Representing Family Lawyers Throughout Australia

Family Law Section

Law Council of Australia

Submission to the Senate Community Affairs Committee

Child Support Legislation Amendment (Reform of the Child Support Scheme – New Formula and Other Measures) Bill 2006

Introduction

1. The Law Council of Australia is the peak national body of the Australian legal profession. Through its constituent bodies, the State and Territory Bar Associations and Law Societies, it represents approximately 50,000 Australian lawyers. The Family Law Section (FLS) is the Law Council's largest Section. FLS membership consists of approximately 2,200 practicing family law practitioners, throughout Australia.

2. Members of FLS represent parents and their children in respect of all issues arising from relationship breakdown (including child support both in its own right and in terms of its inter-relationship with the broader restructuring of family financial arrangements) from the very beginning of the process of separation through to finalisation of family arrangements. In the course of the journey, lawyers facilitate an infinite variety of solutions because each family is unique and the needs of each family are different.

3. On 14 September 2006 the Senate, on the recommendation of the Selection of Bills Committee, referred the *Child Support Legislation Amendment (Reform of the Child Support Scheme – New Formula and Other Measures) Bill 2006* (the Bill) to the Community Affairs Committee for inquiry and report by 10 October 2006.

4. In his Second Reading Speech to the House of Representatives, the Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs, the Hon Mal Brough MP, said that "*The reforms in this bill are the most significant and most comprehensive in the 18-year history of the Child Support Scheme…"*. It is extremely disappointing - and FLS is very concerned to note - that the community has had a little over a week to comment on the 306 pages of complex amendments, supported by a 230 page Explanatory Memorandum, which underpin these significant reforms.

5. In the limited time available FLS has identified the following areas which are of concern or which require clarification or further consideration:

Schedule 1 – The formulas (commencing on 1 July 2008)

5.1 Post-separation costs

- Clarification of excluded income (paragraphs 9-10)
- No notice of application by payer is given to payee (paragraph 11)
- Payee does not have opportunity to make submissions (paragraph 11)
- No notification is given to payer if payee's application refused (paragraph 11)

5.2 Percentage of care

- Determinations based on oral agreements between parties (paragraphs 13-14)

5.3 Costs of Children Table

- Level of support for larger families (paragraph 16)
- Child support when parents income exceeds cap (paragraphs 17-18)

Schedule 3 – SSAT review of child support decisions (commencing on 1 January 2007)

5.4 SSAT

- Inappropriate forum for *inter partes* proceedings (paragraph 21)
- Inappropriate to commence proceedings by telephone (paragraphs 22-23)
- Production of documents (paragraphs 24-28)

- No provision for questioning a party (by or on behalf of the other party) (paragraph 29)
- Unclear that a party can be represented by a lawyer (paragraph 30)
- No adequate provision for testing factual assertions (paragraph 31)
- No provision for award of legal costs (paragraph 32)
- Failure to comply with a notice to provide "information", which is not defined, punishable by 6 months imprisonment (paragraph 33)
- Decisions can be given orally or in writing (paragraph 34)

Schedule 4 – Other amendments commencing on 1 January 2007

5.5 Change of Assessment

- Requirement to obtain leave to change assessment from date earlier than 18 months (paragraphs 35-39)

5.6 Jurisdiction of courts

- Requirement for court to determine it is in the best interests of parties to determine child support with other proceedings (paragraphs 40-44)

Schedule 5 – Amendments relating to child support agreements and court orders (commencing on 1 July 2008)

5.7 Child Support Agreements

- No capacity to vary child support agreements (paragraphs 49-51)
- Ease with which agreements can be set aside (paragraphs 52-57)
- Use of limited child support agreements for modest amounts (paragraphs 58-59)
- Low threshold for termination of limited child support agreements (paragraphs 60-61)
- Saving provisions (paragraph 62)
- Sunset clause for binding child support agreements (paragraph 63)

5.8 Notional Assessments

- Unrealistic time periods for notification (paragraphs 64-67)

Schedule 6 – Amendments relating to departure orders (commencing on 1 July 2008)

5.9 Resident child

- Definition (paragraphs 68-69)

5.10 Departure orders

- Orders on the grounds of responsibility for step-children (paragraphs 70-71)

Schedule 8 – Amendments relating to family tax benefit (commencing on 1 July 2008)

5.11 Family tax benefit

- Further comment to be provided at public hearing

6. FLS notes that these issues reflect our preliminary views only, and would appreciate the opportunity of appearing before the Committee to expand on these comments. FLS does not seek to address the broad policy underlying the changes proposed in the Bill. The comments in the submission are in the nature of technical comment on the draft legislation.

Schedule 1 – The formulas (commencing on 1 July 2008)

7. Schedule 1 repeals Part 5 of the *Child Support (Assessment) Act 1989* and replaces it with a new Part 5 that provides a new series of child support formulas (which are based on recent Australian research on the costs of caring for children).

8. FLS notes that Schedule 1 gives legislative effect to the formula changes proposed in the recommendations of the Ministerial Task Force Report[1].

Post-separation costs

9. Section 44 of the new Part 5 sets out how post-separation costs are to be assessed. Subparagraphs 44(1)(d)(i) and (ii) enable the Registrar to exclude from a person's child support income amount that income which, in the Registrar's opinion, which was earned:

> **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.**

[1] *In the Best Interests of Children – Reforming the Child Support Scheme*, Report of the Ministerial Taskforce on Child Support, May 2005, ISBN 1 920 85187 9

10. FLS considers the wording (and particularly subparagraph (ii)) to be unnecessarily vague and imprecise. The Explanatory Memorandum[2] to the Bill provides at page 10 that the intention is to exclude income from overtime or a second job, because a parent may have undertaken the work to earn such income in order to re-establish themselves following separation. If this is the intended meaning of the provision, then the legislation should say so. **FLS recommends that the subsection be redrafted to clarify that intention**.

11. Section 44 does not require the Registrar to give notice of an application (made under subsection 44(1)) to the payee. The payee may only become aware of the issue once the Registrar makes a determination. The payee seems to be intended to have no input into the determination. It is our experience that payees often know a lot about the working pattern of their former partners. They could make highly relevant submissions to the Registrar concerning those matters, and should be given the opportunity. **FLS recommends that the section be redrafted so that:**

    (i) the payee is notified that an application has been made by the payer to exclude post-separation income and be provided with a copy of the application and any supporting documentation; and

    (ii) the payee has an opportunity to provide submissions to the Registrar regarding the exclusion of post-separation income; and

    (iii) the Registrar is required to provide copies of his/her decision to both parties together with information that either is able to object to the assessment and if aggrieved by the decision on the objection to apply to the SSAT for review of the decision.

[2] House of Representatives, *Child Support Legislation Amendment (Reform of the Child Support Scheme – New Formula and Other Measures) Bill 2006*, Explanatory Memorandum, Circulated by the authority of the Minister for Families, Community Services and Indigenous Affairs, the Hon Mal Brough MP).

Percentage of care

12. Under sections 49-50 of the new Part 5 the Registrar must determine the percentage of care of a child that each parent has. These sections provide as follows:

> **49 Agreements, parenting plans and court orders may determine percentage of care**
>
> **The percentage (if any) of care of a child that a parent or non-parent carer is likely to have during a care period is determined in accordance with the following agreement, plan or order if the Registrar is satisfied that the agreement, plan or order allows such a percentage to be determined:**
> - **(a) if the relevant application for administrative assessment for child support for the child is made under subparagraphs 25A(b)(ii) to (iv) (application by non-parent carer in relation to one parent):**
>   - **(i) an oral or written agreement, or parenting plan, between the parent and a non-parent carer of the child that the Registrar is satisfied has been made; or**
>   - **(ii) a court order that relates to the parent and a non-parent carer of the child, or that relates to the child;**
> - **(b) otherwise:**
>   - **(i) an oral agreement between the parents of the child that the Registrar is satisfied has been made; or**
>   - **(ii) a parenting plan for the child that has been entered into by the parents; or**
>   - **(iii) a court order that relates to the parents, or that relates to the child.**
>
> **50 Registrar determinations where no agreement, plan or order**
>
> - **(1) The Registrar must determine the percentage (if any) of care of a child that a parent or non-parent carer of the child is likely to have during the relevant care period if there is no agreement, plan or order that allows such a percentage to be determined under section 49.**
> - **(2) In making the determination, the Registrar must take into account such period as is required in order for the Registrar to be satisfied that there is, has been, or will be, a pattern of care for the child.**
> - **(3) The Registrar may revoke or vary a determination made under this section.**

13. Where there is a parenting plan or court order in place that would seem to be binding on the Registrar (subparagraphs 49b(ii) and (iii)). A determination based on "*an oral agreement between the parents*" (see subparagraphs 49(a)(i) and 49(b)(i)) is much more problematic and raises significant evidentiary issues as to the precise terms of such an agreement or indeed whether there was any agreement. **FLS recommends that oral agreements only be recognised for the purpose of determining percentage of care if the parties acknowledge that there was such an agreement.**

14. While these provisions enable the Registrar to make a determination as to the percentage of care based on parenting plans or orders, or failing them, based on oral agreements, FLS observes that in all likelihood, if a dispute arises as to percentage of care, the parties will be more likely to determine that issue before a Federal Magistrate or judge rather than go through the processes of submissions to the Registrar, objections, and review before the SSAT.

Division 6 – the costs of the child

15. Division 6 of the new Part 5 sets out how the costs of the child are worked out using the rules in that Division as well as the Costs of Children Table in Schedule 1. The costs of the child are fundamental in determining the level of child support payable under the formula. The Costs of Children Table set out in Schedule 1 is given statutory endorsement under the new section 55G. Section 55G provides:

> **55G Working out the costs of the children**
> **(1) If an annual rate of child support for a day in a child support period is assessed for a child under section 35, 36, 37 or 38 (Formulas 1 to 4), identify the column in the Costs of the Children Table for that child support period that covers the combined child support income of the parents of the child.**
> **Note: The Secretary publishes the updated Costs of the Children Table in the Gazette each year for child support periods that begin in the next year (see section 155).**
> **(2) If an annual rate of child support for a day in a child support period is assessed for a child under Subdivision D of Division 2 (Formulas 5 and 6), identify the column in the Costs of the Children Table for that child support period that covers the child support income of the parent of the child.**
> **Note: This subsection also applies in working out the relevant dependent child amount and the multi-case allowance (see step 4 of the method statement in section 46 and step 3 of the method statement in section 47).**
> **(3) Identify the number of children (the child support children) in the child support case that relates to the child.**
> **(4) Identify the ages of the child support children at the time the administrative assessment is made. If there are more than 3 child support children, use the ages of the 3 oldest children.**
> **(5) Identify the item in the relevant column in the Costs of the Children Table that covers that number of child support children of those ages.**
> **(6) The amount worked out for the item in accordance with Schedule 1 to this Act is the costs of the children.**

Level of support for larger families

16. FLS is concerned that the maximum amount of child support does not increase in families with more than three children. It is noted that this is based on research which shows that the net costs of children increases only very slightly for the fourth and subsequent children in a family[3]. The practical experience of FLS members does not reflect this. FLS suggests that consideration be given to permitting an application to vary the child support liability where the payee can establish that the actual cost of maintaining the larger family exceeds the maximum formula amount and the payer has capacity to pay in excess of the formula amount without undergoing undue hardship.

17. New subparagraph 118(1)(e) of the Child Support (Assessment) Act (item 85 of Schedule 2 of the Bill) provides as follows:

> **118**
> **(1) The orders that a court may make under this Division are as follows:**
> **(a) an order varying the annual rate of child support payable by a parent;**
> **(b) an order varying a parent's or non-parent carer's cost percentage for a child;**
> **(c) an order varying a parent's child support income;**
> **(d) an order varying the parents' combined child support income;**
> **(e) an order that:**
> **(i) the column in the Costs of the Children Table that covers a parent's child support income or combined child support income that is, or is ordered to be, greater than 2.5 times the annualised MTAWE figure for the relevant September quarter, is the column headed "2 to 2.5"; and**
> **(ii) the column is to apply as if the second dollar amount in the heading to that column did not apply;**
> **(f) an order varying a parent's child support percentage;**
> **(g) an order varying a parent's adjusted taxable income;**
> **(h) an order varying a parent's relevant dependent child amount or multi-case allowance;**
> **(i) an order varying a parent's self-support amount;**
> **(j) an order varying the costs of the children.**

18. Subparagraph 118(1)(e) contains a reference to the Costs of Children Table. Whilst it is almost incomprehensible, the drafting of this subparagraph would seem to empower a court, in making a departure order, to determine the cost of children whose parents' combined child support income is over the cap, to be assessed on the highest child support figure below the cap. Why this column alone is referred to is unclear. Surely a court should have the discretion to apply any of the columns in the Cost of Children Table. **FLS recommends** that the provision be redrafted to clarify its meaning and intention and to grant the court full discretion in making departure orders.

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[3] Ibid, page 71.

Schedule 2 – Consequential amendments and application and saving provisions relating to the formulas

19. FLS has no comment at this stage on Schedule 2.

Schedule 3 – SSAT review of child support decisions (commencing on 1 January 2007)

20. Schedule 3 of the Bill expands the role of the Social Security Appeals Tribunal to include independent review of child support decisions. The SSAT will replace the courts in departure applications.

21. The proposed procedures encompassed by the amendments are suitable for the resolution of administrative disputes between the government and citizens but are unsuitable for the determination of *inter partes* disputes such as child support liability. Having said that the FLS recognises that the proposed changes reflect Government policy. However FLS would like to identify a number of areas of concern.

22. The new section 94 of the Child Support (Registration and Collection) Act deals with application procedures for review by the SSAT as follows:

> **94 Application procedures**
>
> **(1) A person may apply to the SSAT for review under this Part by:**
>
> **(a) sending or delivering a written application to:**
>
> **(i) an office of the SSAT; or**
>
> **(ii) an office of the Department; or**
>
> **(iii) an office of the Commonwealth Services Delivery Agency; or**
>
> **(iv) an office of the Department administering the Commonwealth Services Delivery Agency Act 1997; or**
>
> **(b) going to an office of the SSAT and making an oral application; or**
>
> **(c) contacting an office of the SSAT by telephone and making an oral application.**
>
> **(2) If a person makes an oral application in accordance with paragraph (1)(b) or (c), the person receiving the oral application must:**
>
> **(a) make a written record of the details of the oral application; and**
>
> **(b) note on the record the day on which the application is made.**
>
> **(3) If a person makes a written record of an oral application in accordance with subsection (2), this Part has effect as if the written record were a written application made on the day on which the oral application was made.**
>
> **(4) An application may include a statement of the reasons for seeking a review of the decision.**

23. It is inappropriate that *inter partes* proceedings be capable of commencement by a mere telephone call as proposed in the new subsection 94. This is particularly the case where the decision for which review may be sought will have been made in relation to a dispute between a separating or separated couple. Emotional responses are common. It is important that applicants are required to give careful thought to what their application should be and whether they should proceed with it. The pursuit of an application will initiate an inquiry and hearing process which will be stressful, demanding and inconvenient for the other party and potentially delay the proper payment of appropriate support.

24. The new subsection 95(3)(b) provides that the Child Support Registrar is to send to the SSAT Executive Director ….. "*the original or a copy of every document or part of a document that is in the possession or under the control of the Registrar and is relevant to the review of the decision"*. Copies must also be given to the parties (see new subsection 96(1)).

25. However the Registrar does not have to provide documents if he is able to persuade the SSAT Executive Director to prohibit or restrict disclosure to some or all of the parties …… "*because of the confidential nature of the document or statement, or for any other reason*" (see new subsection 98(2)).

26. FLS has been concerned that historically the Registrar of Child Support has been reluctant to require the provision of all relevant financial documents to the other party in change of assessment matters. FLS takes the view that this is wrong and that both parties should have access to, and the ability to compel production of, all documents which would be relevant to the financial circumstances of the other party in such matters.

27. As the proposed new section 98 currently reads, the decision of the SSAT Executive Director to prohibit or restrict disclosure is not appellable, though presumably it is reviewable under the *Administrative Decisions (Judicial Review) Act 1977*. This is unsatisfactory. Many documents which are relevant to change of assessment applications might be considered to be of a "confidential nature". They would include tax returns, bank statements, new spouse's tax returns, medical reports, balance sheets and financial statements of businesses. It is submitted that unless the document would be privileged from production in court proceedings then production should be compellable for SSAT proceedings. Full and frank disclosure of all relevant information and documents is fundamental to the proper resolution of all aspects of financial issues between former partners, including liability for or eligibility to receive child support.

28. FLS is also concerned that the broad discretion conferred on the SSAT Executive Director extends not only to the disclosure of documents deemed confidential but for *"for any other reason*" (see new subsection 98(2)). **FLS recommends that:**

    (i) there be a requirement for full and frank disclosure of all relevant information and documents subject only to issues of legal professional privilege and ensuring the personal safety of the parties and children; and

    (ii) the words "for any other reason" be removed from subsection 98(2).

29. The proposed new sections 103C to 103F deal with the way hearings will be conducted. Whilst it is understood that the proceedings are intended to be inquisitorial rather than adversarial, **FLS recommends** that there should be provision for the questioning of a party by or on behalf of the other party. Anyone who has litigated maintenance or child support disputes will know that it is usually only by testing by cross-examination, after access to the relevant documents, that the real picture emerges.

30. Subsection 103C(2) provides that *"a party to a review may have another person make submissions to the SSAT on his or her behalf*". Presumably this would mean that a party can be represented by a lawyer. This should be put beyond doubt. **FLS recommends** that the Act specifically provide for a right of legal representation in SSAT child support reviews given the *inter partes* nature of the proceedings.

31. FLS notes that there seems to be no adequate provision for the testing of factual assertions.

    31.1 Proposed section 103G says that evidence may be taken on oath. However, the right to cross-examine, or to obtain disclosure of relevant documents does not seem to be contemplated. This is particularly unsatisfactory because the review process within the CSA is often criticised because either party can assert facts which are false, exaggerated or misleading but which cannot effectively be challenged. This deficiency in procedures is aggravated by proposed section 110G, which restricts the capacity of a court, reviewing an SSAT decision, to make findings of fact which are inconsistent with those made by the SSAT.

31.2 The proposed procedures, if legislated, will engender frustration and anger in parties who ought to be entitled to properly put their case and to test the factual assertions of the other party before any decision is made by a Tribunal or Court. The proposed procedures are at odds with the emphasis in family law on full disclosure and are a denial of principles of natural justice. The proposed procedures will discourage settlement because they will diminish the confidence of parties that there has been full disclosure. **FLS recommends that further consideration be given to the impact of these procedures**.

32. It is noted that the proposed new section 103Z deals with the costs of review, but there is no power therein for one party to be ordered to pay any of the expenses of the other party. The only provision for expenses is that the Commonwealth can be ordered to pay reasonable costs incurred by a party for travel and accommodation or for the provision of a medical service if arranged for by the SSAT. **FLS recommends** that there should be provision for SSAT to require a party to meet legal costs of another party in appropriate circumstances. It is submitted those circumstances could be akin to the provisions of section 117(2)(A) of the Family Law Act and include:

- The financial circumstances of each of the parties;
- Whether a party has been totally unsuccessful;
- Whether a party is assisted by legal aid;
- The conduct of a party in relation to the proceedings including the provision of information, production of documents, and similar matters.
- Such other matters as the SSAT considers relevant.

33. The new subsection 103K(1) provides that the SSAT Executive Director has power to issue a written notice requiring a person to give …. "*such information as the SSAT Executive Director requires*". The only criterion for the written notice to be given is that the SSAT Executive Director must consider it is reasonably necessary for the purposes of a review. "Information" is not defined. A person commits an offence punishable by imprisonment for six months for failing to comply with such a notice. The vagueness of this provision is disturbing. The criteria of relevance and admissibility which pertain to the subpoena process in a court seem to be inapplicable and the SSAT Executive Director has unfettered discretion. The only defence to failure to comply with a notice is that compliance might tend to incriminate the person (S103K(3)). It is submitted that the section should include a right of a person to challenge the notice in a court. It is submitted that "information" is too broad and may impinge on legal professional privilege. Persons may be compellable to produce documents,

but FLS draws the Committee's attention to the High Court decision in *ACCC v Daniels*[4] regarding the production of documents which are protected by legal professional privilege.

34. The new section 103X provides that reasons for decision must be given orally or in writing within 14 days. FLS (while acknowledging that there may be resource implications) believes that written reasons should be mandatory in all matters, and certainly in all matters involving change of assessment processes. **FLS recommends** that given the importance of the subject matter of most reviews written reasons for decisions should be given in preference to oral reasons.

Schedule 4 – Other amendments commencing on 1 January 2007

Backdating changes of assessment limited to 18 months

35. Item 11 inserts new subsections 98S(3B) and (3C) in the Child Support (Assessment) Act as follows:

> **(3B) The Registrar may only make a determination under this Part in respect of a day in a child support period, being a day that is more than 18 months earlier than:**
> **(a) the day on which the application for the determination is made under section 98B; or**
> **(b) the day on which the Registrar notifies the relevant parties under subsection 98M(1);**
> **if a court has granted leave under section 112 for the determination to be made.**
> **(3C) If a court has granted leave under section 112, the Registrar may only make a determination under this Part in respect of a day in a child support period if the day is within the period specified by the court, under subsection 112(6), in the order granting the leave.**

36. These new provisions will only enable a change of assessment for a period of 18 months before the application was made, unless a court has granted leave under the new section 112 of the Child Support (Assessment) Act for the determination to be made. In other words, you have to go to court to get leave to change an assessment from a date earlier than 18 months ago, and then, if successful, come back to the Registrar to seek the change of assessment. The criteria for a court to grant leave under section 112 are set out in subsection 112(4) and include reference to the reasons and responsibility for the delay, and the hardship caused to parties if leave is or is not granted.

37. Section 112 is not easy to read, but it would seem that the court granting leave can also hear the application as a departure application if it is satisfied that it would be in the interests of the parties to do so. Hopefully this would be the norm, however, **FLS recommends** that the drafting should make this clear.

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[4] *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49 (7 November 2002)

38. FLS questions whether an 18 month cap is warranted. Experience shows that parties can debate issues with the Child Support Agency for a long time before they realise that they have to make a formal application. Quite often decisions of the Agency are made which have retrospective effect so that the time for making the application for change of assessment may have expired before the payer or payee became aware. It is commonplace that parties' financial circumstances may have changed some years earlier, but for the change not to have filtered through to the amended child support assessment until a considerable time later.

39. FLS is not aware of the reasons behind the 18 month cap. However, it is submitted that there is no justification for making an applicant jump through an additional hoop (namely having to bring an application for leave and show that the necessary criteria are satisfied) in order to have a determination made as to what is the proper level of child support. **FLS recommends that further consideration be given to the impact of the 18-month cap**.

Jurisdiction of the Courts

40. Item 18 repeals subsections 116(1), (1A) and (1B) of the Child Support (Assessment) Act which sets out the jurisdiction of the courts in relation to departure orders in special circumstances. These provisions are replaced by a new subsection 116(1) which provides as follows:

> **(1) A liable parent or a carer entitled to child support may, in respect of an administrative assessment of child support for a child, apply to a court having jurisdiction under this Act for an order under this Division in relation to the child in the special circumstances of the case if:**
> **(a) all of the following apply:**
> **(i) the Registrar has, under section 98E or 98R, refused to make a determination under Part 6A in respect of the administrative assessment;**
> **(ii) an objection to the refusal has been lodged under section 80 of the Registration and Collection Act;**
> **(iii) the Registrar has disallowed the objection; or**
> **(b) both of the following apply:**
> **(i) the liable parent or carer entitled to child support is a party to an application pending in a court having jurisdiction under this Act;**
> **(ii) the court is satisfied that it would be in the interest of the liable parent and the carer entitled to child support for the court to consider whether an order should be made under this Division in relation to the child in the special circumstances of the case; or**
> **(c) in the case of a liable parent—the administrative assessment of child support payable by the liable parent for the child is made under subsection 66(1).**
>
> **Note 1: For the orders that a court may make under this Division see section 118.**
>
> **Note 2: With a court's leave, a court may make an order under this Division in respect of a day that is more than 18 months earlier than the day on which the relevant application was made (see subsection 118(2B)). A person is taken to have applied under this section if leave is granted..**

41. The existing provisions in relation to the jurisdiction of Courts to deal with child support issues where the parties have other proceedings before the court has been much-criticised because of uncertainty as to whether, and in what circumstances, the court will exercise this jurisdiction. The proposed amendments create a new form of uncertainty

42. The proposed subsection 116(1)(b) gives courts jurisdiction if there are other proceedings pending in the court and if the court is satisfied that it will be in the best interests of the parties to determine child support. This means, for example, that if there are property and spousal maintenance proceedings before the court one or both of the parties may sensibly ask the court to deal with child support issues but they will not know, possibly until judgment is delivered, as to whether the court shares their view. If the court decides not to exercise jurisdiction in relation to the child support issues then the work and the expenses associated with it will have been wasted and whichever party is the applicant may be ordered to pay the other party's costs in relation to the child support aspect of the proceedings.

43. **FLS recommends** that the uncertainty can be eliminated by deleting proposed subsection 116(1)(b)(ii) which will have the effect of enabling parties to have a court determine child support, whenever there are other proceedings such as property settlement or spouse maintenance.

Schedule 5 – Amendments relating to child support agreements and court orders (commencing on 1 July 2008)

44. Item 5 of Schedule 5 makes a number of changes to Part 6 of the Child Support (Assessment) Act regarding, inter alia, child support agreements. There will now be two types of agreement: *binding* and *limited* child support agreements.

45. The provisions for making a binding child support agreement are set out in the new section 80C which provides:

> **80C Making binding child support agreements**
> **(1) An agreement is a binding child support agreement if:**
> **(a) the agreement is binding on the parties to the agreement in accordance with subsection (2); and**
> **(b) the agreement complies with subsection 81(2).**
> **(2) For the purposes of subsection (1), an agreement is binding on the parties to the agreement if, and only if:**
> **(a) the agreement is in writing; and**
> **(b) the agreement is signed by the parties to the agreement; and**
> **(c) the agreement contains, in relation to each party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:**

(i) the effect of the agreement on the rights of that party;

(ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and

(d) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided; and

(e) the agreement has not been terminated under section 80D; and

(f) after the agreement is signed, either the original agreement or a copy of the agreement is given to each party.

Note: For the manner in which the contents of a binding child support agreement may be proved, see section 48 of the Evidence Act 1995.

46. These requirements replicate in part those in section 90G of the Family Law Act.

47. The provisions for making a limited child support agreement are set out in the new section 80E which provides:

80E Making limited child support agreements

(1) An agreement is a limited child support agreement if:

(a) it is in writing; and

(b) it is signed by the parties to the agreement; and

(c) it complies with subsection 81(2); and

(d) it meets the conditions in subsection (2), (3) or (4), as the case requires, (assuming the agreement is accepted by the Registrar).

Note: In addition to the requirements in this section, there must be an administrative assessment in force in relation to the child in respect of whom the agreement is made (see subsection 92(3)).

Child support payable on day application for acceptance of agreement is made to Registrar

(2) An agreement meets the condition in this subsection if:

(a) child support is to be payable under the agreement, by one party to the agreement to the other party or parties, on the day on which the application is made to the Registrar for acceptance of the agreement; and

(b) the annual rate of child support that is so payable under the agreement on that day is at least the annual rate of child support that would otherwise be payable under this Act on that day.

Note: If the child support payable under the agreement is not a periodic amount, the regulations can prescribe the method by which that amount is to be converted into an annual rate (see subsection (5)).

Child support payable on day agreement commences

(3) An agreement meets the condition in this subsection if:

(a) child support is not to be payable under the agreement, by one party to the agreement to the other party or parties, on the day on which the application is made to the Registrar for acceptance of the agreement; but

(b) the annual rate of child support that is payable under the agreement, by one party to the agreement to the other party or parties, on the day on which the agreement commences is at least the annual rate of child support that would otherwise be payable under this Act on that day.

Child support payable for past period

(4) An agreement meets the condition in this subsection if:

(a) child support is payable under the agreement, by one party to the agreement to the other party or parties, for a period before the day on which the application is made to the Registrar for acceptance of the agreement; and

(b) the amount of child support that is so payable under the agreement for that period is at least the amount of child support that would otherwise be payable under this Act for that period.

Regulations

(5) The regulations may, for the purposes of subsections (2), (3) and (4), provide a method of converting an amount of child support that is payable under an agreement otherwise than in the form of periodic amounts into an annual rate of child support.

Varying Child Support Agreements

48. FLS notes that neither a binding child support agreement nor a limited child support agreement can be varied (see new sections 80C and 80F respectively). The only option is to terminate the agreement and to enter into fresh agreement (which involves parties in additional complexity and expense).

49. FLS believes that these provisions require further consideration. For example, in the case of limited agreements there may be merit in providing an option for limited variation in defined circumstances.

50. FLS would like to discuss this further at the Committee's public hearing on 4 October 2006.

Setting aside agreements

51. The proposed new section 136 of the Child Support (Assessment) Act sets out the circumstances in which a child support agreement can be set aside by a Court as follows:

136 Power of court to set aside child support agreements or termination agreements

(1) A party to either of the following agreements may apply to a court having jurisdiction under this Act for the court to set aside the agreement:

(a) a child support agreement that has been accepted by the Registrar under section 92;

(b) a termination agreement, or a written agreement referred to in paragraph 80G(1)(b), that has been accepted by the Registrar under section 92.

(2) If a party has applied under subsection (1), the court may set aside the agreement in accordance with the application if the court is satisfied:

(a) that the party's agreement was obtained by fraud or a failure to disclose material information; or

(b) that another party to the agreement, or someone acting for another party:

(i) exerted undue influence or duress in obtaining that agreement; or

(ii) engaged in unconscionable or other conduct;

to such an extent that it would be unjust not to set aside the agreement; or

(c) that because of a significant change in the circumstances of one of the parties to the agreement, or a child in respect of whom the agreement is made, it would be unjust not to set aside the agreement; or

(d) in the case of a child support agreement—that the agreement provides for an annual rate of child support that is not proper or adequate, taking into account all the circumstances of the case (including the financial circumstances of the parties to the agreement).

(3) Subject to section 145 (Registrar may intervene in proceedings), the parties to a proceeding under subsection (1) are the parties to the agreement.

(4) If:

(a) the court sets aside a child support agreement under this section; and

(b) the court is satisfied as mentioned in paragraph 117(1)(b) (departure orders);

the court may make an order under Division 4 of Part 7 without an application having been made under section 116.

52. Section 136 applies to both *binding* and *limited* child support agreements.

53. Despite the intention that *binding* agreements will be an important contractual arrangement, able to be entered into only with independent legal advice, the proposed section 136 enables agreements to be set aside easily, whenever there has been a "significant change" in the circumstances of one of the parties or a child and it would be unjust not to set aside the agreement, or if the agreement provides for a level of child support that is "not proper or adequate".

54. FLS suggests that binding agreements should be more difficult to set aside than this and **recommends**, for the sake of consistency, that Section 136 have a requirement similar to that which Section 90K of the Family Law Act imposes on financial agreements. Section 90K(d) allows for the setting aside of a financial agreement where there has been a material change in circumstances (being circumstances relating to the care, welfare and development of the child of the marriage) and, as a result of the change, the child or, if the applicant has care and responsibility for the child, a party to the agreement will suffer hardship if a Court does not set aside the agreement .

55. Such a provision would enable agreements to be set aside in appropriate circumstances but would preserve the intention that a binding agreement will, in all general circumstances, be binding on the parties.

56. FLS is of the view that the provisions to set aside *limited* child support agreements should be less onerous than those which apply to *binding* child support agreements. Notwithstanding this position, FLS believes that the current drafting of subsection 136(2)(c) is too broad and should be amended to provide:

(c) that because of a significant change in the financial circumstances of one of the parties to the agreement, or a child in respect of whom the agreement is made, or where there has been a significant change in circumstances relating to the care, welfare and development of the child in respect of who the agreement is made, it would be unjust not to set aside the agreement;

Lump sum child support agreements

57. The new section 84 sets out the provisions that may be included in agreements as follows:

84 Provisions that may be included in agreements

Provisions that may be included

(1) An agreement is a child support agreement only if it includes one or more of the following kinds of provisions:

- **(a) provisions under which a party is to pay child support for a child to another party in the form of periodic amounts paid to the other party;**
- **(b) provisions under which the rate at which a party is already liable to pay child support for a child to another party in the form of periodic amounts paid to the other party is varied;**
- **(c) provisions agreeing between parties any other matter that may be included in an order made by a court under Division 4 of Part 7 (departure orders);**
- **(d) provisions (the non-periodic payment provisions) that state:**
  - **(i) that a party (the liable party) is to provide child support for a child to another party otherwise than in the form of periodic amounts; and**
  - **(ii) that the annual rate of child support payable for the child by the liable party under any relevant administrative assessment is to be reduced, in the manner specified under subsection (6), by the amount of child support to be provided by the liable party;**
- **(e) provisions (the lump sum payment provisions) that meet the requirements of subsection (7) and that state:**
  - **(i) that a party (the liable party) is to provide child support for a child to another party in the form of a lump sum payment (including by way of transfer or settlement of property); and**
  - **(ii) that the lump sum payment is to be credited against the liable party's liability under the relevant administrative assessment in relation to amounts payable under the liability;**
- **(f) provisions under which a party is to provide child support for a child to another party otherwise than in the form of periodic amounts and that are not non-periodic payment provisions or lump sum payment provisions;**
- **(g) provisions under which the liability of a party to pay or provide child support for a child to another party is to end from a specified day.**

(2) The agreement may include more than one kind of provision in relation to different parts of a child support period and different child support periods.

Other kinds of provisions not to have effect

(3) If the agreement also includes provisions of a kind not referred to in subsection (1), those provisions do not have effect for the purposes of this Act.

(4) Subsection (3) does not affect the operation of provisions of the kind referred to in that subsection for any other purpose.

Agreement may also be parenting plan, maintenance agreement or financial agreement

(5) Without limiting subsection (4), nothing in this Part is to be taken to prevent the same document being both a child support agreement and:

- **(a) a parenting plan; or**
- **(b) a maintenance agreement or financial agreement under the Family Law Act 1975.**

Additional requirements of agreements with non-periodic payment provisions

(6) If an agreement includes provisions of the kind referred to in paragraph (1)(d), the statement referred to in subparagraph (1)(d)(ii) must specify either:

(a) that the annual rate of child support payable under the administrative assessment is to be reduced by a specified amount that represents an annual value of the child support payable; or

(b) that the annual rate of child support payable under the administrative assessment is to be reduced by 100% or another specified percentage that is less than 100%.

Note: Non-periodic payment provisions are taken to have effect as if they were a statement made by a court under section 125 in an order made under section 124 (see subsection 95(3)).

Additional requirements etc. of agreements with lump sum payment provisions

(7) If an agreement includes provisions of the kind referred to in paragraph (1)(e), the provisions meet the requirements of this subsection if:

(a) the agreement is a binding child support agreement; and

(b) an administrative assessment, in relation to the child in respect of whom the agreement is made, is in force immediately before the application for acceptance of the agreement is made; and

(c) the amount of the lump sum payment:

(i) is specified in the agreement; and

(ii) equals or exceeds the annual rate of child support payable for the child under the administrative assessment.

Note: If an agreement includes provisions of the kind referred to in paragraph (1)(e) (lump sum payment provisions), the lump sum payment is credited under section 69A of the Registration and Collection Act against the liable party's liability (rather than reducing the annual rate of child support payable under the administrative assessment).

(8) An agreement that includes lump sum payment provisions may also state that the lump sum payment is to be credited against the liability under the administrative assessment in relation to 100%, or another specified percentage that is less than 100%, of the child support payable under the liability.

Note: If an agreement does not specify a percentage, the lump sum payment is credited against the liability in relation to 100% of the amounts payable under the liability (see section 69A of the Registration and Collection Act).

58. It would appear from subsection 84(7) that the agreement must be a *binding* child support agreement. In complex matters this is appropriate. However, in matters where the lump sum payment is modest it seems disproportionate to apply the stricter provisions which accompany binding agreements. **FLS suggests** that consideration be given to the use of limited child support agreements where the value of the transfer is less than say $10,000.

Terminating limited child support agreements

59. The new section subsection 80G(1)(d) provides that a limited child support agreement can be terminated, *inter alia*,:

(d) if the notional assessment of the amount of child support that would have been payable by one party to the previous agreement to another party is varied by more than 15% from the previous notional assessment in circumstances not contemplated by the previous agreement – a party to the previous agreement giving the Registrar written notice of the termination of the agreement within 60 days of that party receiving notice of the variation;

60. FLS has two concerns about this provision. Firstly, that the 15% threshold is too low; and secondly, that the termination is a unilateral act. **FLS recommends that further consideration be given to the impact of this provision.**

Saving provisions for current agreements

61. The new subsection 74(1)(b) provides that the Registrar must review agreements in force immediately before 1 July 2008 and determine whether the agreement is to be taken to be a binding child support agreement or be terminated. It is not clear if the intention of this provision is to invalidate all child support agreements made before 1 July 2008 as very few, if any, agreements in place before this date will meet the criteria for binding child support agreements (see new section 80C). Many existing agreements are part of a final resolution of financial issues between former partners and to invalidate them would undermine settlement arrangements and invite reagitation of financial disputation between the parties. **FLS recommends that the legislation make it clear that existing agreements accepted by the Child Support Registrar remain in full force and effect notwithstanding any provisions contained in the new legislation.**

Sunset clause for binding child support agreements

62. FLS is of the view that section 80DI, which provides for the termination of binding financial agreements, should be amended to make it clear that parties are able to include in a binding agreement a self-fulfilling sunset clause or nominate some other circumstance by which the agreement, or some specific provision of the agreement, should terminate.

Notional assessments

63. The periods of time for notification of the making, and application by a party to vary, a provisional notice of assessment are unrealistically short. CSA clients frequently complain that they do not receive CSA correspondence, and this may often be because of change of address. A provisional notional assessment will often be issued long after the CSA has had any direct contact with a payer, who may simply be making regular child support payments directly to the payee pursuant to an agreement and not be aware of the importance of keeping the CSA aware of a current address.

64. When a provisional notional assessment is received most payers will not initially recognise the importance of the assessment or be aware of the action that they may need to take to protect their interests.

65. The proposed provisions in Section 146C provide that a party has only 14 days in which to make an application and proposed Section 146E (2) provides that a notice is deemed to be served upon a party 14 days after it was sent to that person's "last known address". This takes no account of obvious considerations such as mail re-direct arrangements or that someone may simply be away for four weeks working or on holidays.

66. FLS suggests that the CSA should be required to take reasonable steps to check the current address of the recipient; that unreturned mail shall be regarded as having been received 28 days after being sent; and that a party should have 90 days in which to make any application.

Schedule 6 – Amendments relating to departure orders (commencing on 1 July 2008)

Resident child

67. Item 5 of Schedule 6 inserts a new paragraph 117(2)(aa) into the Child Support (Assessment) Act as follows:

> **(aa) that, in the special circumstances of the case, the capacity of either parent to provide financial support for the child is significantly reduced because of the responsibility of the parent to maintain another child (the resident child) of the parent;**

68. FLS queries the reference to "of the parent" at the end of the subparagraph which appears to conflict with section 117(2A).

Departure order on the grounds of responsibility for step-children

69. Item 9 of Schedule 6 repeals the current subsection 117(3) of the Child Support (Assessment) Act and inserts a new subsection 117(2A) which provides:

> **Parent's responsibility to maintain resident child**
> **(2A) The ground for departure mentioned in paragraph (2)(aa) is taken not to exist in respect of a resident child unless:**
> **(a) the resident child normally lives with the parent, but is not a child of the parent; and**
> **(b) the parent is, or was, for 2 continuous years, a member of a couple; and**
> **(c) the other member of the couple is, or was, a parent of the resident child; and**
> **(d) the resident child is aged under 18; and**
> **(e) the resident child is not a member of a couple; and**
> **(f) neither parent of the resident child is able to support the resident child due to:**
> **(i) the death of the parent; or**
> **(ii) the ill-health of the parent; or**
> **(iii) the responsibility of the parent to care for another child; and**
> **(g) the court is satisfied that the resident child requires financial assistance.**

High costs involved in enabling parent to care for a child

(2B) A parent's costs involved in enabling the parent to care for a child can only be high for the purposes of subparagraph (2)(a)(iv) or (2)(b)(i) if the costs that have been or will be incurred, during a child support period, total more than 5% of the amount worked out by:

(a) dividing the parent's adjusted taxable income for the period by 365; and

(b) multiplying the quotient by the number of days in the period.

(2C) If a parent has at least regular care of a child, then the only costs that can be taken into account for the purposes of subsection (2B) are costs related to travel to enable the parent to care for the child.

70. The proposed subsection 117(2A) generates the following difficulties:

70.1 This provision invites manipulation. It is almost impossible to see how a payee could test an assertion by a payer that he/she has the financial responsibility, in the terms proposed, for someone else's child. Neither CSA nor SSAT procedures seem to contemplate the testing of evidence by a payee to rebut the assertion, and a payee will always encounter practical difficulties in marshalling the information or evidence necessary to demonstrate that the claim is false or exaggerated.

70.2 The provision is inconsistent with the law about step-parent maintenance in the Family Law Act and with the long-standing definition of a "dependent" in family law.

Schedule 7 – Other Amendments commencing on 1 July 2008

71. FLS has no comment at this stage on Schedule 7.

Schedule 8 – Amendments relating to family tax benefit (commencing on 1 July 2008).

72. In the limited time available FLS has not been able to record its concerns about this Schedule. FLS would like the opportunity to provide comment at the Committee's public hearing on 4 October 2006.