

3 May 2007

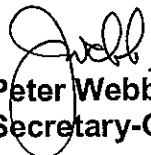
Mr Elton Humphery
Committee Secretary
Community Affairs Committee
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Mr Humphery

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

I am pleased to enclose the attached submission on the *Families, Community Services and Indigenous Affairs Legislation Amendment (Child Support Reform Consolidation and Other Measures) Bill 2007* prepared by the Family Law Section of the Law Council of Australia.

Yours sincerely



Peter Webb
Secretary-General



Law Council
OF AUSTRALIA

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

Senate Community Affairs Committee

3 May 2007

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Submission to the Senate Community Affairs Committee

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

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 practising 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 29 March 2007 the Senate, on the recommendation of the Selection of Bills Committee, referred the provisions of the *Families, Community Services and Indigenous Affairs Legislation Amendment (Child Support Reform Consolidation and Other Measures) Bill 2007* (the Bill) to the Community Affairs Committee for inquiry and report by 8 May 2007.

4. FLS was advised of the Inquiry on 23 April 2007. In the limited time available FLS has identified three areas of concern:
 - Documents provided to court by the SSAT;
 - Private enforcement of child support areas; and
 - Setting aside binding child support agreements.

Documents provided to court by the SSAT

5. Section 110K of the *Child Support (Registration and Collection) Act 1989* currently provides:

110K Sending of documents to, and disclosure of documents by, the court

When an appeal is instituted in a court, or a question of law is referred to a court, under this Division:

- (a) the SSAT Executive Director must cause to be sent to the court all documents that were before the SSAT in relation to the proceeding to which the appeal or reference relates; and
- (b) at the conclusion of the proceeding before the court in relation to the appeal or reference, the court must cause the documents to be returned to the SSAT.

6. Item 64 of Schedule 1 of the Bill repeals the current s110K and replaces it with the following:

110K Sending of documents to, and disclosure of documents by, the court

When an appeal is instituted in a court, or a question of law is referred to a court, under this Division, the SSAT Executive Director must cause to be sent to the court all documents:

- (a) that were before the SSAT in relation to the proceeding to which the appeal or the reference relates; and
- (b) that are relevant to the appeal or the reference.

7. The effect of the proposed amendment is that the SSAT will determine which documents are relevant to be sent to the court. FLS is concerned about the appropriateness of this amendment. It may not always be clear which documents are relevant and it would be unfortunate if a court dealing with an appeal or a reference on a question of law were unable to make a determination because certain documents had not been provided to it by the SSAT. Further, it is not appropriate that the body that may have made the error of law determines what documents are provided to the court. It should be a matter for the court to determine which documents are relevant and the parties to the proceedings should have the opportunity to make submissions as to which documents are relevant.
8. **FLS recommends that no change be made to s110K.**

Private enforcement of child support arrears

9. Section 111F of the *Child Support (Registration and Collection) Act 1989* currently provides

111F Court order for payment in proceedings instituted by payee to recover debt

If, in relation to a proceeding instituted by the payee of a registered maintenance liability under section 113A, the court makes an order for payment of an amount by the payer of the liability, the court may specify in the order that payment be made to:

- (a) the payee of the liability; or
- (b) the Registrar

10. Item 74 of Schedule 1 of the Bill repeals the current s111F and replaces it with the following:

111F Court order for payment in proceedings instituted by payee to recover debt

- (1) If, in relation to a proceeding instituted by the payee of a registered maintenance liability under section 113A, the court makes an order for payment of an amount by the payer of the liability, the payment must be made to the Registrar.
- (2) The Registrar must, as soon as practicable after receiving a payment in accordance with subsection (1), pay the amount received by the Registrar to the payee.

11. The effect of the proposed amendment is that the court will no longer have the discretion to order payment either to the Registrar or to the payee. The availability of private enforcement of child support arrears will enable a payee to institute child support enforcement proceedings concurrently with other financial proceedings, such as proceedings for property settlement. The proposed amendment will disadvantage a payee who might otherwise be able to offset a child support debt against a payment by way of adjustment of property interests. For example, let's assume a court makes a determination under section 79 of the *Family Law Act 1975* (FLA) that the wife may keep the family home provided that she pays \$100,000 to the husband. Let's also assume that the husband owes child support arrears of \$20,000. If the court has a discretion to order payment of the child support arrears to the wife rather than to the Registrar, then this could be offset against the payment she must make to the husband by way of property settlement, so that she need pay only \$80,000. Under the proposed amendment, the court is obliged to order that the husband pay his child support arrears to the Registrar, rather than offsetting this payment against his section 79 FLA entitlement. This means that the wife must find \$100,000 to pay to the husband, who must then pay \$20,000 to the Registrar, who will then pay \$20,000 back to the wife. It may be that the wife has the capacity to borrow \$80,000, but not \$100,000. In such a case the proposed amendment would operate so as to prevent the wife from being able to keep the family home.

12. The Explanatory Memorandum (page 7) indicates that the amendment is required to 'allow the Registrar to maintain accurate records of amounts outstanding, and minimise disputes between the payee and payer about what payments have been made'. FLS notes that a payee is already under obligation to notify the Registrar of any court orders in relation to the payee and penalties are imposed if the payee fails to notify the Registrar of such orders (see item 76 of the Bill regarding amendments proposed to subsection 113A(2) and (3) of the *Child Support (Registration and Collection) Act 1989*). Administrative convenience should not prevail over judicial discretion and the opportunity to achieve a just and equitable outcome.

13. FLS recommends that no change be made to s111F.

Setting aside binding child support agreements

14. *The Child Support Legislation Amendment (Reform of the Child Support Scheme—New Formula and Other Measures) Act 2006* made certain amendments to section 136 of the *Child Support (Assessment) Act 1989* which were due to come into effect on 1 July 2008 in relation to the power of a court to set aside child support agreements or termination agreements. Item 177 of Schedule 1 of the Bill makes further amendment to section 136. The proposed amendment provides:

- (d) in the case of a binding child support agreement—that because of exceptional circumstances, relating to a party to the agreement or a child in respect of whom the agreement is made, that have arisen since the agreement was made, the applicant or the child will suffer hardship if the agreement is not set aside. [emphasis added]

15. FLS agrees that binding child support agreements should be more difficult to set aside than limited child support agreements but believes the proposed amendment is unduly harsh. FLS 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. 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. This position was previously recommended to the Senate Community Affairs Committee Inquiry into the *Child Support Legislation Amendment (Reform of the Child Support Scheme – New Formula and Other Measures) Bill 2006*.