28 June 2004

Mr Philip Bailey
Acting Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Mr Bailey

Inquiry into the *Family Law Amendment Bill 2004*

Thank you for your letter of 18 June 2004 inviting the Family Law Section of the Law Council of Australia to contribute to the Committee's Inquiry.

The two areas of greatest concern to FLS are the amendments proposed in:

- Part 16, item 139, which amends Section 117(1) of the *Family Law Act 1975* to provide that the Family Law Rules *"may provide that, in the circumstances specified in the Rules, a party to proceedings under this Act is to bear the costs of another party to those proceedings unless the court otherwise orders*"; and
- Part 17, Item 140, which amends Section 123(1) of the *Family Law Act 1975* by permitting the Family Law Rules to provide *"for civil penalties for failures to comply with the standard Rules of Court".*

FLS submits that the proposed amendments will:

(i) Create further non-uniform procedures in the Family Court of Australia and Federal Magistrates Court, in direct conflict with the Government's recommendations in its Federal Civil Justice Strategy Paper (currently under consideration by the Government).

(ii) Enable the Family Court to make law which goes well beyond the purpose for which the rule-making power exists.

(iii) Enable the Court to make rules which affect substantive rights - this should be the province of elected Parliamentary representatives rather than Family Court judges who are not accountable.

Further comments on the Bill are attached. These comments have previously been forwarded to the Attorney-General's Department and a number of Members of the Parliament and the Senate.

Yours faithfully

Michael Foster
Chairman

FAMILY LAW SECTION
LAW COUNCIL OF AUSTRALIA

COMMENTS ON THE *FAMILY LAW AMENDMENT BILL 2004*

The Family Law Section (FLS) has no comment on the following Parts of the Bill:

- Part 1 – Parenting compliance regime
- Part 2 - Costs and offers of settlement
- Part 3 – Suspension of sentences of imprisonment
- Part 4 – Enforcement (removal of information procedure)
- Part 5 – Private Arbitration
- Part 6 – Change of venue
- Part 7 – Definition of disposition
- Part 8 – Appeals
- Part 9 – Transfer of matters from State courts of summary jurisdiction to the Federal Magistrates Court
- Part 10 – Terminology relating to divorce and principal relief
- Part 11 – Leave to appeal
- Part 12 – Power to dismiss appeal
- Part 13 – Appeals to High Court
- Part 15 – Frivolous or vexatious proceedings
- Part 18 – Powers of judicial registrars

Comments on the remaining Parts are attached.

Part 14 – Recovery of amounts paid under maintenance orders

Proposed amendment	FLS Comment
Item 136 At the end of Division 7 of Part VII Add: Subdivision G—Recovery of amounts paid under maintenance orders 66X Recovery of amounts paid under maintenance orders If: (a) a court has at any time purported to make a maintenance order (the *purported order*) requiring a person to pay an amount by way of maintenance for a child; and (b) the person has paid the amount in compliance with the purported order; and (c) a court has determined 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 this Part.	1. FLS has no objection to the principle behind proposed section 66X, namely that persons who are subsequently found not to be parents of a child should be able to recover monies paid in compliance with a maintenance order for that child. However, it is suggested that there is some ambiguity in section 66X as drafted. It is suggested that this section should read: (1) If: (a) a court has at any time made a maintenance order (the *purported order*) requiring a person to do any of the things specified in Section 66P(1)(a), (b) or (c) by way of maintenance for a child; and (b) the person has complied or partially complied with the purported order; and (c) a court has determined that the person is not a parent or step-parent of the child; 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; (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.

Part 16 – Rules as to costs

Proposed amendment	FLS Comment
Item 139 After subsection 117(1) Insert: (1A) The Rules may provide that, in the circumstances specified in the Rules, a party to proceedings under this Act is to bear the costs of another party to those proceeding unless the court otherwise orders.	FLS strongly opposes this amendment for two reasons: • 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 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. **Fundamental cost principles should be legislated** 1. The fundamental principles that guide the allocation of costs in Family Court proceedings are closely linked to access to justice and equity issues, and also to the welfare of individual children. It is important, for example, that poorly-resourced litigants are not excluded from using the court process because they do not have the resources to apply to have an automatic costs order set aside, or that a case concerning the welfare of a child remains unresolved because a litigant does not have the means to ask that an automatic costs order be set aside. 2. Legislative enshrinement of fundamental costs principles ensures that those principles receive the scrutiny of Parliament. Parliament and successive governments have a strong tradition of broad consultation in relation to Family Law Act changes including changes concerning fundamental cost principles.

Part 16 – Rules as to costs

Proposed amendment	FLS Comment
Item 139 contd…..	3. The fact that change can only occur by legislative amendment means that it does not occur frequently. As a result fundamental cost principles are consistent and well-known 4. By contrast, Family Law Rules are changed frequently, sometimes with minimal consultation even with the legal profession. Generally there is no consultation outside the legal profession. Family law rules can be changed by a mere majority of judges. 5. Family Raw Rules are intended to deal with practice and procedure in the Family Court of Australia. Defining the fundamental principles that govern the allocation of costs is well outside the purpose of the Rules. **Amendment to Facilitate Automatic Cost Consequences** 6. Judges of the Family Court of Australia already have broad discretion to make costs orders in appropriate instances and do so regularly. They are required under the Family Law Act to take into account a range of considerations including the outcome of the proceedings, the conduct of the parties in relation to the proceedings and the financial circumstances of each of the parties. 7. The Court has sought this amendment to enable it to impose automatic cost liabilities in certain circumstances, such as the failure of a party to comply with a rule or procedure of the Court, or the success of a party in achieving an outcome which is as good or greater than a settlement proposal as contained in a confidential offer. The Family Court has proposed that automatic costs orders apply even where parties settle on a basis that is more favourable than an open offer. The court suggested that parties take into account the costs to be paid when agreeing on settlement. Such an approach is totally inappropriate in a setting where settlements are to be encouraged.

Part 16 – Rules as to costs

Proposed amendment	FLS Comment
Item 139 contd…..	8. The imposition of automatic cost consequences disadvantages certain categories of litigants and advantages others. Well-resourced parties are not affected by the prospect of or the actual imposition of costs. However, poorly-resourced litigants, particularly women, and legally aided persons are likely to feel intimidated by the risk of automatic costs orders. While the Court may, in some circumstances, permit an application for an automatic costs order to be set aside, only well-resourced litigants will be able to afford to take this step. 9. The practical result of such a costs regime is that poorly-resourced litigants are easily discouraged from continuing with their cases and have little choice but to accept the settlement proposals of well-resourced or more robust litigants. There is a real risk that some cases concerning the welfare of children will not reach a hearing because of automatic cost orders or fear of their imposition. 10. The capacity to make an offer linked to an automatic costs order has been described by the English High Court of Justice as being akin to "spread-betting". It enables a well-resourced or tenacious litigant to bet on the accuracy of his or her legal advice. Such a cost regime will act as a powerful deterrent to poorly-resourced litigants and to those who have limited access to experienced legal advice and representation. Female litigants are likely to be intimidated into settling on the best offer put by their husband rather than to gamble on the outcome of the proceedings. The husband, perhaps with a stronger income and better access to financial resources, will be able to financially back the judgment of his advisors. 11. Offers with automatic cost consequences are also likely to encourage poor conduct in the litigation process. The imposition of a cost liability would be dictated solely by the outcome of the case whereas presently the Court is able to take into account non-compliance with Court procedures and the obligation to disclose

Part 17 – Civil penalties for contravention of Rules

Proposed amendment	FLS Comment
Item 140 After paragraph 123(1)(t) Insert: (ta) providing for civil penalties for failures to comply with the standard Rules of Court; and	FLS strongly opposes this amendment for two reasons: • 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 with Court procedures. The Court already has ample means by which it can enforce compliance with procedures. **The "criminalizing" of conduct should be determined by the legislature:** 1. Determination of what conduct should be the subject of substantial financial penalties and the maximum penalties to be applied should be a responsibility of Parliament, not of the courts which must determine whether such conduct has occurred and what penalty should be imposed. This is fundamental to the doctrine of separation of powers. 2. No other Commonwealth court has such powers. 3. Laws imposing substantial financial penalties should receive the scrutiny of Parliament. 4. Parliament and successive governments have a strong tradition of broad consultation in relation to the Family Law Act. A proposal for the imposition of substantial financial penalties has broad implications for the general community.

Part 17 – Civil penalties for contravention of Rules

Proposed amendment	FLS Comment
Item 140 contd…..	5. The requirement that laws in relation to substantial financial penalties can only be made by Parliament means that change will not occur frequently. This has the benefit that the community becomes familiar with and can anticipate the penalties that attach to proscribed behaviour. 6. By contrast, Family Law Rules are changed frequently, sometimes with minimal consultation even with the legal profession. There is no tradition of consultation outside the legal profession. Family law rules can be changed by a mere majority of judges. 7. Family Law Rules are intended to deal with practice and procedure in the Family Court of Australia. The making of "laws" authorising substantial financial penalties on litigants and their legal representatives is well outside the purpose of the Rules. **"Criminalising" non-compliance with Court procedures** 8. Courts have extensive power to enforce procedures by making costs orders against litigants and also against lawyers. 9. Lawyers are already subject to sanction by their own regulatory bodies for breach of professional or ethical obligations including in relation to procedural matters and representation generally. 10. Lawyers are also liable to claims in negligence and breach of contract by clients in relation to procedural matters and their representation generally. 11. There is no research which indicates that the "criminalizing of non-compliance" with Court procedures is necessary. 12. The "criminalizing" of non-compliance with Court procedures is at odds with the concept of a court which is designed to assist families to resolve problems during difficult times. It will change the image of the Court and by doing so will discourage people from using it.

Part 19 – Interaction of family law and bankruptcy law

Proposed amendment	FLS Comment
Item 145 After section 79E Insert: 79F Notifying third parties about application The applicable Rules of Court may make provision for a person who: (a) applies for an order under this Part; or (b) is a party to proceedings for an order under this Part; to give notice of the application to a person who is not a party to the proceedings.	1. FLS supports the amendment in principle. 2. However, it is suggested that the following wording be adopted to make clear to the Court the rules made under this section should allow for some discrimination – otherwise an applicant will need to notify every creditor. It is suggested that the section read as follows (with the suggested changes in underlined italics); The applicable Rules of Court may make provision for *the circumstances in which* a person who: (a) applies for an order under this Part; or (b) is a party to proceedings for an order under this Part; *is* to give notice of the application to a person who is not a party to the proceedings.

Part 19 – Interaction of family law and bankruptcy law

Proposed amendment	FLS Comment
Item 146 After section 90D Insert: 90DA Need for separation declaration for certain provisions of financial agreement to take effect (1) A financial agreement between 2 people, to the extent to which it deals with: (a) how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of them at the time when the agreement is made, or at a later time and before the termination of the marriage by divorce, is to be dealt with; or (b) the maintenance of either of them after the termination of the marriage by divorce; is of no force or effect until a separation declaration is made. (2) A separation declaration is a written declaration that complies with subsections (3) and (4). (3) The declaration must be signed by at least one of the parties to the financial agreement. (4) The declaration must state that: (a) the parties have separated and are living separately and apart at the declaration time; and (b) in the opinion of the parties making the declaration, there is no reasonable likelihood of cohabitation being resumed. (5)In this section: *declaration time* means the time when the declaration was signed by a party to the financial agreement (or last signed by a party to the agreement, if both parties to the agreement have signed). *separated* has the same meaning as in section 48 (as affected by section 49).	1. FLS does not support this amendment. It seems to apply to a small number of recalcitrant individuals while causing maximum inconvenience for a majority. 2. The amendments to part VIIA (particularly Section 90 K (1)) made in the *Family Law Amendment Act 2003* ensure that affronted creditors have sufficient remedies available to them. 3. The philosophy of the Family Law Act is geared towards encouraging separated couples to reconcile. There is no way in which a separation declaration can be made binding if people separate and then choose to reconcile (either in fact or fiction). 4. Apart from the Rich case (for which the remedy was swift) there appears not to be a problem of people using agreements to defeat creditors. The remedial provisions introduced in the *Family Law Amendment Act 2003* have plugged any holes in the legislation.