Senate Community Affairs Committee- Inquiry into Child Support Legislation Amendment (Reform of the Child Support Scheme - New Formula and Other Measures) Bill 2006

To assist the Committee in its deliberations the Department of Families, Community Services and Indigenous Affairs provides the following additional information.

1. CHILD SUPPORT AGREEMENTS

Agreements should be able to be varied. [Law Council of Australia]

Under the proposed legislation, parents cannot vary the agreement, but can effectively do so by substituting a new one that contains the varied provisions of the former agreement. Where the agreement is binding, parents need legal advice to do this; where the agreement is limited, they can do so by mutual agreement. Because of the need for legal advice for binding agreements, it was decided that it was simpler not to allow variation, but to require a new agreement with legal advice. For limited agreements, a whole new agreement with clear fresh agreement from both parents is also clearer for the Child Support Agency (CSA) than trying to administer variations to an agreement.

However, an agreement can deal with changing circumstances within the terms of the agreement itself. Parents will be encouraged to consider appropriate flexibility when formulating the terms of agreements.

For example, an agreement could set out what would happen if:

- the children live 50/50, or care changes to regular care (24%), etc
- one of the parents lose their job, or income changes
- one of the parents has a new child, etc.

There should be changes to the circumstances in which agreements can be set aside by the court. [Law Council of Australia, Professor Parkinson]

FaCSIA is considering this issue and notes that Professor Parkinson indicated to the committee that there were no critical areas of disagreement between himself and the government on the legislation. It is the policy intent that limited agreements be easier to end than binding agreements and that binding agreements should be difficult to end. Where parents wish to have more certainty in their arrangements, it is more appropriate for them to make binding agreements with legal advice. Section 136 sets out the circumstances in which a court may set aside the agreement.

FaCSIA is considering whether amendment of this section is required to provide greater certainty to parents who enter into binding child support agreements.

What will happen with existing agreements?

Section 74 of the Bill sets out the activity to be undertaken by the Registrar in relation to child support agreements existing and accepted as at 1 July 2008. The Registrar will determine, prior to 1 July 2008, that one of the following applies:

(a) from 1 July 2008, the agreement is terminated as it cannot be administered consistently with the Act from that date
(b) from 1 July 2008, the agreement will be taken to be a binding child support agreement.

Parents will be notified of the Registrar's determination and will be able to object to the determination of the Registrar. Only agreements that **cannot** be continued (for example, because they contain a reference to an element of the current formula that cannot be translated to the new formula) will be terminated. Agreements that are determined to be taken to be a binding agreement will be treated slightly differently from new binding agreements in that they will be able to terminated by written agreement of both parties and the parents' entitlement to FTB will be assessed using the actual amount of child support, rather than a notional assessment of the child support that would have been paid if the agreement was not in place.

2. SOCIAL SECURITY APPEALS TRIBUNAL (SSAT)

Currently parents who are unhappy with Child Support Agency decisions can only appeal them to the courts. This is expensive and time consuming. The reforms will expand the role of the Social Security Appeals Tribunal to include review of Child Support Agency decisions. This will improve the consistency and transparency of decisions and will provide a mechanism of review that is inexpensive, fair, informal, quick, and which does not require parents to obtain legal representation.

The SSAT is not an appropriate forum for inter partes disputes. [Law Council of Australia]

The SSAT is to review administrative decisions made by the CSA, not to adjudicate inter partes disputes. A parent is objecting to a decision by the Registrar or delegate of the Registrar – they are not actually disputing with the other parent, although the other parent may be joined as a party to the review.

FaCSIA has received advice that there is no constitutional impediment to the SSAT reviewing CSA administrative decisions. It is currently an anomaly to not have these government decisions reviewable by a tribunal.

It is inappropriate for inter partes proceedings to be able to be initiated by telephone, as this does not require sufficient consideration of the implications of beginning the review process.

SSAT review is intended to be an accessible process. Application by telephone is currently available for review of Centrelink decisions. In most cases, existing SSAT procedure has been adopted for review of CSA decisions, as these are established and tested processes that work well for a similar client group. Centrelink decisions may also involve two separated parents, for example in FTB matters. How these processes work in practice will be monitored by the SSAT and FaCSIA.

It should be made explicit that parties can be represented by lawyers, and that there should be provision for a party (or their representative) to question another party. [The Law Council of Australia]

There is no restriction on parents' being accompanied to SSAT hearings, including by a legal representative. This is explicitly stated in SSAT documentation, including on their website and the forms for application for review. However, the use of the SSAT as a review mechanism is a deliberate step away from adversarial court proceedings. Allowing cross-examination would be likely to make parents feel that they *need* to have legal representation, which is in conflict with the SSAT's aim of providing economical, informal and quick review. SSAT members are experienced in fact-seeking on their own initiative.

The SSAT should be able to make cost orders against the other party for legal representation. **[The Law Council of Australia]**

As noted above, the use of the SSAT as a review mechanism is a deliberate step away from adversarial court proceedings to review an administrative decision. The respondent party is the CSA, not the other parent (who may be joined as an additional party). In these circumstances the awarding of costs is not appropriate.

There is no provision for the SSAT to test factual assertions or compel the production of evidence – this is a denial of natural justice. [The Law Council of Australia]

The SSAT can test facts and require people, including the Registrar, to provide evidence through documentation or, more rarely, personal appearance. There is provision for the SSAT to pay the costs of people who are required to provide evidence.

Written reasons for decision should always be given. [The Law Council of Australia]

Parties can request written reasons within 14 days of the oral decision and the SSAT must provide written reasons on request (s.103X of the Bill). The SSAT has indicated that it will provide full written reasons in all but the simplest

cases. Parties can request written reasons where they are not given, and the possibility of requesting these will be indicated on the documentation provided. These provisions will be reviewed during 2007.

3. PLAIN ENGLISH LEGISLATION [The Law Council of Australia]

The Law Council was concerned that the Bill was difficult to understand and did not meet the Taskforce's recommendation that the legislation be re-written in plain English.

This purpose of this Bill is to amend the current legislation to give effect to the child support reforms. While Government accepted the recommendation to rewrite the legislation in plain English, priority has been given to implementing the reforms. The intention is to undertake a plain English rewrite at the earliest possible opportunity. The amendments contained in the bill clearly deal with very complex matters, are necessarily large in number and involve intricate interactions between related concepts and rules. The amendments have been carefully framed by Commonwealth drafting experts to achieve the intended Government policy. The Explanatory Memorandum provides more detail on the operation of the provisions.

4. EXCLUSION OF ADDITIONAL INCOME FOR RE-ESTABLISHMENT COSTS

The wording of section 44 is unnecessarily vague and imprecise. [The Law Council of Australia]

44(1)(d)
(i) in accordance with a pattern of earnings, derivation or receipt that was established after the applicant and the other parent first separated; and
(ii) that is of a kind that it is reasonable to expect would not have been earned, derived or received in the ordinary course of events.

The calculation of child support liabilities excluding income earned for the purposes of re-establishment is a simple administrative process, rather than a Change of Assessment process. Consequently, the drafting provides for a range of additional income, not derived in the ordinary course of events, to be considered as being earned or derived for the purpose of meeting re-establishment costs. More restrictive drafting would increase the likelihood of dispute about the income to be excluded.

Terms like "reasonable" and "in the ordinary course of events" were unclear, and could lead to conflict. [The Law Council of Australia]

Terms such as these are well established in law. More detail on the intended operation of the provisions is included in the Explanatory Memorandum (p10).

5. PERCENTAGE OF CARE

Because of lack of evidence, oral agreements (sections 49-50) should determine the percentage of care only where the parties acknowledge that there was such an agreement. [The Law Council of Australia]

Where one parent contacts CSA to give notice of an oral agreement, CSA will contact the other parent to confirm their agreement. Following notification to CSA of an oral agreement, a notice will be issued to both parents, who can object to the assessment (usually within 28 days) – this means that they effectively acknowledge their oral agreement a second time by accepting the basis of the assessment.

Where parents cease to agree, they will need to show that they have sought to reach agreement – this means that there will be **less** need for the Registrar to make factual decisions about care, or about agreements that have been made, than currently, as the Registrar often needs to make decisions about what is actually occurring.

6. RECOGNITION OF STEP-CHILDREN

It is too hard for the other parent to challenge assertion that first parent has financial responsibility for a step-child. [The Law Council of Australia]

The first parent can claim that they have responsibility only in very limited circumstances – ie, where neither of the child's natural parents can earn income, so the step-parent must, logically, be supporting them. Such claims will be made through Change of Assessment process, and will therefore be subject to consideration by a Senior Case Officer of what is "just, equitable and otherwise proper" and subject to objection by either parent and external review by the SSAT.

7. LATE PAYMENT PENALTIES

The court should have a specific power to remit Late Payment Penalties. [Ms Kathleen Ng]

There are already significant provisions in relation to the remitting of late payment penalties.

CSA imposes a late payment penalty on a payer whenever they fail to pay their child support debt by the due date. The purpose of a late payment penalty is to encourage payers to comply voluntarily with their obligation to pay child support and discourage late payment.

A late payment penalty is a debt due and payable to the Commonwealth. Any late payment penalties CSA collects are paid into consolidated revenue. They are not paid to the payee.

CSA calculates late payment penalties on the unpaid balance of a payer's child support debt after the due date for each payment period. The rate of the penalty is linked to the annual rate of the penalty for unpaid income tax under the *Income Tax Assessment Act 1936*.

CSA will vary the Register to remove any late payment penalties applied because a payer failed to pay an amount of child support that is no longer due.

CSA has discretion to remit a late payment penalty in part or in full. CSA will use this discretion in a way that will further the objectives of the child support scheme, according to the particular circumstances of each case.

The parent can object (and subsequently seek review of the decision) if CSA declines to remit the penalties.