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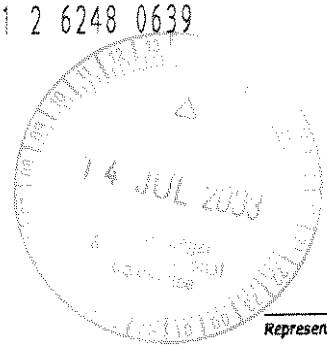



Representing Family Lawyers Throughout Australia

Law Council
OF AUSTRALIA

# Facsimile Cover Sheet

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| **To:** | Ms Louise Gell |
| **Organisation:** | Senate Legal and Constitutional Committee<br>Room S1.161<br>Parliament House, Canberra |
| **Fax:** | 02 6277 5794 |
| **From:** | Elizabeth Marburg - Family Law Section |
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| **Date:** | 14 July 2003 |
| **Pages (including cover):** | 8 |
| **Subject:** | Inquiry into the Family Law Amendment Bill 2003 |

Dear Ms Gell

Following is the Family Law Section of the Law Council of Australia preliminary comments on the Bill and two amendments in the Bill that greatly concern FLS.

Yours sincerely

Elizabeth Marburg

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*Representing Family Lawyers Throughout Australia*

14 July 2003

Senator Marise Payne
Chair
Senate Legal and Constitutional Committee
Room S1.161
Parliament House
CANBERRA ACT 2601

**By facsimile: (02) 6277 5794**

Dear Senator Payne

**Inquiry into the Family Law Amendment Bill 2003**

The *Family Law Amendment Bill 2003* was referred to your Committee on 14 May 2003.

I have attached for your information a copy of the preliminary comments on the Bill which the Family Law Section of the Law Council of Australia (FLS) provided to the Attorney General's Department in January this year. The Attorney-General's Department has adopted some of the changes recommended by FLS and we understand that a number of minor Government amendments will be recommended. However, there are two amendments in the Bill that greatly concern FLS. These are:

(1) the proposed amendment to section 117(1) of the Family Law Act regarding *costs orders for child representatives*; and
(2) the retrospective application of the proposed amendments to section 90F of the Family Law Act regarding *financial agreements*.

*Costs orders for child representatives*

From our discussions with the Attorney-General's Department it appears that the Attorney-General is mindful of our concerns about the possible impact of the proposed amendment to section 117(1) but wishes to proceed with the amendment on the basis that he would monitor its impact. We do not believe that this is an adequate substitute for the broad consultation which should be a pre-requisite to any significant change in family law which has the potential to impact adversely on children.

While the Committee's examination of the Act provides an opportunity for some consultation there is relatively little public awareness of this Bill and consultation on this type of possible change would normally be conducted by the Family Law Council or the Attorney –General's Department.

The amendment is the first major change in Family Law Act cost principles since the Act began operation in 1976 and there would be a range of stakeholders who are likely to have a view about whether the long-standing principle that each party should pay his or her own costs (subject always to judicial discretion to order otherwise) should be altered.

The amendment is intended to effect the child representation area and there are be a number of groups who should have been consulted, ranging from the Family Law Council, to women's and men's groups, to the legal aid commissions who manage many child representation arrangements.

We have considerable doubt that it would be easy to legislate quickly to reverse this amendment if the government's monitoring of its effect showed that it resulted in fewer child representatives being appointed.

FLS remains concerned that the proposed amendment will be interpreted by legal aid commissions and the courts as intending that costs orders should be made in most circumstances, even where proceedings are resolved by consent. The amendment may cause litigants, particularly those who are self-funded, to oppose the appointment of a child representative where it otherwise might seem appropriate. FLS is concerned that the amendment will lead to a reduction in the number of cases where child representatives are appointed. We have therefore suggested to the Attorney-General's Department that the amendment be removed from the Bill until there can be broader consultation and debate about its implications.

*Financial Agreements*

Subsection 90F(1) currently provides that, in certain circumstances, the power of the court to make an order for maintenance for a party may be excluded by a financial agreement made before or during marriage. The proposed amendment, which is to be applied *retrospectively*, will invalidate those parts of a financial agreement which purport to cancel the spousal maintenance rights of a party, where that party is in receipt of an income tested pension, allowance or benefit. The amendments will apply to all agreements made since the commencement of the *Family Law Amendment Act 2000* on 27 December 2000, and all future agreements.

FLS has advised the Government that it is only opposed to the retrospective application of this amendment. Retrospective application has the potential to impact adversely on both parties to an agreement who have settled their property affairs in good faith, and on the basis of what was provided in the *Family Law Amendment Act 2000*. It also significantly alters the conditions in which parties may have made settlement. There is no ground to set aside an agreement under section 90K of the Family Law Act on the basis that legislation is subsequently changed.

I would be happy to brief you further on these issues. My telephone number is (03) 6235 1111.

Yours sincerely

Michael Foster
Chairman

*Representing Family Lawyers Throughout Australia*

**FAMILY LAW SECTION**
**LAW COUNCIL OF AUSTRALIA**

**PRELIMINARY COMMENTS ON THE FAMILY LAW AMENDMENT BILL 2003**

**Schedule 2 – Use of audio links, video links etc**

| Proposed provision | Comment | |
|---|---|---|
| Division 3 – sections 102M and 102N | 1 | This Division introduces the concept of a split court. FLS queries how it is envisaged that this concept will work in practice. |
| Section 102D(3) | 2 | FLS queries whether the words "person giving testimony" should be "person appearing" and the second reference to "testimony" should be "appearance". |
| Section 102E (3) | 3 | FLS queries whether the words "person giving testimony" should be "person making submissions" and the second reference to "testimony" should be "submission". |

**Schedule 5 – Financial agreements**

| Proposed provision | Comment | |
|---|---|---|
| Section 90C | 4 | FLS queries why the Department did not pick up previous FLS submissions about altering section 90C to make it clear that an agreement made after separation but before divorce falls within the definition of a financial agreement. This is a major problem. |
| Section 90F(1) | 5 | 5.1 FLS is strongly opposed to the retrospective application of this provision. Since the commencement of Schedule 2 of the Family Law Amendment Act 2000 in December 2000, many financial agreements have been entered into by parties on the basis of that Act. FLS is not opposed to the proposed amendment if it is prospective in effect.<br><br>5.2 Retrospective application of the proposed provision has the potential to impact adversely on parties to an agreement who have settled their property affairs in good faith, and on the basis of what was provided in the Family Law Amendment Act 2000. It may significantly alter the conditions in which parties may have made settlement. There is no ground to set aside an agreement under section 90K of the FLA on the basis that a provision has been retrospectively invalidated by legislation.<br><br>5.3 The intention to legislate retrospectively has not been publicly foreshadowed by the Government.<br><br>5.4 The proposed wording of section 90F(1) may create uncertainty and ambiguity. The current section 90F(1) sets, as the point of enquiry as to whether the person is able to support themselves without a pension, the day on which the agreement is made. The new subsection 90F(1A) talks about the agreement coming "into effect". That is the only reference in Part VIIIA to an agreement coming "into effect". The only other point of time identified by the FLA is when an agreement is "binding". FLS is concerned that the expression "comes into effect" may be interpreted as the day on which the marriage breaks down or, in the case of a post separation agreement, the day on which the agreement is invoked to defend a maintenance claim. |

**Schedule 6 – Orders and injunctions binding third parties**

| Proposed provision | Comment | |
|---|---|---|
| PartVIIIAA | 6 | This new Part appears to deal only with issues relating to property settlement and injunctions. FLS queries whether proceedings for spousal maintenance should also be included so that the jurisdiction exists whenever the Court is faced with a need to make orders in relation to the financial affairs of the parties. |
| Sections 90AE (3) (b) and 90AF (3) (b) | 7 | FLS believes it may be appropriate to include after the words "paid in full" something to the effect of "in accordance with the terms of the debt". It might otherwise be possible to argue that although a debt would not be paid within the time period permitted by the debt it would eventually be "paid in full". The additional words may, however, prevent an order being made where a debt is already in default. The drafting of this clause might benefit from further discussion with FLS. |

**Schedule 7 – Miscellaneous amendments**

| Proposed provision | Comment | |
|---|---|---|
| Section 19N | 8 | FLS has no comment on this amendment provided that it does not limit the scope for making further amendments after the completion of the current PDR Review. See letter from Garry Watts to Kym Duggan of 25.10.02. |
| Section 117 | 9 | 9.1 FLS is concerned that the word "shall" has been replaced by the word "must" in subsection 117(1). As it presently stands, the scheme of the section is that a person "shall" pay his or her own costs unless the court decides to make a costs order under sub section (2). The change in the long-standing wording may lead to an interpretation that some change was intended by the legislature.<br><br>9.2 FLS has previously written to the Attorney-General regarding its opposition to the imposition of cost recovery conditions as part of the Funding Agreements between the Commonwealth of Australia and various State and Territory Legal Aid Commissions. See letter Garry Watts to Attorney-General of 2 January 2001. The Child Representative's role centres around the best interests of the child. An obligation to pursue cost recovery in all or most circumstances can compromise the capacity of the Child Representative to achieve, often by negotiation rather than litigation, the best possible outcome for the child.<br><br>9.3 While FLS supports a provision to clarify and confirm the jurisdiction of Courts to order costs against parties and in favour of Child Representatives in the appropriate circumstances, the proposed provision goes much further than this, raising some extremely important issues. This proposed amendment should be the subject of broad debate and consultation before a decision is taken to include it in a Bill.<br><br>9.4 Some indication of the types of issues that will arise for discussion are as follows:<br><br>9.4.1 If the provision is intended to apply only where proceedings are determined by a judge then it will be a strong discouragement against parties having their case judicially determined. Discouragement will impact most strongly on the party with financial resources who will feel most vulnerable to a costs order, and it will have least effect on an impecunious party. As well as being inequitable in its effect it will mean that in some cases the best interests of a child are never properly addressed and that meritorious applications are not pursued to the detriment of the child concerned. |

**Schedule 7 – Miscellaneous amendments continued…..**

| Proposed provision | Comment |
|---|---|
| Section 117 continued….. | 9.4.2 If the provision is intended to apply even when proceedings settle it will tend to complicate and prolong proceedings, to generate antagonism between parents, and to distract the parties and the Child Representative from working towards an agreed settlement which focuses on the best interests of the child.<br><br>9.4.3 The role of a Child Representative will be compromised and enlarged. The Child Representative (possibly even where proceedings have settled) will have to make inquiry and form a view about the merits of the position taken by each of the parties and also as to their financial circumstances so that the Child Representative can make appropriate submissions to a Court faced with the difficult task of allocating financial responsibility.<br><br>9.4.4 The practical consequence of the proposed amendment will often be to place the cost burden of child representation on the better-resourced party who, faced with the cost of paying for his or her own legal representation, is likely to abandon the application or response for fear of the financial consequences of pursuing it. It will be difficult for a Court to make a costs order against an impecunious party whose uncooperative parenting the Court may suspect as being the stimulus for the proceedings. This is at odds with the traditional costs principle in the Family Court, that litigants can seek the assistance of the Court to resolve family problems without the fear of a costs order in most circumstances provided that they act responsibly.<br><br>9.5 Section 117 (2) seems to implicitly contradict subsection 117 (1). It is hard to imagine what costs order could be made by a court under subsection (2) other than requiring the parties to pay the Child Representative's costs.<br><br>9.6 Section 117 (2) does not contemplate an order that costs not be paid.<br><br>9.7 Section 117 (1B) and 117 (2A)(b) are contradictory. |