendments.

Yours sincerely,

(Jennifer Boland)
Chairperson