*Senate Community Affairs Committee*

# Inquiry into Families, Community Services, and Indigenous Affairs Legislation Amendment (Child Support Reform Consolidation and Other Measures) Bill 2007

***Submission by:***

***The Lone Fathers' Association (Aust.) Inc.***

**April 2007**

*pb1020*

Committee Secretary
Community Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra
ACT 2600

Tel 6277 3515
Fax 6277 5829
community.affairs.sen@aph.gov.au
web.senate@aph.gov.au

Dear Sir/Madam

# Submission by the Lone Fathers' Association to the Senate Inquiry into Families, Community Services, and Indigenous Affairs Legislation Amendment (Child Support Reform Consolidation and Other Measures) Bill 2007

## Lone Fathers Association Australia (LFAA)

This submission to the Inquiry is being provided by the Lone Fathers Association (Australia) Inc. (LFAA).

The LFAA is a peak body at the Commonwealth level. It represents a broad cross section of Australians, namely men and women who wish their children to be loved, nurtured, and supported to adulthood by both parents - even where the parents are separated - and also by the children's step-parents, grandparents, and other members of their extended families as appropriate.

## The Inquiry

The Senate Committee Inquiry is being conducted into the provisions of the Families, Community Services, and Indigenous Affairs Legislation Amendment (Child Support Reform Consolidation and Other Measures) Bill 2007.

The Explanatory Memorandum to the Bill states:

> "The Bill makes minor consolidating refinements to the Child support scheme, and some minor consequential amendments to the family system law, to clarify and refine the operation of the Government's major 2006 legislation that restructured the scheme in line with the recommendations of the Ministerial Task Force on child support, chaired by Professor Patrick Parkinson. It also clarifies a small number of pre-existing issues or anomalies of the operation of the scheme."

The Minister's *Second Reading Speech* mentions:

Further detail on the new policies passed by the Parliament (SSAT/courts, and interaction between the two Child Support Acts)
The basis for child support agreements between parents
The remote area allowance
Children in separated households
The relocation of the provisions of the CSLA Bill 2004 – with international regulations moved into the Act itself
Improving equal access to a Court on parentage issues
Child support agreements and lump sum child support - connection with the Maintenance Income Test
The Baby Bonus for teenagers
Asset test exemption of principal home sale proceeds from 12 months to up to 24 months, and
Minor refinements to means tests.

The LFAA agrees with the need for the great majority of the above amendments. However there are number of important points of principle reflected in other amendments, not specifically referred to in the Second Reading Speech, which require substantial comment.

The comments below mostly relate to these points of principle, to which the Senate Committee's attention is hereby directed.

## Individual proposed changes

### Page 5, Explanatory Memorandum. Frivolous or vexatious applications

The Explanatory Memorandum states that:

> "Such powers should be available to courts hearing child support matters, and are included in both Acts by these amendments".

There is a question as to what evidence is available that courts are currently being required to hear frivolous or vexatious applications in a significant number of cases. If such cases do not occur in significant numbers, it should not be necessary to change the existing legislation. Such a provision could lay itself open to abuse where non-frivolous applications were dismissed without sufficient cause.

**Page 7. Clarifying misleading headings about capacity to earn**

> "Amendments to the headings of the sections make it clear that the limiting factors apply in all stages considering a departure, including the establishment of a ground for departure, and considering whether a change would be just and equitable and otherwise proper".

Further explanation is required as to what is meant by “otherwise proper" in the present context, and how such propriety is to be assessed.

**Page 7. Private enforcement: orders for payment**

> “Amendments are made to require the court to order payment to the Registrar, for disbursement to the payee" but also, "the payee must also inform the Registrar of any payments made directly to them when they have taken private enforcement action”.

There is an apparent contradiction between these two statements. Is it the intention that the payee must inform the Registrar of any payments made directly to her/him when she/he has taken private enforcement action, and that the Registrar will then inform both parties involved that such payments must in future be made through the Registrar?

**Page 9. Setting aside binding agreements (Item 177, page 42 of the Bill)**

> "This amendment restricts the scope of the setting aside of binding child support agreements, by specifying that exceptional circumstances relating to one of the children or parties to the agreement must have arisen since the making of the agreement, and that the child or party would suffer hardship if the agreement were not altered or set aside.”

It is always incumbent on the legislature to seek the right balance between giving courts too much power and too little power. That balance-point may in practice depend considerably on the personal views of judges, and this may be difficult to predict in advance as court personnel changes over time.

The experience of the LFAA is that "non-custodial parents" may enter into unsatisfactory or even oppressive agreements through a failure to look far enough ahead. And in those cases, courts are likely to indicate that they are not disposed to alter such an agreement at the behest of one party only. This is, if anything, an argument for relaxing the rules as they apply to binding agreements. It is not an argument for making those rules any stricter, and further restricting the power of courts in dealing with these matters.

The proposed amendment should not be endorsed unless and until it has been fully explained and justified, and receives community understanding and acceptance - if such acceptance is in fact achieved.

The meaning of "exceptional circumstances relating to one of the children or parties to the agreement" is not clear. Some further explanation is needed.

**Page 11. Cost of children and parents in "multiple" cases**

This proposed amendment represents a significant change to the formula embodied in the 2006 legislation as it applies to "multiple cases", and is, to that extent, not in accordance with the conclusions or the arguments in the Parkinson report.

LFAA questions where the proposed amendment originated from. As the Explanatory Memorandum makes clear, the amendment will create considerable further complexity in the formula as it applies to such cases.

**Page 17. Amendment of assessments (Items 146 and 147, page 37 of the Bill)**

> "In general, such amendments to an assessment to reflect a changed care level for a child must be made with prospective effect only. One exception applies where the Registrar considers the care arrangements on the application of a parent during or at the end of the child support period, and determines that a parent shall be considered to have less than 14% care of the child for the purpose of child support period."

A question arises as to why there is a lack of symmetry between the two provisions. What they, taken together, amount to is that a non-custodial parent having more time with the child than originally envisaged receives recognition of the extra time only in respect of *future* periods after notifying the CSA, whereas a custodial parent having more time with the child than originally envisaged receives recognition of the extra time *retrospectively* as well. This does not appear to be equitable as between the two parents, or fair to the child.

Although the provision is evidently not a new one, an opportunity has arisen in the Bill to correct the inequity.

**Page 21. Variations to crediting orders**

The meaning of this paragraph is not clear.

**Page 22. Issues in parentage proceedings (Items 16 and 79, page 10 of the Bill)**

> "The new formula act sets out factors that a court should have regard to when considering whether an order for repayment of child support should be made, when it finds that child support has been paid by a person who is not the parent of the child. One of these factors concerns the likely knowledge of both parents about the issue of parentage. Amendments are being made to make it clear that a mere suspicion on the part of either parent that the payer was not the parent of the child is a factor relevant for the court to consider, even when this fall short of a reasonable doubt about parentage."

This looks like an escape clause which could be used by a mother after many years have passed and considerable child support payments had been made to claim that the

supposed father "really knew all along" about his non-paternity, even though he did not. This escape clause should not be available to the courts.

Under the proposed amendment, it would be essential for the supposed father in such a situation, in order to protect both his rights and the rights of the children, to find out definitively whether in fact he was the biological father. In practical terms, it may be that that could only happen if there was/had been a DNA test carried out. In those cases it would be essential, for reasons of consistency, that the man in question actually has the test carried out - and he should be encouraged by the law to do so.

The above conclusion is, however, contrary to views expressed by both the Law Reform Commission and the former Chief Justice of the Family Court of Australia about the authorisation of DNA tests (see below). The proposed amendment is unnecessary and potentially unjust, and should not be proceeded with.

**Page 37. One parent to reside in Australia**

> “In several provisions, the need for one parent to reside, or continue to reside in Australia has been clarified. Some of the provisions currently envisage that both parents may live overseas - this is not the intended policy. Such cases should not be dealt with under Australian child support law."

A question arises about the situation where the child is being looked after by, for example, a close relative of one of parents. Should not such a close relative of one of the parents be entitled to claim for child support, as they are able to do if at least one parent is resident in Australia?

**Page 57. Recovery of overpayments between payers and payees (Items 37 and 38, page 120 of the Bill)**

The Explanatory Memorandum refers to the following well-known case of an application for a refund of overpayments :

> "Z had been seeking a refund, from the Registrar, of his child support payments made after a certain point. He had succeeded in the case before a single judge of the court, but (a) full Court decision overturned the earlier judgment so that Z was ultimately unsuccessful. The ultimate result is in line with the policy intent in such cases. However, the case highlighted considerable confusion about the legislation involved, which the court suggested be clarified. It is proposed to provide that clarification and to safeguard the intended operation of the provisions".

The statement that, “The ultimate result is in line with the policy intent in such cases" is objectionable, as is also the following statement that “It is proposed to provide that clarification and to *safeguard* the intended operation of the provisions". The LFAA questions the validity of the statement that the result of the case put by Z in any way reflects Government policy. There are, in fact, recent statements by the Attorney General which suggest that it is contrary to Government policy.

> "It is generally intended that any amount be recovered by Z in such circumstances would be recovered as provided by section 143 of the Child Support (Assessment) Act 1989 - in court. As addressed by subsection 143 (4), recovery would be by Z from T is not from the Registrar - this intended outcome is to be made clearer through amendments that make only minimal changes to section 143".

A question arises as to who this outcome was/is "generally intended" by. The proposal demonstrates a serious lack of symmetry and equity.

The proposal would mean that while the full force of Government would be brought to bear on individuals who (however incorrectly) are assessed to pay child support in the first instance, no particular effort would be made by Government in cases where payments have been incorrectly required and are due to be repaid. Whereas "payees" would receive maximum assistance from the Government, "payers" would receive little or no assistance to ensure that proper outcomes were achieved in their case. The situation should be that, if the CSA has the power to require payments from Z to T, it should also be in the position of having the power to require repayments from T to Z. This point is fundamental.

The suggestion by one very senior judge that Z's claim should not be accepted because "it would open a Pandora's box" appears to be based on very unusual legal reasoning.

***Paternity issues***

The proposed provision in the Bill raises the broad question of paternity testing.

Anecdotal evidence suggests that more than 20% of men in Australia currently having DNA paternity testing performed are demonstrated not to be the biological father.

The LFAA Family Law Conference in June 2005, addressed by both the Attorney General and the Minister for Family and Community Services, recommended in relation to DNA testing that:

> "DNA testing children should be mandatory at birth, to overcome the numerous and complex problems (medical, emotional, financial, etc.) which may otherwise subsequently arise - none of which are being well handled at present by the court system.
>
> "DNA testing should be made affordable, available when requested, and routine for all births. The recommendation of the Law Reform Commission proposing the criminalisation of DNA tests not ordered by a court is completely unacceptable."

This continues to be the LFAA's view.

DNA testing should be a compulsory procedure at the birth of every child, to ensure that the correct father is registered. And to the extent that the procedure has not

already been performed, it should be a compulsory procedure at the time of any application to the CSA for the collection of child support.

The cost of an “official”, i.e., court-approved, DNA test at the present time is about $800. The cost of an “unofficial” but still high-quality test is about $500, and there is a possibility, according to one laboratory estimate, that the cost of the latter type of test, if conducted in a large number of cases, could be reduced to as little as $50 within a few years.

The tests would be non-invasive and would be conducted at the same time as the “Guthrie card” newborn screening tests (NBS) that have been carried out routinely in Australia on all newborns for 40 years. At present, the NBS is able to investigate three or four types of potential congenital problem, and, if the NBS was supplemented by an appropriate DNA test, doctors could begin to test for many more potential diseases and conditions.

DNA testing is merely one of a number of techniques that can be used to establish parentage of children. It is, however, ethically superior to most if not all of the other possible techniques, as it is efficient, unobtrusive, safe, credible, cost-effective, and repeatable. Most of these characteristics are either partly or wholly absent from other techniques for obtaining the necessary information.

It is a fundamental human right for parents to know who their children are, and for the children to know who their parents are. And if DNA testing is a good way (and especially if it is the best way) of obtaining such information, it would be a fundamental interference with those basic rights for anyone to seek to prevent it. That stricture should apply, inter alia, to the Family Court of Australia.

DNA testing should meet high technical and ethical standards, protect the integrity of genetic samples, and, where appropriate, provide information about counselling.

***Consequences of a paternity non-match for child support payments***

Compulsory testing would ensure that any current paternity fraud being committed would be exposed at the earliest possible time after separation. This would assist the efficiency of operations of the CSA, which has a duty of care to ensure that the non-residential parents they are pursuing for child support are properly liable for the support of the child in question. Children would be likely to benefit in terms of emotional health, physical health, and financially.

***Report by the Law Reform Commission, “Essentially yours: the protection of human genetic information”***

A 2003 report by the Law Reform Commission recommended that "DNA parentage testing involving children under 12 should be allowed only with the written consent of both parents, or pursuant to a court order”. And the Commission recommended that this rule should also apply to children and 12 to 18 years of age who lacked sufficient maturity to make a free and informed decision about testing.”

The fundamental problem with this recommendation is that where there has been deception practised by the mother of the child in relation to the supposed father, the mother may have a strong incentive to refuse consent, because it may be against her interests to reveal the truth. This means the child will not be informed about his or her true parentage for perhaps many years, and the deception practiced on the supposed father may likewise continue for many years. If the couple are separated, the supposed father may be required to pay child support for many years, and this, depending on the man's income, could amount to several hundred thousand dollars over that period. It would be highly improper for the law to permit, encourage, or endorse the continuation of such deception. And it would be very likely that such deception would come to an end at some point in the future, with all the disruption and very far reaching financial implications that may then follow.

The child support system in Australia is based on the principle that biological parenthood creates an obligation for child support. If a man *is* a biological parent, he *is* liable for child support. It also follows that if the man is *not* the biological parent he is *not* liable for child support, unless he decides to voluntarily take up that responsibility with full knowledge of the true situation. And the fact of non-liability may in many cases only be ascertainable through a paternity test. The child support system is not based, and should not be based on the principle that the nearest available male adult can be pressed into service as a payer of child support.

Men are entitled to be told about the true situation in relation to their fatherhood at an early stage so that they do not misdirect the planning of their future lives. This applies equally to supposed fathers who turn out not to be the biological father and to men who later find out that they were the biological father and have not had the opportunity to plan their lives with that knowledge.

The Law Reform Commission’s apparent belief that a man in doubt about his paternity of a child will decide to not have a paternity test done just because he is told that that he cannot legally use the results of such a test is unrealistic. Many, and perhaps most, men who have doubts about their paternity of children and are motivated to resolve those doubts will do so regardless of any huffing and puffing by official agencies who would like to prevent them from doing so.

***Comments by the former Chief Justice of the Family Court***

The former Chief Justice of the Family Court in 2002 called for legislation to make it a criminal offence to carry out DNA paternity testing, e.g., using a child's hair or saliva removed "without permission" - presumably meaning without the consent of the mother. He also expressed the view that the results of such DNA tests should not be admissible in court proceedings, and that any criminal sanctions should apply to both those ordering the test and the DNA laboratories that conducted them knowing the samples had been removed from children “without permission”. The former Chief Justice said that if fathers had a genuine reason for seeking a DNA paternity test “they ought to go to the court and ask for it”.

However, laboratories which have been carrying out paternity testing in Australia for a number of years have indicated that there is no evidence of DNA testing being

abused, and that people seeking such testing almost invariably have genuine reasons for wanting it.

There is therefore no good reason for a court to be approached in order to establish whether a person seeking the DNA test has a genuine reason for seeking it.

Are any *other* reasons why such a person should need to approach a court for permission to have a test done? The LFAA believes that, in general, there are not. A very large proportion of the paternity tests which are carried out at present come under the category of "peace of mind" tests. There is no reason for courts to be involved in any of those tests. The great majority of such tests confirm a biological match between the father and the child. The tests can be and are carried out discreetly, without disturbance to the family, and in the great majority of cases would have the effect of strengthening family relationships. Indeed, if the Family Court were to create an issue out of an otherwise discreet paternity test which came to its attention, that would be far more likely than the test itself to cause trouble in a family.

The notion that DNA material can only be obtained invasively by cutting locks of hair, etc. is simplistic. The reality is that people release their DNA into the environment with almost everything they do. For example, DNA can be obtained from items such as a cigarette butt, chewed gum, electric razor shavings, a licked envelope, or a toothbrush.

The ethics of information about paternity are fairly straightforward in its main aspect. A mother knows whether a particular child is hers, and the father should also have the right to know whether the child is his. Furthermore, if the mother has good reason to think that the child may not be his, that information should be available also to the father. To deny access to information of such importance to the father would be unacceptable discrimination as between the two parents.

Children have a fundamental right to know who their biological parents are, so that they can be in touch with their family connections and family history, and be aware of any personal health risks which are genetic in origin. This latter consideration is becoming more and more important over time, as knowledge of the connection between genetics and congenital diseases becomes better understood.

The above considerations, taken together, argue strongly for the striking out of the current gender-biased provisions in the Bill relating to recovery of overpayments between payers and payees.

The LFAA will appreciate this submission being taken into account by the Committee’s in its deliberations, and will be happy to answer any questions that the Committee may wish to ask. The LFAA will be able to assist the Committee most effectively if Senators could provide some indication prior to the hearings as to the questions they would like to ask.

Yours sincerely

| | |
|---|---|
| B C Williams | J B Carter |
| President | Policy Adviser |
| LFAA | LFAA |

23 April 2007