

Supplementary submission
tabled at the public hearing
in Sydney on 13 March 2020

Supplement 1.1

DRAFT FAMILY LAW AND CHILD SUPPORT AMENDMENT BILL 2020. Synopsis

Outline of the Draft *Family Law and Child Support Amendment Bill 2020*.

The objective of this bill is to provide fairness and equality in the Family Law and the Child System.

Once having been involved with family law and child support issues, most people will invariably ask themselves one (1) or two (2) of the following questions:

1. What was the cause of their unfair and inequitable result?
2. How can this system be fixed to prevent this problem from happening to other people, in the future?

The cause of their unfair and inequitable result is an agenda.

This agenda is historical.

Labor governments, since the Whitlam Government of 1972, have had an unfair, pro-female agenda.

This has resulted in some extreme outcomes as a result of the *Family Law Act 1975*, the two (2) child support acts of 1988 and 1989 and the more recent domestic violence legislative changes made in 2011.

We are very supportive of a pro-female agenda where it is necessary. However, the agenda in family law should be gender neutral. The children are the main issue.

Unfortunately, with each new legislative change, the pendulum has swung more and more away from the centre. This benefits no one. At the same time, it creates dysfunctional families, with children being the losers.

We are a conservative-based party and as such, we resist some of these more extreme changes made by previous Labor governments.

If the *Family Law and Child Support Amendment Bill 2020* is passed by Parliament, it will help move the pendulum back to the centre.

One of the two main amendments in the Bill is joint residency as the starting point, after either divorce or separation. The other main amendment is to allow for a more realistic cap on child support payments.

Both these two (2) amendments and the other amendments contained in the Bill will help to provide fairness and equality in the Family Law and Child Support System.

Supplement 1.2

2019-2020-2021

The Parliament of the
Commonwealth of Australia

THE SENATE

Presented and read a first time

(Draft) Family Law and Child Support Amendment Bill 2020

No. , 2020

(Senator)

A Bill for an Act to amend the *Family Law Act 1975*, the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1988* and for other related purposes

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Family Law Act 1975

A Bill for an Act to amend the *Family Law Act 1975*, the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1988* and for other related purposes.

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Family Law and Child Support Amendment Act 2020*.

2 Commencement

This Act commences on the day after it receives the Royal Assent.

3 Object of the Act

The main object of this Act is to provide fairness and equality in the Family Law and the Child Support System.

4. Application of the *Acts Interpretation Act 1901*

For the avoidance of doubt, section 15AB of the *Acts Interpretation Act 1901* applies to the operation of this Act.

5 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1— Rebuttable Presumption of Joint Residency

Family Law Act 1975

1. After Division 1 of Part VII

Insert:

Division 1A—Joint residency

Subdivision A—Principles

60K Fundamental right of every child

This Division recognises the fundamental right of every child to experience the love, guidance and companionship of both parents after their separation or divorce by assuring a child of frequent and continuing contact with both parents and to encourage parents to share the rights, duties and responsibilities of child rearing.

60L Meaning of joint residence order

In this Division, **joint residence order** means an order made under subsection 64B(2)(a) designating each parent as a child's residence provider, and providing that residency of the child is shared in such a way as to assure the child of frequent and continuing contact with both parents. The child's contact with each parent must be as equal as possible. A joint residence order obligates the parties to exchange information.

Subdivision B—Parenting orders and parenting plans.

60M Parenting orders

- (1) In deciding to make a residence order in relation to a child, the court must regard the best interests of the child as a primary consideration, as set out in subsections 60CC(2), 60CC(2A), 60CC(3) and 60CC(5), in the following order of preference:
 - (a) to both parents jointly in a joint residence order;
 - (b) to either parent;
 - (c) to any other person deemed by the court to be suitable and be able to provide an appropriate and stable environment.

- (2) In considering whether to make an order under paragraph (1)(b), the court shall have regard, with all the factors set out in subsections 60CC(2), 60CC(2A), 60CC(3) and 60CC(5), to which parent is more likely to allow the child frequent and continuing contact with the non-residence provider parent, and may not determine a parent as a designated residence provider because of the parent's gender or race.
- (3) The parent requesting to be the designated residence provider has the burden of proving that a joint residence order would not be in a child's best interest.
- (4) The parents may agree to a residence order in favour of one parent.

60N Parenting plans

In making a residence order, the court in its discretion may require the submission of a plan for the implementation of the parenting order.

60O Presumption

- (1) There is a rebuttable presumption that joint residence orders are in the best interests of the child.
- (2) The presumption in favour of a joint residence order may be rebutted by showing that it is not in the best interests of the child, after consideration of clear and convincing evidence with respect to all the factors in subsections 60CC(2), 60CC(2A), 60CC(3) and 60CC(5).

60P Reasons.

- (1) If the court declines to award a joint residence order, the court shall state in its decision the reasons for denying the award.
- (2) An objection by a parent to a joint residence order is not a sufficient basis for a finding that a joint residence order is not in the best interests of a child, nor is a finding that the parents are hostile to each other.
- (3) A statement that a joint residence order is not in the best interests of a child shall not be sufficient to meet the requirements of this Division.

60Q Modification

- (1) A joint residence order may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interests of the child require modification or termination of the order.
- (2) In an application for modification or termination, the court shall consider evidence of substantial or repeated failure of a parent to adhere to the plan for implementing the joint residence order.
- (3) The court shall state in its decision the reason for modification or determination of the joint residence order if either parent opposes the modification or termination order.
- (4) Any order specifying a parent as the child's designated residence provider may be modified at any time to a joint residence order.

60R Records

Notwithstanding any other provision of law, unless the court orders otherwise, access to records and information pertaining to a minor child, including but not limited to medical, dental and school records, shall not be denied to a parent because the parent is not the designated residence provider.

2. After subsection 60CC(2)

Delete

- (2A) If there is any inconsistency in applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).

Insert

- (2A) If there is any inconsistency in applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(a).

Schedule 2— Providing Parents with Individual Rights

Family Law Act 1975

1. Deletion and insertion to various sections and sub-sections.

Delete the word "paramount" and insert the word "primary" in its place in the following sections and sub-sections and respective index references, headings and notes.

- i. Index reference at S60CA
- ii. Index reference at S65AA
- iii. Index reference at S67L
- iv. Index reference at S67V
- v. Heading at S60CA
- vi. S60CA
- vii. S60CB(1)
- viii. Note at S60CB(1)
- ix. S60CG(1)
- x. 60D(1)(a)
- xi. 63B(e)
- xii. 63H(2)
- xiii. Heading at S65AA
- xiv. S65AA
- xv. Note 1 at 65DAA(1)
- xvi. Note 1 at 65DAA(2)
- xvii. Note at 65DAA(7)
- xviii. 65(L)(2)
- xix. 65LA(2)
- xx. Heading at S67L
- xxi. S67L
- xxii. Heading at 67V
- xxiii. S67V
- xxiv. S67ZC(2)
- xxv. S68L(1)
- xxvi. S68S(1)(e)
- xxvii. Note at 68S(1)(e)
- xxviii. S69ZX(4)
- xxix. S70NBA(2)

2. Deletion and insertion to various sections and sub-sections.

Delete the definite article "the" before the word "primary" and insert the indefinite article "a" in its place in the following sections and sub-sections and notes.

- i. S60CA
- ii. S60CB(1)
- iii. Note at S60CB(1)
- iv. S60CG(1)
- v. 60D(1)(a)
- vi. 63B(e)
- vii. 63H(2)
- viii. S65AA
- ix. Note 1 at 65DAA(1)

- x. Note 1 at 65DAA(2)
- xi. Note at 65DAA(7)
- xii. 65(L)(2)
- xiii. 65LA(2)
- xiv. S67L
- xv. S67V
- xvi. S67ZC(2)
- xvii. S68L(1)
- xviii. S68S(1)(e)
- xix. S69ZX(4)
- xx. S70NBA(2)

Schedule 3— Restoration of Individual Privacy

Child Support (Assessment) Act 1989

Child Support (Registration and Collection) Act 1988

1. Delete

Delete the whole of section 16C of the *Child Support (Registration and Collection) Act 1988* “Registrar may require Commissioner to provide information”

2. Delete

Delete the whole of section 150D of the *Child Support (Assessment) Act 1989* “Registrar may require Commissioner to provide information”

Schedule 4— Remove the Link Between Family Tax Benefit Payments and Child Support

Child Support (Assessment) Act 1989

A New Tax System (Family Assistance) Act 1999

1. Delete

Delete the whole of section 151A of the *Child Support (Assessment) Act 1989*, “Procedure where person making election is receiving more than the base rate of family tax benefit Part A”

2. Delete

Delete clause 10 of Schedule 1 of *A New Tax System (Family Assistance) Act 1999*. “Effect of certain maintenance rights.”

Schedule 5— Reduce Court Secrecy and Increase the Accountability of the Family Court

Family Law Act 1975

1. Delete

Delete the whole of section 121 of the *Family Law Act 1975*, "Restriction on publication of court proceedings"

2. Insert

Insert a new section 121

Section 121. Publication of court proceedings

(1) In the case of family proceedings in a court, that has jurisdiction under the *Family Law Act 1975*, it shall not be lawful for a person to whom this subsection applies—

- (a) to print or publish, or cause or procure to be printed or published, in a newspaper or periodical, or
- (b) to include, or cause or procure to be included, in a programme included in a programme service for reception in Australia, any particulars of the proceedings other than such particulars as are mentioned in subsection (1A) below.

(1A) The particulars referred to in subsection (1) above are—

- (a) the names, addresses and occupations of the parties and witnesses;
- (b) the grounds of the application, and a concise statement of the charges, defences and counter-charges in support of which evidence has been given;
- (c) submissions on any point of law arising in the course of the proceedings and the decision of the court on the submissions;
- (d) the decision of the court, and any observations made by the court in giving it.

(1B) Subsection (1) above applies—

- (a) in relation to paragraph (a) of that subsection, to the proprietor, editor or publisher of the newspaper or periodical, and
- (b) in relation to paragraph (b) of that subsection, to any body corporate which provides the service in which the programme is included and to any person having functions in relation to

the programme corresponding to those of an editor of a newspaper.

- (2) Any person acting in contravention of this section shall be liable on summary conviction to fine the person not more than 60 penalty units.
- (3) No prosecution for an offence under this section shall be begun without the consent of the Attorney General or the delegated representative.
- (4) Nothing in this section shall prohibit the printing or publishing of any matter in a newspaper or periodical of a technical character bona fide intended for circulation among members of the legal or medical professions.

3. Insert a new section 121A.

Section 121A. Privacy for children involved in certain proceedings.

- (1) No person shall publish to the public at large or any section of the public any material which is intended, or likely, to identify—
 - (a) any child as being involved in any proceedings before a court, in which any power under the *Family Law Act 1975*, may be exercised by the court with respect to that or any other child; or
 - (b) an address or school as being that of a child involved in any such proceedings.
- (2) In any proceedings for an offence under this section it shall be a defence for the accused to prove that he did not know, and had no reason to suspect, that the published material was intended, or likely, to identify the child.
- (3) Any person who contravenes this section shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding 60 penalty units.

3. Replace.

Delete the wording of section 102PC and insert the following wording in its place:

If there is any inconsistency in applying the considerations set out in this part and between sections 121 and 121A, the court is to give greater weight to the considerations as set out in sections 121 and 121A.

Schedule 6— Increase the Accountability of the Child Support Commonwealth Officers

Administrative Decisions (Judicial Review) Act 1977

1. Delete

Delete paragraph (s) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977*.

Schedule 7— Child Support Registrar to be governed by the rules of evidence

Child Support (Assessment) Act 1989
Administrative Appeals Tribunal Act 1975

1. Replace

Delete sub-section 98H(4) of the *Child Support (Assessment) Act 1989*.
“Procedure for dealing with application” and insert new sub-section 98H(4)

(4) In any hearing before the Registrar, and any inquiry or investigation carried out by the Registrar, the Registrar is bound by any rules of evidence.

2. Add

Add an additional sentence to the end of sub-section 33(1) of *Administrative Appeals Tribunal Act 1975* – “Procedure of Tribunal”

This is with the exception of child support matters, where the Tribunal is to be bound by the rules of evidence

Schedule 8—Restriction of Access to Tax File Numbers.

Taxation Administration Act 1953
Income Tax Administration Act 1936.

1 Paragraph 8WA(1AA)(b) of the *Taxation Administration Act 1953*

After paragraph “(g),” delete paragraph “(ga),”.

2. Paragraphs 8WB(1)(d) and (e) of the *Taxation Administration Act 1953*

After paragraph “(g),” delete paragraph “(ga),”.

3 Section 202 “Objects of this part” of the *Income Tax Administration Act 1936*.

After paragraph (g), delete the following paragraph (ga)

(ga) to facilitate the administration of the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1988*; and

4. Table 1 of section 355-65 of the *Taxation Administration Act 1953*.

Delete the following wording in Table 1

7. *the Child Support Registrar ... is for the purpose of administering the Child Support (Registration and Collection) Act 1988 or the Child Support (Assessment) Act 1989.*

Schedule 9—Capping of Child Support Payments.

Child Support (Assessment) Act 1989

1. Delete and Insert

Delete “The Costs of the Children Table”, in Item 1 of Schedule 1 and insert the following table.

1 The Costs of the Children Table

The Costs of the Children Table has effect.

Costs of the Children Table	
Parents’ combined child support income or parent’s child support income	
Fraction of MTAWE	0 to 0.5
Child support Children	
Costs of the children	
All children aged 0-12 years	
1 child	17%
2 children	24%
3 children	27%
All children aged 13+ years	
1 child	23%

Costs of the Children Table	
Parents' combined child support income or parent's child support income	
Fraction of MTAWE	0 to 0.5
2 children	29%
3 children	32%
At least one child aged 0-12 years and one child aged 13+ years	
2 children	26.5%
3 children	29.5%

2. Insert

Insert the following note at the bottom of the above "The Costs of the Children Table":

The maximum parents' combined child support income or parent's child support income is to be 0.5 of MTAWE.

Schedule 10—Assets Acquired Prior to the Marriage or the Relationship.

Family Law Act 1975

1. Insert new item as sub-section 79(3)

(3) When making orders in property settlement and in superannuation splitting proceedings, the courts are to include in the orders, but to exclude from consideration, the value of the assets and superannuation acquired prior to the marriage or relationship. The value of these assets and superannuation are to remain in the possession of the individual that had the ownership of the assets at that time. This is not to affect the distribution of any of the other assets and other superannuation and any other orders that are made in these proceedings.

2019-2020-2021

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

Supplement 1.3

(DRAFT) FAMILY LAW AND CHILD SUPPORT AMENDMENT BILL 2020

(DRAFT) EXPLANATORY MEMORANDUM

(Circulated by Senator)

FAMILY LAW AND CHILD SUPPORT AMENDMENT BILL 2020

OUTLINE

The objective of this bill is to provide fairness and equality in the Family Law and the Child System.

Once having been involved with family law and child support issues, most people will invariably ask themselves one (1) or two (2) of the following questions.

1. What was the cause of their unfair and inequitable result?
2. How can this system be fixed to prevent this problem from happening to other people, in the future?

The cause of the problem is currently an unfair agenda.

The solution is provided in the *Family Law and Child Support Amendment Bill 2020*.

One of the two main proposed amendments in the Bill is that it provides for joint residency as the starting point, after either divorce or separation. The other main amendment is that it allows for a more realistic cap on child support payments.

All of the proposed amendments in the Bill are aimed at providing more fairness and equality to the Family Law and Child Support System.

Financial impact statement

There is no financial impact from these amendments.

NOTES ON CLAUSES

Clause 1 sets out how the Act is to be cited, that is, the *Family Law and Child Support Amendment Act 2020*.

Clause 2 provides the commencement date of the Act.

Clause 3 provides for the Object of the Act

Clause 4 notes that court may consider material which is extrinsic to the Act to be interpreted, if to do so would assist the court to find the meaning of the Act. For example, the extrinsic material may include any report of a Committee of the Parliament where that material was laid before Parliament before the enactment of the provision.

Clause 5 provides that each Act that is specified in a Schedule is amended or repealed as set out in that Schedule.

Schedule 1—Rebuttable Presumption of Joint Residency

Summary

The first part of Schedule 1 provides for a rebuttable presumption of joint residency. The second part of Schedule 1 reverses some of the negative effects of the *Family Law Amendment (Family Violence and Other Measures) Act 2011*.

Background

In 2002, the then Senator Len Harris tabled the *Family Law Amendment Joint Residency Bill 2002*. The first section of Schedule 1 is substantially the same as the details that formed that bill. This is with some modifications necessary to suit the current family law legislation.

It is noted that the *Family Law Amendment Joint Residency Bill 2002* was not debated and the bill subsequently lapsed.

The House of Representatives *Standing Committee on Family and Community Affairs* also conducted a series of hearings on joint custody in 2003. The Committee released its report into child custody and child support on 29 December 2003. The report was titled “*Every Picture Tells a Story*”.

The key reason for holding the Inquiry was to determine whether or not to recommend a rebuttable presumption of joint child custody and also to review child support issues. In their report, the Standing Committee recommended that regard to the joint custody issue, that courts only consider equal time.

As a result of the Standing Committee’s recommendation, amendments were then made to the *Family Law Act 1975* in 2006. However, although equal time was then considered by the courts, it was generally still not implemented, in practice.

Later the *Family Law Amendment (Family Violence and Other Measures) Bill 2011* was passed by Parliament. The family violence bill was passed by the Senate on 22 November 2011 and by the House of Representatives on 24 November 2011.

The *Family Law Amendment (Family Violence and Other Measures) Act 2011* (Act no. 189 of 2011) then came into effect on 7 June 2012. This legislation provided a significant change to the operation of the *Family Law Act 1975*.

As a result of this amending legislation made in 2011, the 2006 “consideration” of equal time provisions was now to be given a “secondary” consideration – i.e. after alleged or otherwise issues of family violence which were now given the first priority.

Whilst the 2006 amendments did not go far enough in allowing for a rebuttable presumption of joint child custody; the family violence amendments

made in 2011 then significantly undermined attempts at children being able to have contact with both parents after either separation or divorce.

This is to the point that children now have less contact with both parents than before the 2006 amendments occurred.

The proposed amendments in the second part of Schedule 1 seek to address this inequality.

Explanation of the changes

The first part of Schedule 1 provides for a rebuttable presumption of joint residency/joint custody.

The second part of Schedule 1 reverses some of the more negative effects of the *Family Law Amendment (Family Violence and Other Measures) Act 2011*. This is so that the need of children to have contact with both parents will now have a greater precedence over issues of family violence.

Schedule 2—Providing Parents with Individual Rights

Summary

The word “*paramount*” is to be replaced with the word “*primary*” in the *Family Law Act 1975*. This change is with regard to the “*best interests*” principle or the paramouncy principle (as it is often called) in Part VII of the *Family Law Act 1975*.

Background

The difference in the words “*paramount*” and “*primary*” is important. At present the best interests of the children are “*paramount*” – that is, they are determinative.

The lack of parental rights and the rights of other relatives is a key problem in family law.

The paramouncy principle is currently defined in Section 60CA of the *Family Law Act 1975*. It states that:

In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

The word “*paramount*” is mentioned in 29 locations of the Act (including section 60CA above).

United Nation’s Convention on the Rights of the Child.

Australia was one of the 160 countries that signed the United Nation's *Convention on the Rights of the Child* in 1989. Item 1 of Article 3 of the UN Convention states that the best interests of the child shall be a primary consideration.

The specific wording of the UN Convention is as follows:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration

History

The paramountcy principle was contained in section 64(1) of the original *Family Law Act 1975*.

The wording of the section 64(1) was then as follows:

(a) the court shall regard the welfare of the child as the paramount consideration;

Since that time, the paramountcy principle has been relocated several times within later amendments of the *Family Law Act 1975*

The principle was relocated to section 60D by the *Family Law Amendment Act 1987*.

It was then returned to section 64(1) by the *Family Law Amendment Act 1991*. At the second relocation, the paramountcy principle was slightly re-worded in section 64(1) as follows:

(a) the court must regard the welfare of the child as the paramount consideration;

The main change made in the 1991 amendment was inconsequential in that the word “*shall*” was simply changed to the word “*must*”.

A more significant change was made to the paramountcy principle as a result of the *Family Law Reform Act 1995*. The words “*best interests*” from Article 3 of the above United Nations Convention replaced the word “*welfare*” in the paramountcy principle.

At the same time, the paramountcy principle was moved to section 95E of the *Family Law Act*.

It is noted that the word “*primary*” or the words “*a primary*” were not similarly adopted from United Nations Convention. No formal explanation was provided for this exclusion.

(reference: *Family Law Reform Bill 1994* Explanatory Memorandum cat 94 47236 paragraphs 337 to 340, cat 94 51390 paragraphs 327 to 332 and cat 94 53416 paragraphs 327 to 332).

The wording of the paramountcy principle in section 65E was then as follows:

..... *a court must regard the best interests of the child as the paramount consideration*".

Following further amending legislation in 2006, the principle was then relocated to its current location of section 60CA of the Act. The wording in section 60CA remained the same as what it had been in the previous section 65E.

Explanation of the changes

The paramountcy principle means that only children have rights under the current family law legislation. As a result, parents and other relatives, who should have rights, actually have no rights.

The replacement with the word "*primary*" would more closely mirror the wording of Item 1 of Article 3 of the United Nation's *Convention on the Rights of the Child*. This would be the same result with the replacement of the definite article "*the*" with the indefinite article "*a*" before the word "*primary*".

The inclusion of the indefinite article "*a*" before the word "*primary*" would mean that there could be more than one primary consideration, viz. the parents and other relatives.

As a result, the replacement of the words "*the paramount*" with "*a primary*" would mean that parents and other relatives would now at least have had some rights in family law proceedings involving children.

Schedule 3—Restoration of Individual Privacy

Summary

Section 16C of the *Child Support (Registration and Collection) Act 1988* and Section 150D of the *Child Support (Assessment) Act 1989* will be repealed.

Background

Privacy should be a vital concern for everyone in our community.

Section 16C of the *Child Support (Registration and Collection) Act 1988* and section 150D of the *Child Support (Assessment) Act 1989* allows government employees in the Child Support Programme to have access to Tax File Numbers (TFN) and other tax information, without the affected person's permission.

Nearly all government employees in the Child Support Programme are given the delegated authority by the Child Support Registrar to have this access.

As such, the *Tax File Number* (TFN) system has been allowed to become a child support identification system. This is a similar identification system to that was proposed in the failed *Australia Card Bill 1986*.

When the *Australia Card Bill 1986* ultimately failed to pass Parliament for the third time in 1988, the then Labor Government introduced the TFN system. On 1 September 1988, the Treasurer Paul Keating presented the *Taxation Laws Amendment Bill (Tax File Numbers) 1988* to Parliament.

During the second reading speech, Paul Keating said in Parliament that:

There will be no requirement on people to produce a card or any other evidence of their tax file number. No other government or non-government agency will have access to the Tax Office file number registration system, nor will it be able to use an individual's tax file number for any registration system of its own.

Under the current legislation and contrary to the above statement, the Child Support Programme is allowed to obtain a person's TFN and tax information directly from the Australian Taxation Office (ATO), without the affected person's permission. Also, contrary to the above statement, the Child Support Programme has its own registration system that is based on a person's TFN.

Explanation of the changes

The Child Support Programme is part of the Department of Human Services (DHS). With the repealing of Section 16C of the *Child Support (Registration and Collection) Act 1988* and Section 150D of the *Child Support (Assessment) Act 1989*, the exchange of information between the DHS and the ATO would still be permitted. This is by the secrecy provisions of the child support legislation.

These secrecy provisions are still provided in sub-sections 16(2A), 16(3)(ca) and 16(6) of the *Child Support (Registration and Collection) Act 1988* and sub-sections 150(2A), 150(3)(ca) and 150(6) of *Child Support (Assessment) Act 1989*.

In addition, the child support legislation specifically authorises the Registrar to request, but not compel, a person to provide a written statement of their TFN (section 16B of *Child Support (Registration and Collection) Act 1988* and section 150B of the *Child Support (Assessment) Act 1989*). This part of the child support legislation would remain unchanged.

Schedule 4—Remove the Unnecessary Link Between Family Tax Benefit Payments and Child Support

Summary

Section 151A of the *Child Support (Assessment) Act 1989* and Clause 10 of *Schedule 1 of A New Tax System (Family Assistance) Act 1999* will be repealed.

Background

In order to receive more than the minimum *Family Tax Benefits (FTB) Part A payment*, a custodial parent/payee is required by Centrelink to undertake what is called the *Reasonable Action Test*.

The recipient of the FTB is normally the custodial parent (which is generally the child support payee). The FTB payment is only made to the non-custodial parent if it is applied for and the care/contact is above 35 per cent.

As a result, the *Reasonable Action Test* would normally only apply to the custodial parent.

This means that the custodial parent needs to take reasonable maintenance action by doing one of the following:

- apply to register with Child Support,
- apply to Child Support for the acceptance of a child support agreement,
- or
- take reasonable action to change from being the payer under a child support agreement to being the child support payee for a child whom the individual has more than 65% care.

When applying for family tax benefits, the custodial parent would generally tick the box for the first option on the application form, i.e. apply to register with Child Support.

If one of the three boxes on the application is not ticked and if Centrelink decides that “*reasonable action*” has not been taken; then only the minimum *Family Tax Benefit Part A* payment is made to the custodial parent.

Therefore joining the Child Support Scheme is linked to the payment of *Family Benefit Part A* payments. As a result, most parents, particularly those on lower incomes, are effectively forced into the Child Support Scheme. This is when there may be other options available.

The end result is that the *Reasonable Action Test* promotes unnecessary conflict between the child support payee and the payer.

Clawback.

The Department of Families, Housing, Community Services and Indigenous Affairs (FACHSIA) in their "Annual Report 2000-01" provided the following definition of "*Clawback*": –

"Clawback" is a measure of the savings in Family Tax Benefit that can be attributed to the operation of the Child Support Scheme. In other words, it measures the payments that Centrelink would have been required to make to resident parents if they had not been in receipt of child support payments from the non-resident parent. The Clawback arising from reductions in Family Tax Benefit outlays was \$380.4 million in 2001.

It is noted that the above financial information has not been made publicly available since 2001.

There is little financial benefit for the Government or the custodial parent to continue with this artificially-created linkage. The Government's savings are "soaked up" in the running of the Child Support Programme. The value of these savings was \$380.4 million in 2001. At the same time, the custodial parent can lose up to 50 per cent of their Family Tax Benefit Part A payment through "*Clawback*".

History

The Government has changed the "*Reasonable Action Test*" over a number of years. The requirement to take reasonable action was previously set out in section 1069-K3 of the *Social Security Act 1991*. The changes that have taken place to section 1069-K3 are provided below:

- From 20 September 1990 to 31 December 1992, the requirement to take reasonable action applied to recipients of a number of payments.
- Between 1 January 1993 and 19 March 1998, the reasonable action test applied only to recipients of *Sole Parent Pension* and *Family Allowance*.
- From 20 March 1998, the requirement to take reasonable action applied only to those who are seeking payment of *Family Allowance* at more than the minimum rate, including component and supplementary payments the rate of which would be affected by maintenance income.

It is noted that the *Family Tax Benefit Part A* payments were formerly called *Family Allowance* payments and sometime prior to that it was called *Child Endowment* payments. All three (3) types of payments are similar.

In 1999, the provisions for the *Reasonable Action Test* were then transferred to a new act. This new act was called *A New Tax System (Family Assistance) Act 1999*.

At the same time, that section 1063-K3 was deleted from the *Social Security Act 1991*, a new section 151A was added to the *Child Support (Assessment) Act 1989*

Section 151A of the *Child Support (Assessment) Act 1989* states that the payment of the *Family Tax Benefit Part A* is determined by applying Clause 10 of Schedule 1 of *A New Tax System (Family Assistance) Act 1999*.

Explanation of the changes

These changes will remove the *Reasonable Action Test* from child support matters.

Schedule 5—Reduce Court Secrecy and Increase Accountability of the Family Court

Summary

The repealing of section 121 and substitution with a new section 121 and the insertion of a new section 121A will reduce court secrecy and increase the accountability of the courts and tribunals that have jurisdiction under the *Family Law Act 1975*.

Section 102PC will be modified so that there is no inconsistency between that section and sections 121 and 121A.

Background

The original section 121 of the *Family Law Act* “*Restriction on publication of evidence*” significantly restricted the publication of any proceedings or evidence in proceedings carried out under the *Family Law Act 1975*. Penalties were fairly severe in that they were either heavy fines or imprisonment.

There was a perception in the community that the Family Court operated as a “star chamber”.

As a result, the original section 121 was then repealed in 1983 and substituted with a new section 121.

The amended section 121 “*Restriction on publication of court proceedings*” did allow for some publication of family law proceedings. However this was with approval of the court. At the same time, penalties were still fairly severe in that there are still either heavy fines or imprisonment not exceeding one year or both. That is, the imposition both of these two (2) types of penalties could be an option for the same offence.

Section 121 was further amended in 1991 so that the only option was imprisonment not exceeding one year.

The 1991 amendment of section 121 results in wording that is similar to the current version of section 121 (relatively minor amendments were made to section 121 in 1999, 2000, 2003, 2015 and 2016).

Since 1983, approval is still required to be given by the court. As such, there is a current perception in the community that the Family Court still operates as a “star chamber”.

The passing of this proposed amendment would result in a greater reduction of this adverse community perception of the Family Court. At the same time, public scrutiny would no doubt increase the accountability of the Family Court.

Explanation of the changes

It is appreciated that some media restrictions are still required. However, there is no justification for an almost complete media “blackout”. Publication of court cases are able to occur without providing undue duress to the participants.

Section 69 of the *UK Magistrates Court Act 1980* states that family law proceedings are open to the press, but are closed to the general public.

Whilst allowing for publication by the press, section 71 of the *UK Magistrates Court Act 1980* sets out certain restrictions.

Section 71 states, in part, that:-

It shall not be lawful to print or publish, or cause to be printed or published, in relation to any judicial proceedings for divorce or family-related matter any particulars other than the following:

- (i) The names, addresses and occupations of the parties and witnesses.*
- (ii) The grounds of the application and a concise statement of the charges, defences and counter-charges in support of which evidence is given.*
- (iii) Submissions on any point of law arising in the course of the proceedings and the decision of the court thereon*
- (iv) The decision of the court and any observations made by the court in giving it.*

Section 71 is then subject to some further restrictions provided in section 97 of the *UK Children Act 1989*.

Section 97 states, in part, that:-

No person shall publish any material which is intended, or likely, to identify:

- any child as being involved in such proceedings, or*

- *an address or school as being that of a child involved in such proceedings.*

The wording from the above UK legislation has been substantially used to assist in the wording of the amended section 121 and the new section 121A.

Section 102PC

Section 102PC has also been amended to indicate that sections 121 and 121A have priority with regard to publication issues.

Schedule 6—Increase the Accountability of the Child Support Commonwealth Officers

Summary

Paragraph (s) is deleted from Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977*.

Background

The *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) allows an aggrieved person to apply to the Federal Court or the Federal Circuit Court for a judicial review of the administrative decisions made by Commonwealth officers.

This is a judicial review process and it is not an appeal on the merits as would be the case in a hearing conducted by the Administrative Appeals Tribunal (“AAT”).

Nearly all of the Child Support Registrar's administrative decisions, that are made under either or both the *Child Support (Registration and Collection) Act 1988* and the *Child Support (Assessment) Act 1989*, are capable of judicial review under the ADJR Act.

The exception is determinations made under Part 6A of the *Child Support (Assessment) Act 1989* (that is, decisions on a parent's application to change a child support assessment or on a Registrar initiated change of child support assessment)

This exception for determinations made under Part 6A of the *Child Support (Assessment) Act 1989* would be removed by the deletion of paragraph (s) from Schedule 1 of the ADJR Act.

History

In 1992, the change of child support assessment process was added to Part 6A of the *Child Support (Assessment) Act 1989*. The amending legislation was the *Child Support Legislation Amendment Act 1992 – Act no 13 of 1992*.

The exemption paragraph (s) was then later added to Schedule 1 of the ADJR Act. This was as a result of the *Child Support Legislation Amendment Act (no.2) – Act no 151 of 1992*.

Subsequent to 1992 and prior to 31 December 2006, a person aggrieved by a determination made under Part 6A of the *Child Support (Assessment) Act 1989*, could take their new administrative assessment to a court having jurisdiction. The matter would be heard “*de novo*” with fresh evidence being provided by the participants.

Paragraph (s) still prevented judicial review of the original administrative decision (except for a short period between the passing of the above two amending acts in 1992).

Therefore the original decision made by the Senior Case Officer was not part of the re-hearing by the court. The only item that was reviewed was the new child support administrative assessment that had been made as a result of the Senior Case Officer’s decision.

As a result of the *Child Support Legislation Amendment (Reform of the Child Support Scheme--New Formula and Other Measures) Act 2006*, from 1 January 2007 to 30 June 2015, an aggrieved person could then take the original administrative decision to the *Social Security Appeals Tribunal* (SSAT) on appeal. The matter was heard on a merits basis by the SSAT. If that person was still dissatisfied, then that decision made by the SSAT could then be taken to the AAT on a point of law.

As a result of further amending legislation, since 1 July 2015, the original decision can now be taken to the Administrative Appeals Tribunal (AAT), with that tribunal taking over the function of the SSAT. The AAT now hears the matter on a merits basis.

Merit versus Judicial Review

The AAT hears a matter on a merit basis. That is, it “stands in the shoes” of the primary decision-maker and can make a fresh decision based on the information available to it. The objective of the review by the AAT is to ensure that ‘the correct or preferable’ decision is made.

On the other hand, a judicial review is directed towards ensuring that the decision made by the primary decision-maker was properly made within legal limits. This is not part of the brief of the AAT.

The ADJR Act should be made available to the aggrieved person, so that he or she can be able to have a judicial review of the original administrative decision made under Part 6A of the *Child Support (Assessment) Act 1989*. One by-product of the judicial review process is an accountability factor. A decision-maker whose determination can be subject to judicial oversight is less likely to follow a personally preferred policy to decide cases in a particular way that merely suits that person.

Explanation of the changes

With the removal of paragraph (s), the Child Support Registrar's administrative decisions, made under Part 6A of the *Child Support (Assessment) Act 1989*, can now be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

Schedule 7—Child Support Registrar to be Governed by the Rules of Evidence

Summary

The wording “bound by any rules of evidence” would be inserted into section 98H of the *Child Support (Assessment) Act 1989* and into section 33 (with respect to child support matters) of the *Administrative Appeals Tribunal Act 1975*.

Background

Most Tribunals are not governed by the rules of evidence. However determinations, made by a child support senior case office under Part 6A of the *Child Support (Assessment) Act*, are often seen by the public as being judicial in nature. Similarly any review by the Administrative Appeals Tribunal is often seen in the same way.

As noted in Schedule 6 above, prior to the implementation of the *Child Support Legislation Amendment (Reform of the Child Support Scheme--New Formula and Other Measures) Act 2006*, and after an internal objection process, the review of the administrative assessment could be carried out by a court with jurisdiction under the child support legislation. The hearings were heard “de novo” and as such would be subject to the rules of evidence.

However since the commencement of above amending Act in 2006, the next stage of the review process after the internal objection generally now has to be carried out by a tribunal. This review was initially carried out by the Social Security Appeals Tribunal and now it is done by the Administrative Appeals Tribunal.

The word “generally” has been used above because a review can still be also heard by an appropriate court rather than by a tribunal This is only if there is another application “on foot” in the court and that the child support review is approved by the judiciary. However this alternative step of going to court seeking a judicial review (that has to follow the rules of evidence) is unusual.

Because of current legislation, neither the review process made before the Child Support Registrar (under Part 6A) nor appeal process conducted by the Administrative Appeals Tribunal is currently governed by the rules of evidence.

There is a general expectation in the community that these hearings should be governed by the rules of evidence i.e. by the *Cth Evidence Act 1995*.

These amendments would allow for this expectation to be materialised.

Explanation of the changes

Determinations conducted under section 98H of the *Child Support (Assessment) Act 1989* and reviews conducted under section 33 (with respect to child support matters) of the *Administrative Appeals Tribunal Act 1975* would now be governed by the rules of evidence i.e. by the *Cth Evidence Act 1995*.

Schedule 8—Restriction of Access to Tax File Numbers

Summary

These changes are designed to remove the ability of the government employees of the Child Support Programme to arbitrarily access another person's tax file information. This is unless the affected person(s) has been notified and has also approved of this access occurring.

Background

There are heavy penalties for wrongly accessing tax information. The two main legislative sections that restrict this access are:

1. Section 8WA of the *Taxation Administration Act 1953* "Unauthorised requirement etc. that tax file number be quoted"
2. Section 8WB of the *Taxation Administration Act 1953* "Unauthorised recording etc. of tax file number"

Both sections were added as a result of the *Taxation Laws Amendment (Tax File Numbers) Act 1988*.

The Taxation Commissioner is able to access tax file numbers because of section 202C of the *Income Tax Assessment Act 1936*. This section works on the basis that a person provides a tax file declaration. Otherwise that person is liable to maximum taxation (reference Items 1.60 ff of the Explanatory Memorandum of *A New Tax System (Tax Administration) Bill 1999*).

Prior to 2001, section 8WD of the *Taxation Administration Act 1953* stated that the Tax Commissioner was also the Child Support Registrar.

Because of this fact, the government employees of the Child Support Agency (as the Child Support Programme was previously named), deemed that they had direct access to a person's tax file number and tax details. This was because the Tax Commissioner was also the Child Support Registrar and that

person delegated access to certain government employees of the Child Support Agency.

It could be argued that the Tax Commissioner, acting as the Child Support Registrar, did not have the authority to allow the Child Support Agency to have legal access to tax file information.

In 2001, amendments in Schedule 5 to the *Child Support Legislation Amendment Act 2001* (Act No. 75) were made that repealed section 8WD of the *Taxation Administration Act 1953*. This consequently removed the Taxation Commissioner from holding the Office of Child Support Registrar.

In 2001, the Child Support Agency was also relocated to another Government department.

However the employees of the Child Support Agency (now known as the Child Support Programme) kept their direct access to a person's tax information after the legislative changes made in 2001.

This was because the Child Support Registrar was provided with a specific exception to this restriction to tax file information that exists under the above sections 8WA and 8WB.

This was done by adding a new item (ga) to sub-section 8WA(1AA)(b) and to sub-sections 8WB(1A)(a) and (b) of the *Taxation Administration Act 1953*. The wording of item (ga) is as follows:

(ga) to facilitate the administration of the Child Support (Assessment) Act 1989 and the Child Support (Registration and Collection) Act 1988;

Reference to item (ga) was also inserted into section 202 of the *Income Tax Administration Act 1936*. This was to enable the exemption to take effect.

This exemption applies to the Child Support Registrar. As part of his duties, the Child Support Registrar has then delegated this exception to nearly all of the employees of the Child Support Programme.

Explanation of the changes

By way of these changes, the government employees of the Child Support Programme would now be restricted from having direct access to a person's tax file information. This is without first obtaining the permission of the person whose information would be accessed by these employees of the Child Support Programme.

It is noted that once the appropriate permission has been obtained, the ATO would still be able to disclose protected information about taxpayers to the Child Support Programme. This is in accordance with section 366-65 of the *Taxation Administration Act 1953*.

Schedule 9—Capping of Child Support Payments

Summary

Approximately 43 per cent of child support payers are either unemployed or effectively unemployed on very low incomes. (Reference: Table 5.2 of the *Child Support Scheme Facts and Figures 2006-07*).

Unfair child support assessments have created this disincentive to work.

This is because the present child support formula does not allow for a fair cap on child support payments. A fairer cap can be placed on child support income. This is by simply deleting columns 2 to 6 in the 'Costs of children' table. As a result only column 1 would remain in the table.

Background

As part of the *Child Support Legislation Amendment (Reform of the Child Support Scheme – New Formula and Other Measures) Act 2006*, a new child support formula was adopted. Part of the formula included the “Costs of Children” table. There are six columns in the table. As stated above, a cap can be placed on the maximum child support payments by deleting columns 2 to 6 in the 'Costs of Children’ This is so that the table is left with column 1.

Explanation of the changes

The proposed changes would provide an incentive for both child support payers and child support payees to obtain better employment opportunities, where they are capable of doing so.

Example of a typical child support calculation.

In this typical example, a payer has an adjusted taxable income of \$60,000.00 per annum and the payee has an adjusted taxable income of \$20,000.00 per annum. There are 2 children from the relationship, both under 12 years of age. There are no other dependent children from another relationship. The payer has contact 50 days a year with the 2 children.

The amount of child support payable by the payer is \$8,604.00 per annum.

This is determined by the following 7 steps:-

Step 1 Child Support Income

Payer

Adjusted taxable income	=	\$60,000.00
Minus a self-support amount	=	\$24,154.00 -
Minus a relevant dependent child		
Amount	=	<u>\$0.00</u>

The Payer's child support income = \$35,846.00

Payee

Adjusted taxable income	=	\$20,000.00
Minus a self-support amount	=	\$24,154.00 -
Minus a relevant dependent child		
Amount	=	<u>\$0.00</u>
The Payee's child support income	=	\$0.00

Step 2. The Combined Child Support Income

The Combined Child Support Income = \$35,846.00

Step 3. Income Percentage

The payer's income percentage	=	100.00 %
The payee's income percentage	=	0.00 %

Step 4. Care of the Child Support Children

Payer

Payer's care of the children = 50 nights per year.

Payer's care level – classified as below regular care

Payer's care percentage = 14.00 %

Payee

Payee's care of the children = 315 nights

Payee's care level – classified as above primary regular care

Payee's care percentage = 86.00 %

Step 5. Cost Percentage of the Children

Payer

Payer's cost percentage = 0.00 %

Payee

Payee's cost percentage = 100.00 %

Step 6. Child support percentage

Parent's income percentage – parent's cost percentage = child support percentage

Payer

Payer's income percentage = 100.00 %
Payer's cost percentage = 0.00 %
Child support percentage = 100.00 %

Payee

Payee's income percentage = 0.00 %
Payer's cost percentage = 0.00 %
Child support percentage = -100.00 % (negative)

Step 7. Costs of the Children

From the Costs of the Children Table, the cost of the children is \$0.24 in the dollar of the combined child support income.

Therefore the costs of the children is $0.24 \times \$35,846.00 = \$8,604.00$.

In this example, the amount of child support payable by the payer is

Per year:	\$8,604.00
Per month:	\$717.00
Per fortnight:	\$330.00
Per week:	\$165.00

The Maximum Assessable Income of the Payer

The maximum assessable income in the above example, would be $\frac{1}{2} \times \text{Male Total Weekly Earnings (MTAWE)} + \text{the self support amount (i.e. } \frac{1}{3} \times \text{MTAWE)}$. For 2017, the maximum assessable income of the payer would be $\frac{1}{2} \times \$72,462 + 24,154 = \$60,385.00$ per annum.

This would result in a maximum child support liability of \$8,696.00 per annum.

It is noted that the amount of income of the payee has a minimal effect on the maximum child support liability. For example, if the payee's adjusted taxable income of, say, \$50,000.00 per annum could be substituted into the above example. This is instead of using an adjusted taxable income of \$20,000.00 per annum. The child support liability would be \$8,544.00 per annum (\$152.00 less than what it would have been if the lower adjusted taxable income of \$20,000.00 per annum had been applicable)

If the Above Child Support Cap* was not in Place.

1. Payer's Adjusted Taxable Income of \$100,000.00 Per Annum.

Without the above child support cap in place and the adjusted taxable income of the payer had been, say, \$100,000.00 per annum (rather than \$60,000.00 per annum in the above example); then the child support liability would have been \$17,706.00 per annum, in the above example.

2. Payer's Adjusted Taxable Income of \$181,155.00 Per Annum.

Similarly without the proposed child support cap in place, the highest child support liability would be where the combined child support income would be 2.5 times the Male Total Weekly Earnings (MTAWE). In that case, the child support liability would have been \$32,004.00 per annum. This would be based on the child support payer having an adjusted taxable income of \$181,155.00 per annum (again rather than the adjusted taxable income of \$60,000.00 per annum provided in the above example) and with the payee still having the same adjusted taxable income of \$20,000 per annum.

* Note: If the above child support cap is in place, the child support liability would \$8,696.00 per annum.

Other Circumstances.

Other circumstances could occur. This would provide different outcomes. For example, the number of children (maximum of 3), the age and the mix of these children (i.e. the number of children from 1 to 12 years and the number 13 years and over) would result in a different child support liability together with a different maximum annual child support liability.

Summary.

This legislative change in Schedule 9 would allow for a fairer cap on child support liabilities. At the same time, it would provide an incentive for both payers and payees to work more gainfully, where they are capable of doing so.

Schedule 10—Assets Acquired Prior to the Marriage or the Relationship

Section 79 “*Alteration of property interests*” of the *Family Law Act 1975* is reasonably ill-defined. This is particularly with regard to the question of determining “*future needs*”.

It is recognised by the courts that although a party cannot claim to have contributed to the acquisition of property or the provision of superannuation obtained by the other before their relationship commenced; he or she may have then contributed to the conservation or improvement of the property or the value of the superannuation fund.

In court proceedings, it is found that the value of the assets owned by the person or persons prior to the marriage or the relationship often becomes “vague” and the original asset value is then often diluted. This is because of the issue of “*future needs*”.

This proposed amendment reinforces the fact that the value of the current property owned and/or current superannuation acquired prior to the marriage or relationship will remain in the possession of the individual that had ownership of the assets at that time. This would include all current assets such as shares and/or liquid assets.

As noted in the proposed amendment, details of all assets are to be included in the court orders. This is for the purpose of obtaining any of the usual stamp duty and/or capital gain tax concessions that may be applicable.

Also, as stated in the proposed amendment, this is not to affect the distribution of any of the other assets and the making of any other orders that are affected by those proceedings. For example, the term “other orders” may include such orders as those relating to child maintenance and spousal maintenance issues.