16 July 2004

Mr Phillip Bailey
Acting Secretary
Senate Legal & Constitutional Committee
Parliament House
CANBERRA ACT 2600

Dear Mr Bailey

Family Law Amendment Bill 2004

Thank you for your email of 12 July 2004 and the invitation to make additional comments in light of the evidence given by the Attorney-General's Department and the proposed Government amendments.

In the course of the evidence by the Attorney-General's Department (AGD) the following matters arose:

1. AGD said the proposed extension of the rule-making power does not anticipate automatic costs consequences.

   FLS notes that the proposed amendment specifically empowers the judges of the Court to make rules that a party shall "*bear the costs of another party …. unless the Court otherwise orders*". This is an explicit power to make automatic costs provisions. Moreover the Court released last year the details of the automatic costs provisions which it intends to make if its rule-making power is extended by this amendment.

2. AGD said that the Australian Law Reform Commission recommended that the courts distinguish between inadvertent non-compliance and deliberate non-compliance and in particular referred to recommendation 110 of the ALRC Report Number 89 *Managing Justice*.

   Recommendation 110 of the ALRC Report specifically says that the Family Court's Future Directions Committee "*should distinguish between inadvertent and deliberate non compliance, and the range of solutions and responses required. Such measures in response to non-compliance should avoid automatic sanctions*".

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

GPO Box 1989, Canberra, ACT 2601, DX 5719 Canberra | Telephone **+61 2 6246 3788** Facsimile +61 2 6248 0639 | 19 Torrens St Braddon ACT 2612 www.lawcouncil.asn.au

3. AGD was asked whether any culture of non-compliance has been identified by the Family Court of Australia.

   FLS is not aware of any empirical evidence to support the existence of a culture of non-compliance. If there is any perception that such a culture exists in the Family Court of Australia the lack of such a culture in the Federal Magistrates Court or the Federal Court of Australia may indicate that the perception is misplaced.

   FLS submits that non-compliance can be adequately dealt with under the existing legislative costs provisions. It is common for judges and court officers to make orders for costs following non-compliance where fault has been properly attributed to the non-complier.

4. AGD said that the Family Law Rules are subject to disallowance in the Senate.

   This would not provide an adequate mechanism for broad public consultation on changes to the law which would otherwise have required legislative amendment.

5. AGD said that the costs provision could not be put in legislation because the Family Court is in a "special position".

   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 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.

6. AGD argues that costs and procedural matters require special consideration and that the provisions of Section 117 may not be adequate.

   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.

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

7. AGD was asked whether the proposed costs provisions would drive work from the Family Court of Australia to the Federal Magistrates Court.

   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.

8. AGD was asked whether there was any precedent in Australia for a court to be empowered to make automatic costs orders.

   FLS is not aware of any precedent nor even of a perception that such provisions are necessary in any other court.

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.

FLS notes that the Family Court of Australia has a new Chief Justice and Deputy Chief Justice and suggests that these controversial provisions (items 139 and 140) be deleted from the Bill and be referred for further consultation with the Family Court of Australia.

Yours sincerely

Michael Foster
Chairman