THE LAW SOCIETY
OF NEW SOUTH WALES

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15 September 2014

Committee Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

**Parliamentary Inquiry into the Child Support Program**

The Family Issues Committee of the Law Society of NSW ("Committee") assists the Law Society in the area of family law, particularly in respect of advocacy about the needs and family law rights and duties of people in NSW. The Committee includes a cross-section of experts in the areas of family law and children's law drawn from the Law Society's membership.

The Committee provided evidence on behalf of the Law Society at a public hearing on 27 June 2014. At that hearing, the Committee agreed to take questions on notice, as recorded in Hansard.[1]

The Committee sets out below its response to those questions taken on notice. Thank you for the opportunity to provide the Inquiry with responses to these questions.

**1. Does the Committee have a view on the proposition that the government should guarantee child support payments and that child support liabilities should be owned by the government? If we move back to automatic withholding being the default, do you think that would ameliorate the need to consider a change where government starts bearing all of the risk?**

As noted at the public hearing on 27 June 2014, the New Zealand Department of Inland Revenue administers the collection and payment of child support liabilities. Where a paying parent does not pay child support on time, the government will pay the custodial parent and the paying parent will acquire a debt to the government. The paying parent will also incur a financial penalty. The government has the power to deduct a child support debt from wages, bank accounts and other assets of the

[1] Proof Committee Hansard, House of Representatives, Standing Committee on Social Policy and Legal Affairs, Child Support Program, Friday 27 June 2014 at 10-14.

paying parent. The government may also take legal action against the paying parent to recover the debt.[2]

There are currently three different ways to manage the transfer and collection of child support payments under the Australian child support system. These apply to payees and payers living in Australia and overseas. Parents can agree that the payment of the amount of child support set by Child Support occur privately; that is, directly from the payer to the payee (known as "private collect"); or Child Support can collect and transfer the payments to the payee (known as "child support collect"; whether by the payer paying Child Support by a prescribed date each month or by deduction from the payer's wage or salary via his or her employer); or parents can manage child support payments completely independently of Child Support ("self management").[3]

Australia was the first common law western country to develop and implement a federal government administered child support system.[4] The option of the government providing a quasi-guarantee of child support payments to the payee pending collection from the liable parent was not considered when the child support scheme was first mooted. The rationale for the child support scheme was said to be that parents are responsible for the financial support of children after family breakdown (or when parents have never lived together) rather than the taxpayer.[5] There is therefore a proper basis to query the utility and the public policy basis of the New Zealand approach.

The Committee raises the concern that adopting the New Zealand approach of the government paying the child support liability in advance of collection from the payer could create an economic disincentive and lead to more liable parents failing to comply with their child support obligations. Arguably, Australia can draw from the New Zealand experience in this area. New Zealand has instituted a harsh penalty regime in relation to late payments and arrears. The self-perpetuating cycle of the New Zealand Department of Inland Revenue chasing arrears (a large proportion of which are just penalties) highlights a potential downside to government administering these debts in this manner.

While child support collect is still available to the payee (and is generally effective in cases where the liable parent is employed and pays income tax) the Committee queries the shift in language and policy within Child Support over the last six to eight years. The Committee queries Child Support's explicit advocacy of informing people about the option of making private arrangements (both in relation to the making of child support agreements and in relation to the method of payment) because the shift in language and policy appears to be correlated with a culture of non-compliance among payers who have elected to use the private collect method. If the apparent finding of the Australian Institute of Family Studies[6] in this context is correct, it is both

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[2] http://www.ird.govt.nz/childsupport/paying-parents/avoid-debt/, accessed on 1 September 2014.
[3] http://www.humanservices.gov.au/customer/enablers/child-support/compare-child-support-collection-options, accessed on 1 September 2014.
[4] *A Comparison of Child Support Schemes in Selected Countries*, Secretariat to the Ministerial Taskforce on Child Support, May 2005, Department of Families, Housing, Community Services and Indigenous Affairs, http://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/a-comparison-of-child-support-schemes-in-selected-countries?HTML, accessed on 12 September 2014.
[5] *History of the Child Support Scheme*, Department of Social Services, http://www.dss.gov.au/our-responsibilities/families-and-children/programs-services/history-of-the-child-support-scheme, accessed on 12 September 2014.
[6] Australian Institute of Family Studies submission to the Parliamentary Inquiry into the Child Support Program, submission 50, 13 June 2014 at 15.

inimical to the objects of the legislation (for example, that both parents will contribute to the costs of raising children commensurate with their income, assets and financial resources) and contrary to the rationale of not leaving the cost of raising children to taxpayers following family breakdown.

**2. Would you support the proposition that there should be a blanket prohibition on obtaining Departure Prohibition Orders in respect of people who are not ordinarily domiciled in Australia?**

Part VA of the *Child Support (Registration and Collection) Act 1988* (Cth) ("Act") provides that a Registrar may make a Departure Prohibition Order ("DPO") to prevent a child support debtor from leaving Australia. A DPO prohibits a person with a "child support liability" from departing Australia and offence provisions operate if a person departs Australia in contravention of the DPO.[7] Persons with a child support liability can include Australian citizens and residents and visitors to Australia. Under the Act, the country where the person with the child support liability is ordinarily domiciled is not listed among the statutory criteria for primary consideration when the Registrar considers making a DPO.[8]

A DPO remains in force until it is revoked by the Registrar or until it is set aside by a Court. The Registrar may revoke a DPO in circumstances where the debt is wholly discharged; where satisfactory arrangements have been made for the debt to be wholly discharged; or where the debt is completely irrecoverable. The Registrar also has a broad discretion to revoke a DPO where the Registrar considers it desirable to do so.[9]

The Committee considers that the relevant statutory provisions are well drafted in their present form. In general, the provisions are clear in defining the powers of the Registrar and the rights of a person affected by the making of a DPO. Various decisions of the Registrar may be reviewed by the Administrative Appeals Tribunal. There is a reasonable amount of case law in relation to such decisions. Courts jurisdiction under the Act also provide judicial review in certain circumstances (see below). It is conceivable that payers may have complaints about the pace at which decisions are made or not made when they are affected by the making of a DPO but the inconvenience and restriction upon travel effected by the making of a DPO must be balanced against the public policy reasons in favour of the DPO mechanism. It is sometimes a "last line" enforcement mechanism, both figuratively and literally.

The Committee does not recommend that persons who are not ordinarily domiciled in Australia be exempted from the operation of the DPO provisions. Such an amendment would create an artificial category of payer parents that are exempt from the risk and rigour of DPOs and would carry the risk of abuse. The Committee questions how a payee or Child Support would be in a position to dispute a payer's claims as to foreign domicile.

Further, the notion of allowing an exemption for those claiming to not be domiciled in Australia would be inconsistent with the increased prevalence of reciprocal child support treaties between Australia and other countries. At the risk of over-simplification, the formulation of such reciprocal arrangements, and their increase in number in recent years, reflects a universal commitment to the policy that parents

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[7] Section 72F of the Act.
[8] See section 72D of the Act.
[9] See section 72I of the Act and Part 5.2.11 of the *Child Support Guide*, version 4.02 – released 11 August 2014.

must provide for the financial support of their children even if they do not live in the same country as their child or children (see below for elaboration upon such reciprocal arrangements).

The Committee acknowledges that the contrary approach of exempting people who are not ordinarily domiciled in Australia from being subject to a DPO is based upon an international law principle that another country should not generally interfere with the freedom of movement of a person who is not domiciled in that country.[10] In this context, the country where a payer is ordinarily domiciled is not necessarily the only consideration. For example, holding Australian citizenship could also be relevant. Ultimately competing public policy considerations are present.

**3. Should there be some means of contesting Departure Prohibition Orders in the event that there is a genuine dispute about the existence or amount of the debt?**

The Act provides means for contesting a DPO.[11]

A child support debtor may apply to the Registrar to revoke or vary a DPO. The Act does not provide a statutory time limit about when an application must be made and it does not limit the number of times applications may be made.

A child support debtor may apply to the Administrative Appeals Tribunal ("AAT") for the review of a decision of the Registrar to refuse to revoke or vary a DPO or a decision to vary a DPO. The AAT will conduct an independent merits review of the decision and can exercise the discretions granted to the Registrar when reviewing a decision.[12]

A child support debtor may appeal to the Federal Circuit Court of Australia or the Federal Court of Australia against the making of a DPO. The Court may set aside the order or dismiss the appeal. The Court can determine whether an order was properly made in law, but cannot exercise the administrative decision-making powers granted to the Registrar.[13]

The Committee is of the view that the current review and appeal mechanisms to contest the making of a DPO are satisfactory. The Committee also notes that objection and review procedures exist under the Act and the *Child Support (Assessment) Act 1989* (Cth) in relation to the assessment and registration of child support liabilities at a number of points in time prior to a DPO being made.

**4. What is the appropriate legal arrangement in a situation where substantial amounts of money are owed by persons who are outside Australia? Are the existing international agreements sufficient to recover monies against payers who are outside of Australia ordinarily?**

International maintenance arrangements apply where a child lives with a parent in Australia and also where a child lives with a parent in a reciprocating jurisdiction.

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[10] See the right to freedom of movement in Articles 12 and 13 of the *International Covenant on Civil and Political Rights* (1966), http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/RighttofreedomofmovementIaspx, accessed on 12 September 2014.

[11] See subsection 72I(4) and sections 72Q and 72T of the Act.

[12] Part 5.2.11 of the *Child Support Guide*, version 4.02 – released 11 August 2014.

[13] Part 5.2.11 of the *Child Support Guide*, version 4.02 – released 11 August 2014 and *Re T v Federal Commissioner of Taxation* [1986] FCA 433.

Reciprocating jurisdictions are listed in Schedule 2 of the *Child Support (Registration and Collection Regulations) 1988* (Cth) ("Regulations"). The Child Support Guide states that[14]:

> The underpinning principle of Australia's international maintenance arrangements is that, wherever possible, a liability should be issued and administered in the jurisdiction where the payee resides. The jurisdiction in which the payer is resident is responsible for collection and providing the payer with reasonable assistance in dealing with the overseas authority.

Australia is also a signatory to international agreements and conventions about international maintenance obligations. These include:

(1) The Australia-New Zealand Agreement contained in Schedule 1 to the Regulations (2000);

(2) Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations 1973;

(3) Agreement between the Government of Australia and the Government of the United States of America for the Enforcement of Maintenance (Support) Obligations (2002) and

(4) United Nations Convention on the Recovery Abroad of Maintenance (1956) contained in Schedule 3 to the *Family Law Regulations 1984* (Cth).

The Committee is not in a position to express a view about the efficacy of the existing international agreements, that is, whether in practice they are working well to collect or recover monies payable by payers who ordinarily reside outside of Australia. An empirical consideration of this question may require examination of Child Support statistics or records.

**5. How does the Law Society see natural justice fitting into the current system? Could it be amended to ensure there is natural justice afforded in that system of Departure Prohibition Orders in particular? What would your view be in respect of the proposition that there could be advance notice to respondents to DPOs?**

In administrative decision-making, natural justice or procedural fairness broadly requires that a decision-maker be, and appear to be, free from bias and that a person who is adversely affected by a decision receives a fair hearing.[15] The Administrative Review Council considers that procedural fairness should be an element in government decision-making in all contexts, accepting that what is fair will vary with the circumstances.[16]

At present, section 72D sets out the circumstances in which a Registrar may make an order and matters the Registrar must have regard to when determining whether or not the Registrar is satisfied that the person has persistently and without reasonable grounds failed to pay a child support debt. At common law a decision-maker is

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[14] Part 1.5.1 of the *Child Support Guide*, version 4.02 – released 11 August 2014.
[15] *Australian Administrative Law Policy Guide*, Commonwealth Attorney-General's Department, 2011, p 10.
[16] Administrative Review Council, *The Scope of Judicial Review* Report No. 47 (2006) 52 cited in *Australian Administrative Law Policy Guide*, Commonwealth Attorney-General's Department, 2011, p 10.

required to exercise powers having regard to the requirements of natural justice or procedural fairness.

In theory, the requirements of procedural fairness could be codified in statutory provisions. For example, section 72D could be amended to include a procedure to be followed by the Registrar when considering whether or not to make a DPO. Such a procedure could include providing the child support debtor and payee with copies of the information under consideration by the Registrar and providing the debtor and payee with an opportunity to comment on this information. However, there would be cases where strict compliance with a codified approach would allow a debtor to evade his or her legal obligations because they have received advance notice of the potential making of a DPO. In such a case, better outcomes may be achieved if the Registrar maintains his or her discretion.

It may even be argued that the requirements of natural justice are already being satisfied in practice when the Registrar provides a debtor and payee with an opportunity to provide up-to-date information relevant to registrable maintenance liabilities at periodic intervals. What remains in these cases is that a debtor is informed in writing that the Registrar has the power to make a DPO in accordance with the provisions of the Act and that it is open to any payer that may be subject to these provisions to be proactive and communicate with the Registrar about their individual circumstances prior to the making of a possible DPO against them. It is submitted that the latter notification can be done in the ordinary course of the administration of the Act by the Registrar (and her delegate). If this analysis is correct, it may be unusual and rare for the Registrar to defer the making of a DPO because the Registrar must first communicate with a debtor and invite him or her to respond as to why a DPO should not be made against them.

Thank you for the opportunity to provide further comment by way of answers to the questions on notice. If you have any questions please feel free to contact Emma Liddle, policy lawyer for the Committee on [redacted] or [redacted].

Yours sincerely,

Ros Everett
**President**