Australian Government

Attorney-General's Department

Access to Justice Division

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Committee Secretary
House of Representatives Standing Committee
on Social Policy and Legal Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Parliamentary Inquiry into the Child Support Program – Attorney-General's Department Submission

On 27 March 2014, the Minister for Social Services, the Hon Kevin Andrews MP, asked the House of Representatives Standing Committee on Social Policy and Legal Affairs to inquire into and report on the Child Support Program. This letter provides the Attorney-General's Department's submission to this inquiry.

The terms of reference state that the Committee will inquire and report on the following:

- methods used by Child Support to collect payments in arrears and manage overpayments
- whether the child support system is flexible enough to accommodate the changing circumstances of families
- the alignment of the child support and family assistance frameworks
- linkages between Family Court decisions and Child Support's policies and processes, and
- how the scheme could provide better outcomes for high conflict families.

As part of the inquiry, the terms of reference state that the Committee has a particular interest in:

- assessing the methodology for calculating payments and the adequacy of current compliance and enforcement powers for the management of child support payments
- the effectiveness of mediation and counselling arrangements as part of family assistance frameworks, and
- ensuring that children in high conflict families are best provided for under the child support scheme.

As the Child Support Agency is responsible for administering Australia's Child Support Scheme and the Department of Social Services has policy responsibility for the Child Support Scheme, the Attorney-General's Department does not propose to comment on most of the terms of reference. Issues concerning parental responsibilities, including financial support for children, and family dispute resolution are dealt with separately under the *Family Law Act 1975* and are matters for which the Attorney-General's portfolio is responsible. In particular, there are linkages between Family Court decisions and Child Support's policies and processes that are relevant to the family law system. The Attorney-General's Department will also provide information about the effectiveness of mediation and counselling arrangements.

Background to the child support system

The registration and collection aspects of the child support scheme were introduced in 1988, with the formula for assessment being introduced in 1989, set out in the *Child Support (Assessment) Act 1989* (Assessment Act). The principal object of the Assessment Act is to ensure that children receive a proper level of financial support from their parents[1]. Under the child support scheme, parents have a primary duty to provide financial support for their children to the extent of their capacity to do so.

There have been several re-assessments and examinations of the formula since its introduction. In 2003, the formula for assessing child support under the scheme was reviewed as part of the House of Representatives Standing Committee on Family and Community Affairs' inquiry into child custody arrangements in the event of family separation. In its resultant report, *Every picture tells a story: Report on the inquiry into child custody arrangements in the event of family separation,* the Committee recommended a Ministerial Taskforce to re-evaluate the child support system. This recommendation was agreed to in July 2004 and the Taskforce was established shortly afterwards, providing its report to the Minister for Family and Community Services in June 2005 (*In the Best Interests of Children – Reforming the Child Support Scheme – Report of the Ministerial Taskforce on Child Support*).

Both the Committee and the Taskforce noted the differences that existed at the time in the way in which contact and shared care arrangements affected entitlement to Family Tax Benefit and child support. At the time, having care of children for more than 10% of the time was recognised for the purposes of adjustments in Family Tax Benefit, but having care of children for more than 30% of the time was required for child support purposes[2]. The Committee noted that the different ways in which contact arrangements affected eligibility in the two systems was confusing for parents[3] and the Taskforce proposed that the systems be coordinated so that there was an integrated approach[4].

The Child Support System

Prior to 1 July 2008, section 8A of the Assessment Act enabled assessments to be made as to the level of child support payable where court orders or registered parenting plans were being contravened without a 'reasonable excuse', which was a term defined in the regulations. Under this section, a parent with more care of a child was taken to have care of the child only to the extent provided under court orders or a parenting plan and the parent with reduced care was assessed in relation to their actual level of care. A decision under this provision did not entitle a contravener to

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[1] Subsection 4(1) *Child Support (Assessment) Act 1989*
[2] *In the Best Interests of Children – Reforming the Child Support Scheme – Report of the Ministerial Taskforce on Child Support* , May 2005, p169
[3] Every picture tells a story, p.169
[4] In the Best Interests of Children, p.12

more child support in relation to any more care than was provided under the court order or parenting plan.

From 1 July 2008, a new provision (section 52 of the Assessment Act) enabled the Registrar to make a determination as to the level of child support payable where care was not occurring in accordance with a court order, parenting plan or written agreement and there was no agreement as to the existing care arrangement. Such a decision was called an interim care determination and reflected the actual care arrangements. Under this section, a parent requesting an interim care determination must also have taken action (such as seeking mediation) to resolve the dispute, unless it would have been inappropriate for them to do so due to their special circumstances. This section also provided that, unless there were special circumstances, the Registrar had to review the decision before six months had passed and either revoke that determination or make a new one. Where a receiving parent denied a paying parent contact with a child without an acceptable reason, the amount of child support they received did not increase. These parents were encouraged to mediate a new care arrangement or seek enforcement of the existing orders through the courts.

On 1 July 2010, amendments to the Assessment Act by the *Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Act 2010* (Child Support Amendment Act) came into effect to align care determinations made under the family assistance law and the child support legislation. The amendment addressed the anomaly as to different ways in which the two systems dealt with care percentages and changes in care for a child by aligning the schemes. This means that assessments are made on actual care arrangements, rather than necessarily arrangements outlined in court orders or parenting agreements. The Explanatory Memorandum for the introducing Bill, at page 19, stated that the amendments 'allow parents or carers who are entitled to [family tax benefit] and are also child support payers or payees to have the same care determinations made for a child where the care of the child involves more than one carer. This will reduce inconsistencies and unnecessary duplication of processes and decision making between [the Family Assistance Act and the Assessment Act].' Under the current provisions, the Registrar must determine a responsible person's percentage care for a child according to the person's 'pattern of care'.

Operation of the Family Law Act 1975

The Family Law Act establishes a system for arriving at parenting arrangements and emphasises the best interests of the child as the paramount consideration in determining those arrangements. This system enables parents to enter into parenting plans by agreement or to obtain parenting orders from the family law courts (either by consent or through contested proceedings) as to the arrangements for the care of a child, including where the child lives and the time they spend with each parent. A parenting plan can be overridden by a later made court order or parenting plan. Parenting (court) orders may be overridden by later made parenting plans in some circumstances, as long as this is not prohibited by the parenting order.

The legislative scheme encourages parents to reach agreement about parenting issues by entering into a parenting plan outside of the court system or obtaining parenting orders by consent rather than seeking court orders through litigation[5]. Since 2006, a family must demonstrate that they have unsuccessfully attempted family dispute resolution (FDR), their situation is urgent or there are family violence or child abuse concerns before commencing proceedings in the court to resolve disputes about parenting arrangements. This requirement does not apply where a family is seeking parenting orders with the consent of all parties to the proceedings (ie both parents). Accordingly, in

[5] Section 60I, Family Law Act

many instances parents who obtain parenting orders through contested proceedings in court will be families for whom, due to family violence or safety concerns, it may not be appropriate to require them to attempt to agree. For these families, agreements as to arrangements which differ from court orders may not be possible or safe.

The Family Law Act imposes general obligations on the other parent not to hinder or prevent the parent from spending time with the children as provided for in a parenting order[6] and also contains provisions for dealing with the contravention of orders[7]. Where a party is found to have contravened a parenting order without reasonable excuse, the court may order a range of sanctions. These include attendance at a post-parenting separation course, compensation for time lost, 'make-up' time (such as another weekend) and payment of costs related to the contravention (such as unused airfares or other purchased tickets). For more serious failures to comply with parenting orders, the court may impose other sanctions such as a bond or community service and even imprisonment.

The Department is aware of the view expressed by some parents that at times the child support scheme may contribute to parents contravening parenting arrangements, by keeping the children for more time than the orders provide for, and thereby getting more child support (after 14 weeks) for doing so.

Under the current Child Support Scheme, payments and entitlements are to be calculated on the basis of the agreement, parenting plan or parenting order for up to 14 weeks from the date a breach occurred if the 'aggrieved' parent seeks to reinstate the agreement or enter into a new agreement. The 14 week period can be extended to 26 weeks in special circumstances. The Department understands this process is intended to ensure payments are not provided indefinitely based on care that is not actually occurring.

The Department notes that it may be difficult for parents to seek a resolution through the family law system within this timeframe. Information provided by the Department of Social Services for the period 1 July 2013 to 31 March 2014 indicates that the average time between contacting a Family Relationship Centre and the first FDR session is approximately 12 weeks. The Federal Circuit Court sets a target of finalising 90% of cases within 12 months[8] and the Family Court of Australia sets a target of finalising 75% of cases within 12 months[9].

The effectiveness of mediation and counselling arrangements as part of family assistance frameworks

The Department notes the particular interest that the Committee has in relation to the effectiveness of mediation and counselling arrangements as part of family assistance frameworks. The introduction under the 2006 reforms of a requirement (with exceptions) to attend FDR[10], either through a private FDR practitioner, a specialised FDR service, or through FDR offered at a Family Relationship Centre, before filing family court proceedings for a parenting order has had a major impact on separating families.

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[6] Section 65P, Family Law Act

[7] Division 13A, Part VII, Family Law Act

[8] Portfolio Budget Statements 2014–15, Budget Related Paper No. 12, Attorney-General's Portfolio, p.321

[9] Ibid, p. 320

[10] The requirement to attend family dispute resolution is set out in section 60I of the Family Law Act 1975. Exceptions to the requirement exist for applications for consent orders, where there are allegations of family violence and child abuse and urgent circumstances. Where attempts to reach agreement are unsuccessful or where the exceptions are deemed to apply, an FDR practitioner may issue a certificate allowing parents to lodge an application with the courts.

The 2009 AIFS evaluation of the 2006 Family Law Reforms included an analysis of the use of FDR post the 2006 changes, including examining data from the *Longitudinal Study of Separated Families (LSSF)* wave 1. The evaluation found that:

> FDR appeared to work well for many parents and their children. Among parents who had separated after the reforms, 31% of fathers and 26% of mothers reported that they had attempted family dispute resolution or mediation. About two-fifths of this group reached an agreement, and most of these agreements were still in place at the time the LSSF wave 1 was conducted, about a year after separation.[11]

While the effectiveness of FDR can be partially measured in the number of agreements obtained as a direct result of the session, there may be other more long-terms effects, such as reduction of conflict, increasing parents' capacity to take charge of their dispute and to encourage refocusing on the best interests of the children:

> Whether or not FDR resulted directly in an agreement, the majority of parents who had attended FDR and who had sorted out their disputes felt that they had done so mainly through discussions between themselves. This is consistent with a key aim of FDR, which is to empower disputants to take charge of their dispute. [12]

The two further waves of the LSSF again examined the use of FDR by the study parents. The report *Parenting Dynamics After Separation: A follow-up study of parents who separated after the 2006 reforms* (LSSF wave 2) found that close to one in four fathers and one in five mothers surveyed indicated that they had attempted FDR between the survey waves. Among the parents who had attempted FDR in the 12 months prior to their second survey interview, most (71% of fathers and 67% of mothers) said that this was held at a Family Relationship Centre (FRC). [13]

Despite the exemption from mandatory FDR before court proceedings can be commenced for families where family violence is an issue, FDR is also used by parents who experience family violence, or where other dysfunctional behaviours exist.[14] The LSSF wave 2 report noted that both fathers and mothers who experienced emotional abuse or physical hurt were more likely than other parents to report use of FDR between the survey waves while negotiating or renegotiating their parenting arrangements.[15]

The report *Post-separation parenting, property and relationship dynamics after five years* (LSSF wave 3) found that the proportion of parents who had attempted FDR since the last wave had reduced to 15%. The report noted that in each LSSF wave, about four in every ten parents who attempted FDR reached agreement as a direct part of the FDR process itself. Of those parents who had reached agreement through FDR in wave 1, 54% reported that parenting arrangements had remained sorted out.[16]

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[11] Kaspiew, R, Gray, M, Weston, R, Moloney, L, Hand, K and Qu, L *Evaluation of the 2006 family law reforms* (2009): Australian Institute of Family Studies, Melbourne, p110, based on data from the Longitudinal Study of Separated Families (LSSF) wave 1

[12] Ibid, p110

[13] Qu, L and Weston, R (2014) *Parenting dynamics after separation: A follow up study of parents who separated after the 2006 family law reforms.* Canberra: Attorney-General's Department, pp 46-47

[14] Kaspiew (2009), p 110

[15] Ibid, p 47

[16] Qu, L, Weston, R, Moloney, L, Kaspiew and Dunstan, J (2014) *Post separation parenting, property and relationship dynamics after five years.* Canberra: Attorney-General's Department, p 67

Similarly, data from the 2012 *Survey of Recently Separated Parents* showed that over one-third of parents (37%) had attempted FDR at any point since separation[17] and where it was attempted, 36% of those reached agreement, and 10% were still in the process of mediation[18].

The Allen Consulting Group 2013 Research on Family Support Program family law services found, based on Family Support Program data, that in 2011/12 where both parties attended family dispute resolution conferences in Family Relationship Centres, full agreement was reached for 4,938 cases, or 52% cent of the total. Partial agreement was reached for a further 2,644 cases (28%)[19].

Further data from the 2012 *Survey of Recently Separated Parents*[20] may also be of interest to the Committee. The study shows that the experience of family violence, either before/during separation or after separation, directly impacted upon patterns of child support, in terms of both method of transfer and compliance in amount and timeliness of payment. Higher proportions of parents who experienced family violence reported payments through the Child Support Program in contrast to direct collection arrangements, compared to parents that did not experience family violence.[21] Similarly, the study reported that a higher proportion of parents who had experienced family violence before/during or since separation reported that the amount of child support they received was less than the assessed amount, compared with parents who had not experienced family violence.[22]

The Department hopes this submission is of assistance to the Committee and would be pleased to provide further information if required.

Yours sincerely

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[17] Australian Institute of Family Studies: *Survey of Recently Separated Parents 2012*, p 51, table 4.11
[18] Ibid, pp 51-52, table 4.12
[19] The Allen Consulting Group 2013 Research on Family Support Program family law services, p 77, table 5.5
[21] Australian Institute of Family Studies: *Survey of Recently Separated Parents 2012*, p 51, table 4.11
[21] Ibid, p106, tables 8.5 and 8.6.
[22] Ibid, pp108-109, tables 8.9, 8.10, 8.12