CHAPTER 3

Key Issues

3.1 This chapter outlines the key issues raised in submissions and evidence. This includes the support and concern that was expressed about the various parts of the Bill.

Support for the Bill

3.2 Support was offered for the following Parts of the Bill (no opposition was provided in submissions or evidence to these Parts):

- Part 3 – suspensions of sentences of imprisonment;[1]
- Part 4 – Enforcement (removal of information procedure);[2]
- Part 5 – Private arbitration;[3]
- Part 6 – changes of venue;[4]
- Part 8 – Appeals;[5]
- Part 9 – transfer of matters from State courts of summary jurisdiction to the Federal Magistrates Court;[6]
- Part 12 – power to dismiss appeal;[7]
- Part 13 – appeals to High Court;[8]
- Part 15 – frivolous or vexatious proceedings;[9]

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1 Law Society of New South Wales, *Submission 1*, p.2.

2 Law Society of New South Wales, *Submission 1*, p.2.

3 Law Society of New South Wales, *Submission 1*, p.2.

4 Law Society of New South Wales, *Submission 1*, p.2.

5 Law Society of New South Wales, *Submission 1*, p.2.

6 Law Society of New South Wales, *Submission 1*, p.2.

7 Law Society of New South Wales, *Submission 1*, p.3.

8 Law Society of New South Wales, *Submission 1*, p.3.

- Part 18 – powers of judicial registrars;[10]

Concerns and suggested amendments

3.3 There was both concern and opposition expressed in submissions to some parts of the Bill. The following parts of the Bill attracted either opposition or suggested amendments:

- Part 1 – Parenting orders;[11]
- Part 7 – definition of disposition;[12]
- Part 14 – recovery of amounts paid under maintenance orders;[13]
- Part 16 – rules as to costs;[14]
- Part 17 – Civil penalties for contravention of Rules;[15]
- Part 19 – interaction of family law and bankruptcy law;[16]

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9 Law Society of New South Wales, *Submission 1*, p.3.;National Network of Women's Legal Services, *Submission 8*, p.4.

10 Law Society of New South Wales, *Submission 1*, p.4.

11 Support for the part: Law Society of New South Wales, *Submission 1*, p.2.; Concerns expressed about part: NSW Commission for Children and Young People, *Submission 3*, p.1.; recommendations or suggested amendment: National Council of Single Mothers and their Children, *Submission 2*, p.4.; National Network of Women's Legal Services, *Submission 8*, p.4.

12 Suggested amendments: Law Society of New South Wales, *Submission 1*, p.2.

13 Support for part: Law Society of New South Wales, *Submission 1*, p.3.; suggested amendments: Law Council of Australia, *Submission 6*, p.2.; concern expressed: NSW Commission for Children and Young People, *Submission 3*, p.1.; National Network of Women's Legal Services, *Submission 8*, p.4.; opposition to part: National Council of Single Mothers and their Children, *Submission 2*, p.2.

14 Suggested amendments: National Council of Single Mothers and their Children, *Submission 2*, p.3.; National Abuse Free Contact Campaign, *Submission 4*, p.2.; Law Council of Australia, *Submission 6*, p.3.; Concern expressed: National Network of Women's Legal Services, *Submission 8*, p.5.; Opposition to part: Law Society of New South Wales, *Submission 1*, p.3.

15 Opposition to part: Law Society of New South Wales, *Submission 1*, p.3.; Law Council of Australia, *Submission 6*, p.6..

16 Support for part: Law Society of New South Wales, *Submission 1*, p.4.; Credit Union Services Corporation (Australia), *Submission 9*, p.1.; suggested amendments: Law Council of Australia, *Submission 6*, p.8.; concern expressed: National Network of Women's Legal Services, *Submission 8*, p.5.

Part 1 – Parenting orders

3.4 Part 1 of the Bill would allow the court to vary parenting orders, in proceedings alleging the contravention of a parenting order, if the court is satisfied that the contravention did not occur, or if it did occur, the party had a reasonable excuse.

3.5 This part of the Bill was supported by the Law Society of New South Wales, which argued that it was a "sound reform".[17]

3.6 This was countered by the NSW Commission for Children and Young People which expressed concern in its submission:

> While such a power will ensure that the Family Court is not burdened by contravention proceedings resulting from what the Court considers poorly designed parenting orders, I am concerned that the proposal allows the Court to unduly interfere in arrangements both parties have consented to.[18]

3.7 Both the National Council of Single Mothers and their Children (NCSMC) and the National Abuse Free Contact Campaign made the following recommendation regarding Part 1 of the Bill:

> [the Bill should be amended to] provide that in hearings for contravention orders in relation to children, where issues of violence or abuse have been raised, that the court have the power to commission intensive expert assessment of the safety of all parties and to vary orders to ensure that the safety of a child and her/his family is the threshold determinant of a child's best interests and that all decisions regarding the child privilege the safety of all parties.[19]

3.8 The NCSMC argued that such amendment is needed as:

> [T]he failure to privilege safety as the threshold determinant of a child's best interests results in many inappropriate orders which expose children and other family members to terror, stalking, sexual assault, physical assault and homicide.[20]

3.9 The National Network of Women's Legal Services (NNWLS) expressed their concern as to how the provisions could be used:

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17 Law Society of New South Wales, *Submission 1*, p.2.

18 NSW Commission for Children and Young People, *Submission 3*, p.1.

19 National Council of Single Mothers and their Children, *Submission 2*, p.3.; National Abuse Free Contact Campaign, *Submission 4*, p.2.

20 National Council of Single Mothers and their Children, *Submission 2*, p.3.

> In situations where a mother has been able to prove reasonable excuse as a result of violence and the Court uses the proposed section to restrict the father's contact to a safer arrangement, NNWLS would support the amendment. However, we are concerned that there is wide range of factual situations in which these powers could arise.
>
> NNWLS suggests that consideration be given to including in the proposed clause 70NEB clauses similar to 70NG(1)(c) and (1A) so that parties have the opportunity to properly prepare and present their cases. We make the point that the mentioned subsections were introduced partly in response to submissions by NNWLS at the time but the final drafting did not fully reflect our ideas.[21]

3.10 NNWLS suggested that proposed section 70NEB be amended to include factors to be considered when varying the order, similar to those in section 70NG(1)(c) and (1A):

> [I]deas similar to those contained in 70NG(1)(c) and (1A) should be added to the proposed section 70NEB but the wording should be altered slightly to clarify the intent behind the sections. The factors which should be relevant to the court's decision as to whether or not to vary the original order are as follows:
>
> (i) whether there are any allegations of a history of family violence;
>
> (ii) whether there are any allegations of child abuse;
>
> (iii) the circumstances surrounding the making of the original order (eg. whether it was made by consent at a mediation or legal aid conference or whether the parties were legally represented at a court hearing);
>
> (iv) whether there has been a change in circumstances which make complying with the original order impracticable;
>
> (v) any other circumstance that results in the original order no longer being in the best interests of the child.[22]

3.11 The Committee asked the Attorney-General's Department for a response to these recommendations. In relation to NNWLS's first recommendation, the Department provided the following response:

> The purpose of the proposed section 70NEB is to respond to the concerns expressed by many stakeholders that contravention applications often arise because the original parenting order is effectively unworkable. Often parenting orders are made by consent and it appears that in many cases

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21 National Network of Women's Legal Services, *Submission 8*, p.3.

22 National Network of Women's Legal Services, *Submission 8*, p.4.

> parties do not give sufficient consideration to the obligations that arise under those orders. This may not become apparent until the parties attempt to operate in accordance with those orders. In such cases, a range of judicial officers from both the Family Court and the Federal Magistrates Court have suggested that there should be a power for the courts to vary the original order, rather than require parties to make a separate application for variation and be subjected to further court proceedings.
>
> This is a different situation from that covered by the current section 70NG. That section only applies where a court has been provided with sufficient evidence to make a finding that an order has been breached. Issues relating to family violence should be considered in making this determination. Such issues clearly go to the question of whether or not the person had a "reasonable excuse" for the breach of an order. In these circumstances it is appropriate that there be restrictions on the courts' power to allow an adjournment for a party to seek a variation of the original order. The current provisions essentially relate to a persons ability to understand the original order or the length of time that has elapsed since it was made. There is no such finding in relation to a matter that is to be dealt with under the proposed section 70NEB. In cases under section 70NEB a varied order is of course still an order that would require the court to consider the best interests of the child as the paramount consideration and that requires the court to take account of the matters set out in subsection 68F(2) of the Act.
>
> There is a very broad range of factors that the court must consider. In particular paragraph 68F(2)(g) specifically provides that the court must consider the need to protect the child from physical or psychological harm caused, or that may be caused, by being subject or exposed to abuse, ill treatment, violence or other behaviour; or being directly or indirectly exposed to abuse ill treatment, violence or other behaviour that is directed to or may affect another person. Paragraphs 68(2)(i) and (j) also provide that the court must consider any family violence involving the child, or a member of the child's family and any family violence order that applies to the child or a member of the child's family.[23]

3.12 In relation to the second recommendation by NNWLS the Department provided the following response:

> In relation to recommendation 2 of the NNWLS, submission section 70NG currently sets out the courts' powers in those cases where there has been a contravention of a parenting order made out and where there has not been a reasonable excuse established. Paragraph 70NG(1)(c) currently provides for the option of adjournment of the proceedings so that a variation to the original parenting order can be sought.
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> In section 70NG cases, the applicant has satisfied the onus on them and demonstrated that a breach of court orders has occurred. In that

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23 Attorney-General's Department, *Submission 10A*, pp.1-2.

> circumstance it is appropriate that when the court is considering the response to that breach that there are fairly limited factors that the court must take into account when it is considering the option of further adjourning the proceedings rather than dealing with them. Generally the adjournment of the proceedings at that stage would not be the appropriate course and the limited circumstances that the court must consider in relation to this option are appropriate given that a breach without reasonable excuse has been established.[24]

The Committee's view

3.13 In relation to the recommendation that proposed section 70NEB require the court to consider factors such as history of violence or abuse when varying an order, the Committee notes the response of the Attorney-General's Department that the court is already required to consider such factors by subsection 68F(2).

3.14 In relation to the recommendation that section 70NG be amended in a similar way, the Committee notes the response of the Attorney-General's Department that the fairly limited circumstances that the court is to consider is appropriate given that a breach without reasonable excuse has been established.

Part 7 – definition of disposition

3.15 Part 7 of the Bill incorporates one of the recommendations in the Joint Taskforce Report on the Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax.[25] Item 20 amends subsection 106B(5) to replace the current definition of 'disposition' (which is currently defined to include 'a sale and a gift') with a more expansive definition which includes reference to the 'issue, grant, creation, transfer or cancellation of … an interest in a company or a trust'.

3.16 The Law Society of NSW Family Law Committee expressed concern in its submission that the definition in proposed paragraph 106B(5)(a) may be problematic:

> The question of "and" at the end of s106B(5)(a) could be construed as limiting the definition rather than expanding it. Is the draftsman confident of the construction of the "and" in this context?
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> The same comment applies in relation to sub paragraph (b). The Family Law Committee would support the use of the word "includes" so as not to limit the definition but would give scope for broader interpretation.[26]

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24 Attorney-General's Department, *Submission 10A*, p.2.

25 Family Law Amendment Bill 2004, *Bills Digest* No. 124 2003-04. Department of Parliamentary Services. p.5.

26 Law Society of New South Wales, *Submission 1*, p.2.

The Committee's view

3.17 The Committee notes that the Law Society of New South Wales has asked that attention be directed to the definition in proposed paragraphs 106(5)(a) and (b), specifically the use of the word 'includes' instead of 'and'.

Part 14 – recovery of amounts paid under maintenance orders

3.18 Proposed section 66X provides that where a court has made an order that a person pay maintenance and the person has paid that maintenance, but the court later determines that the person is not a parent or step-parent of the child, the amount paid may be recovered in a court having jurisdiction under Part VII of the Act. There is a similar provision for the recovery of child support in the *Child Support (Assessment) Act 1989*.[27]

3.19 This part of the Bill was supported by the Law Society of NSW Family Law Committee in its submission.[28]

3.20 The NSW Commission for Children and Young People expressed concern in its submission that this provision may allow the recovery of such money from the custodial parent:

> I am concerned that the Bill and explanatory material is silent on where this money would be recovered from. I am particularly concerned that the money might sought to be recovered from the custodial parent of the child to whom the order related. This may place a significant financial burden on that parent and family. There is no indication in the Bill or explanatory material of any measures that might be imposed to make sure that the best interests of the child is safeguarded following any action to recover this money. I suggest that such safeguards should be incorporated into the Bill.[29]

3.21 This part of the Bill was opposed by the NNWLS, who argued that there was no need for the provision:

> NNWLS is concerned that this amendment will cover a tiny number of cases and we wonder why it is really required. In most cases where a man has been paying maintenance in accordance with a court order he would have a strong 'step' parent relationship with the child and would be caught under s66M in any event.
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> It could place a small number of women who mistakenly identified the wrong father in very difficult financial circumstances which will also impact

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27 Family Law Amendment Bill 2004, *Bills Digest* No. 124 2003-04. Department of Parliamentary Services. p.7.

28 Law Society of New South Wales, *Submission 1*, p.3.

29 NSW Commission for Children and Young People, *Submission 3*, p.1.

> on the children who reside with her. Further, it seems unfair to bring in this provision when women cannot claim back payments of retrospective child support. Therefore, while a woman could be made to pay back a wrongly identified man who is not the biological father she cannot then make a retrospective claim against the real father.[30]

3.22 The NCSMC also opposed this part, and suggested that it should be removed from the Bill. It also suggested possible limits on the provision if it were to proceed:

> Recommendation 1: NCSMC recommends that this provision should be rejected on the grounds that it (a) will encourage men to seek to reject their children (b) functions against the .best interests of the child. (c) could unreasonably impoverish affected families (d) will only apply to a very tiny minority of cases but could damage many families wrongly subjected to men's attempts to deny their children.
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> Recommendation 2: NCSMC recommends that this provision should only apply where it can be established, on the balance of probabilities, that the misidentification of the paying parent has knowingly and without duress involved a deliberate course of deception for the purpose of claiming child support.
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> Recommendation 3: NCSMC recommends that the child support agency should advise separating parents subject to child support claims that the child support claim implies their legal acceptance of their parental status and if they wish to dispute this they should forthwith provide DNA and fund a test to establish parentage. Failure to do so would void any subsequent options to claim they were not the parent.[31]

3.23 The Law Council of Australia, Family Law Section, did not object to the principle behind proposed section 66X, but suggested there is some ambiguity in the proposed section, and suggested that it be amended such that immediately after proposed paragraph 66X(c) the words be deleted and the following words be inserted:

> a court having jurisdiction under this Part may make any of the orders specified in subsection (2) hereof:
>
> (2) The orders that a court may make are as follows:
>
> > (a) that the accumulated total amount of any periodic payments paid under the purported order be repaid;

30 National Network of Women's Legal Services, *Submission 8*, p.4.

31 National Council of Single Mothers and their Children, *Submission 2*, p.2.

> (b) that any lump sum or a part of a lump sum paid under the purported order be repaid;
>
> (c) that any property settled under the purported order by way of maintenance of a child or the value thereof be returned to the person who settled the property;
>
> (d) any consequential order necessary to give effect to the provisions of this section.[32]

3.24 At the hearing Mr Michael Foster of the Law Council of Australia, Family Law Section, explained that the intention of these suggested amendments would be to ensure the provisions would apply even where there has been partial compliance.[33]

The Committee's view

3.25 The Committee notes the concern expressed in submissions about the proposed provisions of part 14.

3.26 The Committee also notes the suggested amendments proposed by the Law Council of Australia to ensure that the intention of the proposed provisions would be effective in cases where part payment has been made. The Committee agrees that as currently drafted the provisions are ambiguous in cases where a party has made part payment and would be better drafted to account for such circumstances.

Part 16 – rules as to costs

3.27 Part 16 of the Bill would provide that the Rules may provide that a party to proceedings under the Act must bear the costs of another party to those proceedings unless the court otherwise orders. This would depart from the general rule that each party bears their own costs in proceedings under the Act.

3.28 The NNWLS expressed concern over this part of the Bill, and noted that this could be a 'doubled edged sword':

> On the one hand many are disadvantaged by tactics employed by their former partner to slow or obstruct the proper progress of court proceedings. On the other hand, those who are unrepresented struggle to understand and comply with procedural orders made and we are concerned that this provision may have punitive consequences.
>
> It may be useful to add to s117(2A) a provision which states that the Court should also take into account whether a party is unrepresented and, if so, the circumstances giving rise to that situation. Litigants who choose to self-represent to avoid the mitigating influence of a lawyer should not benefit,

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32 Law Council of Australia, *Submission 6*, p.2.

33 Mr Foster, *Committee Hansard*, 1 July 2004, p.3.

> however, those who self-represent because they are unable to afford a lawyer and unable to obtain legal aid should have their lack of legal counsel taken into account.[34]

3.29 The Law Society of New South Wales opposed this part of the Bill, arguing that the principle that a party bears their own costs is a fundamental principle underlying the Act:

> One of the significant philosophical principles, which underlines the *Family Law Act 1975*, is that each party bears their own costs. This was put into place in 1975 as a response to the former practice of determining .fault.. At that time costs were routinely ordered against a party who was held to be the one causing the divorce. Costs were a significant issue and sometimes became the primary issue. They could become the focus of the dispute between the parties and were often seen as a block to consensual resolution. The Act provides for this as a principle in s117 (A). The amendment completely undermines that principle and for no apparent reason.
>
> The present Act provides for people who behave unreasonably, or fail to accept offers, or who have significant resources against another with limited resources, to be ordered to pay costs. The existing provision works well.
>
> The effect of this amendment is that costs may be used as a method of defeating a less powerful partner in the marriage. It may mean that the threat of a costs order may prevent access to justice. The integrity of the fundamental principle needs to be retained.[35]

3.30 Both the National Council of Single Mothers and their Children and the National Abuse Free Contact Campaign argued in submissions that parents who are non-compliant with orders of the court due to unresolved issues of violence or abuse due to physical or mental incapacity should not be subjected to paying the costs of the other party.[36]

3.31 The Law Council of Australia, Family Law Section, provided strong opposition to this part of the Bill. It provided two reasons to support this opposition:

> The fundamental principles which guide the exercise of discretion in relation to costs should be determined by Parliament and not by the Judges whose job it is to apply those principles.
>
> The Family Court of Australia says that its intention in seeking this amendment is to give it power to restrict judicial discretion on costs and to

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34 National Network of Women's Legal Services, *Submission 8*, p.5.

35 Law Society of New South Wales, *Submission 1*, p.3.

36 National Council of Single Mothers and their Children, *Submission 2*, p.3.; National Abuse Free Contact Campaign, *Submission 4*, p.2.

> impose automatic costs consequences upon the happening of certain events. In a family law context automatic costs provisions will favour some categories of litigants over others, produce inequities and reduce access to justice.[37]

3.32 At the hearing the Law Council, Family Law Section, expanded on these concerns:

> In particular the court has two things in mind, both of which relate to automatic costs consequences. One idea it has is that litigants will be able to put offers and there will be an automatic costs consequence if the offer ultimately is as good as the court's award. The other idea that the court has is that, in relation to procedural breaches, there will be automatic cost consequences, so that if you do not do something such as file a document then there will be an automatic costs penalty. They are major changes.[38]

3.33 A representative of the Attorney-General's Department explained the background to the proposed provisions at the hearing:

> The amendments have been included as a result of a request from the Family Court to support provisions in the context of their rules of court that commenced in March this year. The provisions of those rules do not include any automatic cost consequences, as the Law Society of New South Wales and the family law section representatives mentioned. The court has advised the department that the request should be viewed in light of the conclusion drawn by the Australian Law Reform Commission in its *Managing justice* report that there is a culture of noncompliance in the Family Court. The Law Reform Commission's recommendation in that report was that the court and its committees should identify clearly the various causes, circumstances, processes and registries in which there is significant noncompliance and should distinguish between inadvertent and deliberate noncompliance and the range of solutions and responses that might be required. I refer there to recommendation 110 of the Australian Law Reform Commission report *Managing justice* in 2000. The department's view is that the provision is necessary because of that culture of noncompliance within the court.[39]

3.34 In a supplementary submission to the Committee, the Law Council of Australia, Family Law Section, argued that the proposed provisions are the antithesis of the ALRC recommendation that there should be distinction between inadvertent and deliberate non-compliance:

> The proposed automatic costs provisions are the antithesis of this concept because they do not discriminate between inadvertent and deliberate non-

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37 Law Council of Australia, *Submission 6*, p.3.

38 Mr Foster, *Committee Hansard*, 1 July 2004, p.2.

39 *Committee Hansard*, 1 July 2004, p.15.

> compliance. The cost burden falls automatically on the non-complier and that liability remains in place unless the non-complier applies to the Court for relief and succeeds in that application.[40]

3.35 At the hearing the Attorney-General's Department were asked to justify why the procedures for awarding costs should be dealt with in the rules and not directly by amendments to the Act. A representative of the Department explained:

> There is a recognition that the Family Court is in a special position in relation to its rules on the costing proceedings. It is not the same rule that applies to other proceedings in other courts. For instance, in the Federal Court the power to make costs is within the discretion of the court. Under section 43(2) of the Federal Court of Australia Act, the Federal Court itself has discretion to make an award for costs.
>
> We have a situation in the Family Law Act where there are specific provisions in relation to the principles which guide the court in making cost orders. There is an initial position that both parties bear their own costs. One consideration is that the particular circumstances that may be identified by the rules are going to relate to procedural matters before the court. If there is the desire to use the costs power to secure compliance with procedural mechanisms within the court, then the fairly general guiding rule in section 117 of the act is not one that is going to be particularly useful to ensure compliance with particular procedural processes within the court. The Family Court was proposing to deal with that issue by rules of court and sought to have a limit to the act that would support that, leaving the decision with the court as to the circumstances in which those consequences would apply, bearing in mind that the rules that they might make would be disallowable in parliament and that there would be parliamentary scrutiny at that level, as opposed to having the detail of the circumstances spelt out in the terms of section 117.[41]

3.36 The Law Council of Australia, Family Law Section, responded to these points in its supplementary submission to the Committee. It argued that although rules are disallowable, this would not provide an adequate mechanism for broad public consultation on changes to the law which would otherwise have required legislative amendment.[42] It also responded to the Department's position that the Family Court is in a 'special position' regarding costs:

> With respect, this is not correct. The Family Law Act costs provisions must be applied by all courts which have jurisdiction under the Family Law Act. These costs provisions are therefore used by the Federal Magistrates Court, state courts exercising jurisdiction under the Family Law Act, and the

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40 Law Council of Australia, *Submission 6A*, p.1.

41 *Committee Hansard*, 1 July 2004, p.16.

42 Law Council of Australia, *Submission 6*, p.2.

> Family Court of Australia. The Family Court is not in any special position or at any special disadvantage.
>
> FLS points out that if the Family Court of Australia makes automatic costs provisions under an expanded rule-making power this will generate confusion and ambiguity because those provisions will be in direct conflict with the provisions of Section 117 of the Family Law Act. Section 117 establishes clear principles, none of which include costs as an automatic consequence of an event nor the obligation to make an application in order to seek the removal of an automatic costs consequence. This conflict will no doubt have to be the subject of judicial interpretation which may well be settled in favour of the primacy of the provisions of Section 117 over any costs rules which are inconsistent with it, notwithstanding that the costs rules were made under an expanded rule-making power.

3.37 The Attorney-General's Department were asked whether the provisions were an attempt to shift work from the Family Court to the Federal Magistrates Court. In a subsequent submission to the Committee the Department responded:

> The purpose of the proposal in relation to costs is to address a perceived culture of non-compliance with procedural mechanisms in the Family Court. It does not involve any attempt to shift the work to the Federal Magistrates Court.[43]

3.38 The Law Council of Australia, Family Law Section, disagreed:

> It is the submission of FLS that these provisions will create a perception that the Family Court of Australia is a difficult and dangerous court for some litigants, particularly those with limited financial resources and those who find the litigious process intimidating. This may cause certain categories of litigants to use other courts.[44]

3.39 The Law Council of Australia also argued that the costs provisions of section 117 were adequate, and are used currently:

> Experience demonstrates that costs orders for procedural non-compliance are frequently made under the present legislation whenever the non-complier is clearly at fault.
>
> The intention of the Family Court of Australia, as evidenced by the draft Rules which it released in 2003, is to apply automatic costs provisions to offers as well as procedural matters. As FLS has explained in its submission to the Inquiry, this has far-reaching consequences including implications for equity and access to justice.

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43 Attorney-General's Department, *Submission 10*, p.1.

44 Law Council of Australia, *Submission 6A*, p.3.

> FLS notes that the Federal Magistrates Court does not require automatic costs provisions to enable it to deal with procedural non-compliance.[45]

The Committee's View

3.40 The Committee notes the strong opposition in submissions to part 16 of the Bill. The Committee is concerned that if enacted, the provisions would allow the Court to impose automatic cost consequences on parties. The Committee believes that automatic cost consequences would not accord with the recommendations of the ALRC report *Managing Justice*, that there should be a distinction between inadvertent and deliberate non-compliance.

3.41 The Committee believes this part of the Bill should not proceed or should be amended to take account of whether a party has deliberately or inadvertently failed to comply with procedures.

Part 17 – Civil penalties for contravention of Rules

3.42 Part 17 of the Bill would provide that judges may make Rules "providing for civil penalties for failures to comply with the standard Rules of Court".

3.43 This part was opposed by the Law Society of New South Wales:

> The proposed amendment will mean that point-scoring, using the complex and sometimes confusing Family Court Rules, rather than identifying and resolving the underlying issues may become the order of the day. It offends the principle set out in s97 (3) *Family Law Act* 1975 which provides:
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> *.In proceedings under this Act, the court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted..*[46]

3.44 The Law Council of Australia, Family Law Committee stated strong opposition to this part of the Bill, and providing two arguments against the part:

> The "criminalizing" of conduct by the imposition of substantial civil penalties (proposed to be in excess of $27,000) should be a matter for the legislature, not for the Judges of the Court. It is the role of the legislature to make the law and it is the role of the Judges to apply it.
>
> The Family Court has disclosed that its purpose in seeking this amendment is to enable it to impose substantial financial penalties for non-compliance

45 Law Council of Australia, *Submission 6A*, p.2.

46 Law Society of New South Wales, *Submission 1*, pp.3-4.

> with Court procedures. The Court already has ample means by which it can enforce compliance with procedures.[47]

3.45 The Law Council argued that the courts have extensive power to enforce procedures by making costs orders against litigants and also against lawyers. It further argued that lawyers are already subject to sanction by their own regulatory bodies for breach of professional or ethical obligations in relation to procedural matters and representation generally.[48]

3.46 At the hearing, a representative of the Attorney-General's Department noted that amendments to the Bill would limit the possible penalty to 50 penalty units ($5,500). This was the first time the Committee had been notified of the changes to the legislation as it was referred to the Committee.

3.47 In a supplementary submission to the Committee, the Law Council of Australia, Family Law Section, responded to the proposed amendment to the Bill:

> FLS notes the Government's proposed amendment in relation to civil penalties (item 140) but strongly maintains its position that the imposition of substantial quasi-criminal penalties for procedural matters is unnecessary, inappropriate, is not seen as necessary by other courts, contributes to the trend towards non-uniformity in family law court procedures and raises important issues of equity and access to justice that cannot be addressed through the court's traditional consultation processes or the disallowance procedure.[49]

The Committee's view

3.48 As with part 16 of the Bill, part 17 attracted strong opposition, and the Committee has similar concerns about both sections.

3.49 In relation to part 17 the Committee is concerned that whilst the amendment to the Bill would limit any penalty to 50 penalty units, this is still a substantial penalty ($5,500), and the circumstances under which it is applied will not be set by Parliament, but rather will merely be disallowable. Furthermore, the Committee was not convinced by evidence or submissions that there is the need for the Court to have such powers.

3.50 The Committee heard evidence that the proposed provision may be used to impose penalties of up to $27,000. The Committee notes that the Bill has been

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47 Law Council of Australia, *Submission 6*, p.6.

48 Law Council of Australia, *Submission 6*, p.6.

49 Law Council of Australia, *Submission 6A*, p.3.

amended to limit the possible penalty to $5,500, and heard no evidence as to why limiting the penalty to $5,500 would make it more appropriate.

3.51 How such penalties are to be applied may have a significant impact on the perception of the Family Court as an accessible forum for seeking justice. The circumstances in which such penalties should be applied should be determined by Parliament and not delegated.

3.52 The Committee recommends that part 17 not proceed in its current form.

Part 19 – interaction of family law and bankruptcy law

3.53 Part 19 entitles a third party creditor to become a party to proceedings 'if the creditor may not be able to recover his or her debt' if the order for property settlement were made. It also entitles any other person 'whose interests would be affected by the making of the order' to become a party to proceedings for an order for property settlement.[50]

3.54 The Law Society of New South Wales and the Credit Union Services Corporation both supported this part of the Bill.[51]

3.55 The Law Council of Australia, Family Law Section offered in-principle support for the part, but suggested that the provisions should be amended for purposes of clarity. It suggested that proposed section 79F be amended to read as follows (suggested amendments are underlined):

> The applicable Rules of Court may make provision for <u>the circumstances in which</u> a person who:
>
> (a) applies for an order under this Part; or
>
> (b) is a party to proceedings for an order under this Part; <u>is</u> to give notice of the application to a person who is not a party to the proceedings.[52]

3.56 It argued that these amendments would make it clear to the Court the rules made under this section should allow for some discrimination – otherwise an applicant would need to notify every creditor.[53]

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50 proposed subsection 79(10)

51 Law Society of New South Wales, *Submission 1*, p.4.; Credit Union Services Corporation (Australia) Ltd., *Submission 9*, p.1.

52 Law Council of Australia, *Submission 6*, p.8.

53 Law Council of Australia, *Submission 6*, p.8.

3.57 The NNWLS expressed concern over this part of the Bill, arguing that the current drafting makes it unclear how the needs of the mother and children are to be taken into account as against a third party creditor. It noted that the provisions may make it harder for a custodial parent to retain the family home for the benefit of their children.[54]

3.58 In supporting the provisions of Part 19, Mr Benjamin of the Law Society of New South Wales noted that the practice of notifying creditors when assets are to be transferred already occurs:

> Under the present law, if the court know they are going to make an order which could impact upon a creditor, we are obliged to let the creditor know anyway.
>
> …
>
> All this is doing is putting in place a practical solution to something which we have been dealing with in any event. It adds to the existing law. It does not tie in necessarily with the bankruptcy provisions adversely in any way.[55]

The Committee's view

3.59 The Committee notes the suggestion of the Law Council that proposed section 79F be amended to ensure the Court is able to discriminate as to who must be notified (as opposed to being restricted to requiring all parties to be notified). The Committee agrees with this suggestion and believes proposed section 79F be amended to ensure the Court is able to determine the circumstances regarding who is to be notified in such proceedings.

Recommendations

Recommendation 1

3.60 The Committee recommends that Part 14 of the Bill be amended to clarify that the recovery of payments is possible where part payment of an order has been made.

Recommendation 2

3.61 The Committee recommends that either Part 16 of the Bill not proceed, or be amended to take account of whether a party has inadvertently or deliberately failed to comply with procedures.

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54 National Network of Women's Legal Services, *Submission 8*, p.6.

55 Mr Benjamin, *Committee Hansard*, 1 July 2004, p.13.

Recommendation 3

3.62 The Committee Recommends that Part 17 not proceed.

Recommendation 4

3.63 The Committee recommends that Part 19 be amended to ensure that the Court is able to determine the circumstances in which creditors are to be notified.

Recommendation 5

3.64 Subject to recommendations 1, 2, 3, and 4, the Committee recommends that the Bill proceed.

Senator Marise Payne

Chair