

Our Ref: GAS:MAP:Family2004:4682(551)
(PLEASE QUOTE OUR REFERENCE ON ALL CORRESPONDENCE)
Direct Line: 9926 0212

24 June 2004

The Committee Secretary
Australian Senate
Legal and Constitutional Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam,

Re: Inquiry into the Family Law Amendment Bill 2004

Thank you for your letter dated 18 June 2004 inviting comment on the effect of the provisions of the Family Law Amendment Bill 2004.

The Family Law Committee of the Law Society of New South Wales, which comprises legal practitioners with expertise and extensive experience in family law, has considered the recommendations and forwards its submission for your assistance and consideration.

Mr Robert Benjamin, Chair of the Family Law Committee, is willing to give oral evidence if requested.

Would you also kindly advise whether you would have any objection to our publishing the submission for the information of our members?

For anything further, please contact Maryanne Plastiras on 9926 0212 or by email at map@lawsocnsw.asn.au.

Yours faithfully,

Gordon Salier
President

enc

THE LAW SOCIETY OF NEW SOUTH WALES
FAMILY LAW COMMITTEE
SUBMISSION TO THE
SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
ON
INQUIRY INTO THE FAMILY LAW AMENDMENT BILL 2004
JUNE 2004

Part 1 Parenting Compliance Regime

This is a sound reform and is supported by the Family Law Committee.

Part 2 Costs and offers of settlement

The Family Law Committee has no comment, as this seems to be a mechanical provision which deals with operation of the section.

Part 3 Suspension of sentences of imprisonment

This reform is supported by the Family Law Committee.

Part 4 Enforcement

The Family Law Committee supports this reform.

Part 5 Private Arbitration

This is a sound reform and is supported by the Family Law Committee. The use of Private Arbitration should be encouraged.

Part 6 Change of venue

The Family Law Committee supports this reform.

Part 7 Definition of suspension

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?

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.

Part 8 Appeals

This is a sound administrative change and is supported by the Family Law Committee.

Part 9 Transfer of matters from State courts of summary jurisdiction to the Federal Magistrates Court

The Family Law Committee supports this amendment.

The Committee believes that the Federal Magistrates Court at Parramatta is working very well and efficiently. Legislative change to facilitate transfer of proceedings to that Court in a direct and inexpensive way is good reform.

Part 10 Terminology relating to divorce and principal relief
The Family Law Committee has no comment on this proposed change.

Part 11 Leave to appeal
The Family Law Committee has no comment on this change, as it appears to clarify the existing law.

Part 12 Power to dismiss appeal
The Family Law Committee supports this amendment.

Appeals are expensive and the frustration and agitation for those who need to fund defences of meritless and/or vexatious appeals is great.

Part 13 Appeals to High Court
The Family Law Committee supports this amendment.

Part 14 Recovery of amounts paid under maintenance orders
The Family Law Committee supports this amendment.

Part 15 Frivolous or vexatious proceedings
The Family Law Committee supports this change.

Part 16 Rules as to costs
The Family Law Committee opposes this amendment.

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.

Part 17 Civil penalties for contravention of Rules
The Family Law Committee opposes this provision.

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:

“In proceedings under this Act, the court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted.”

The Law Society has grave concerns that the litigation process in the Family Court is becoming increasingly complex and expensive. A copy of the Law Society’s submission to the Family Court in July 2003 on the Family Court Rules 2004 that outlines those concerns is enclosed.

If a person fails to file a document in time or makes a mistake it can be resolved by way of a costs order, not by way of civil penalties which will no doubt have the underlying effect of inflaming and entrenching conflict. Please note that when this was first mooted last year, the Family Court suggested penalties of up to 260 penalty units (in excess of \$26,000.00). This would place an additional burden on people who are already struggling to solve their domestic problems.

It is planned to impose this penalty regime upon the legal profession as well as parties. This provision will introduce significant civil penalties for the legal profession as well as adding another tier of regulation to that profession. Legal practitioners are already subject to compulsory professional indemnity insurance, regulation as to conduct by Legal Services Commissions, Law Societies and Bar Associations, regulation as to ethics by the professional associations, and of course fidelity fund requirements. Why is another level needed? It will serve no purpose and add to costs. If a legal practitioner has caused delay, the Court already has powers to impose personal costs orders upon that practitioner. This amendment, if used, will in most contentious cases lead to a breakdown in the practitioner/client relationship and could create another hearing within the hearing to determine who was at fault. It could also be used by a party to create a schism between the other party and his/her legal practitioner.

Part 18 Powers of judicial registrars

The Family Law Committee supports this amendment.

Part 19 Interaction of family law and bankruptcy law

The Family Law Committee supports this amendment.