THE UNIVERSITY OF SYDNEY

Faculty of Law

ABN 15 211 513 464

Professor Patrick Parkinson

Web: http://www.usyd.edu.au/

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

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Submission on Inquiry into child support

As the Committee may be aware, I chaired the Ministerial Taskforce on Child Support in 2004-2005 which led to the changes to the Scheme enacted and implemented between 2006 and 2008.

I am writing to offer a few comments on issues concerning the terms of reference of this Committee. Beyond this, I would be pleased to offer the Committee any assistance I can in response to issues it may wish to raise with me at some future time. However, I do not profess to be an expert on all issues within the Terms of Reference by any means.

In this submission, I want to draw your attention to three matters:

- The serious problems concerning the use of departure prohibition orders against people who live overseas, but have child support obligations to children in Australia
- The need for some reform to the grounds for departure contained in section 117 of the Child Support (Assessment) Act 1989, and
- The use of FRCs to sort out child support problems in high conflict families.

All of these matters relate directly to your Terms of Reference.

General comments on the 2006-2008 reforms and the problem of fairness

The work of the Ministerial Taskforce was primarily concerned with the formulae used to calculate child support. We addressed some issues concerning enforcement of child support payments, and management of the system, but these were at the periphery of our Terms of

Reference. Major changes occurred in the Child Support Agency contemporaneously with implementation of our reforms, under Matt Miller's leadership, and I believe these produced some improvements to the operation of the Agency.

The reforms in this period were the result of a huge effort in research and a great deal of analysis of the impact of proposed changes on families across the country. It does seem as if, as a consequence of these reforms, the child support system is perceived to be fairer and the formula can be better justified than previously. I wrote an article written for the legal community which explains in fairly short compass what we were trying to achieve with the 2006 reforms and why. It is available here:
http://www.austlii.edu.au/au/journals/UWALawRw/2007/1.html

I must emphasise however that there are no perfect solutions to the problems of designing a child support system for a nation. Wherever one turns, solving one problem can create unfairness in another direction.

Let me give two illustrations. First, housing costs. The child support formula takes account of costs involved in raising children at different levels of household income and tries to distribute those costs as fairly as possible between the parents when they live apart. The formula is based upon the idea that parents should contribute at least as much when they have separated as when they were together. One way of assessing this is based upon estimated family expenditures within the intact family, including a proportion of shared costs within the household such as running a car, paying electricity bills and replacing household goods such as fridges and washing machines over time. The largest such shared cost is housing; but housing costs vary enormously across the country. The same formula must be applied whether the primary caregiver is living in Southport or Sydney; Brewarrina or Brisbane; Moree or Melbourne. It follows that any child support formula can only work with averages and not be finely tuned to the circumstances of each family. The court-based system could provide a more individualised assessment and keep it updated over time, but at huge expense to the parties and to the government. Many child support payees and payers simply cannot afford lawyers and the courts are already overburdened. Most western countries now have some kind of formula, for that reason.

The second example concerns the impact of new children on existing child support obligations. Consider the situation of a father who is earning $70,000 per year and a mother who is earning $45,000 per year. They have one child. The mother repartners and falls pregnant. She intends to stay at home at least for one year after the child is born, and perhaps longer. That is a sensible choice, and no doubt a good choice for the baby. The consequence, however, is that the father's child support will go up because the mother's income will reduce below the point where it is taken into account in the formula. One way of looking at that is to say that the father is being asked to pay extra to support another man's new baby. There are no doubt men who would feel justifiably upset by this; but the same effect occurs if the mother is receiving child support, and the father repartners and has a new baby. The formula takes account of the obligations the father has to support both children. With more

commitments, his obligation to the first mother is reduced. Effectively she pays (through lost child support income) for him to have a new baby with another mother.

Both of these consequences may at first seem outrageous, and one might say that the system has been badly designed. Yet the alternatives are as bad. One solution to the problem of the mother having a new baby is to take account of the income of the mother, the father and the mother's new partner. Yet that raises other problems. Consider the situation if we were to base the child support system on household income and not on individual parent income. Suppose a father earns $85,000 per year and the mother earns $25,000. The father repartners, and his new partner earns $50,000. The father's household now has $135,000 per annum compared with the mother's income of $25,000. His child support will go up, only because he has repartnered. His new partner is effectively contributing to the support of his child from his first relationship.

I could multiply examples. My point is that the child support system can only ever provide rough justice, and there is a risk in seeking to address one problem that one creates adverse consequences elsewhere. For these reasons, changes proposed to the operation of the formulae and related aspects of the child support legislation need to be very carefully modelled and evaluated before they are enacted.

2. **Methods used by Child Support to collect payments in arrears**

I wrote to Minister Kevin Andrews on March 4th 2014 on the issue of Departure Prohibition Orders (DPOs) and reproduce the substance of this below, but with pseudonyms to protect confidentiality given that this submission may be made public.

The role of Departure Prohibition Orders

A DPO is one of the remedies available to the Child Support Registrar to ensure the payment of outstanding child support debts. The DPO prevents a person from leaving the country unless and until he or she has satisfied the debt or at least as much of their debt as is negotiated with the Child Support officers as a condition for the lifting of the DPO. It is an administrative order. It does not require application to a Court and there is therefore no judicial oversight before making an Order that can interfere with the liberty of an individual. This in itself is troubling.

The relevant legislative provision is s.72D of the *Child Support (Registration and Collection) Act* 1988, the opening words of which provide:

> The Registrar may make an order (a departure prohibition order) prohibiting a person from departing from Australia for a foreign country if:
>
> (a) the person has a child support liability; and
>
> (b) the person has not made arrangements satisfactory to the Registrar for the child support liability to be wholly discharged.

The legislation does not specify that the person against whom the DPO is issued needs to be domiciled or habitually resident in Australia nor that he or she be an Australian taxpayer.

The problem with liable parents who reside overseas

The problem is that DPOs have been issued in situations where a person is merely visiting Australia and lives permanently overseas. I have known two examples of this kind in the course of my part-time work as a practising lawyer with Watts McCray in Sydney, which raise very significant issues of public policy and human rights.

In the first case, Mr & Mrs J had reached an agreement on property division and child support in England at a time when they both lived there. There were orders of the English Court in relation to child support. Mrs J then married again and wanted to move with her husband to Australia. Mr J reluctantly agreed on the basis that he would pay little or no child support and the money instead would go into airfares for him to see his children in Australia. Unfortunately this agreement was never put into writing, so formally, the English orders remained in force between them. When Mrs who by this time was called Mrs M came to Australia, she applied for child support under the Australian system. Mr J countered that there were already Orders made by the English Court and wanted to pay no more than was required under those Orders (which was very much less than the Australian assessment).

There were many aspects of this case which were disturbing, but one of them was that when Mr J came to Australia to visit his children he was met with a DPO which prevented him returning to his full time employment in the United Kingdom until he had settled some of the alleged debt in Australia. Mr J position on this was that he had no valid and enforceable obligation under Australian law. Rather, he had an obligation to abide by the judgment of the English Court. It was essentially a conflict of laws problem. At no stage had the CSA ever taken steps to enforce the Australian child support debt in England, no doubt because the English court would uphold the English order in preference to the Australian assessment.

It seemed extraordinary that a DPO would have been issued to prevent an English citizen returning to England to his full time employment in the name of collecting child support. He was essentially blackmailed into paying some part of the claimed debt which he disputed. In the course of representing Mr J I tried to get an undertaking from the Child Support Agency that it would not issue a DPO if he were to come to Australia again to visit his children. The Agency declined to give such an undertaking, which meant Mr J could not risk travelling to Australia to see his children.

The second case was one where I was consulted recently by telephone. As the story was told to me, a father and his new partner had flown over from New Zealand, apparently at the request of the New South Wales child protection authorities. There were issues concerning the safety and wellbeing of his child. According to his second wife's report, when he was at

Sydney airport ready to return to New Zealand he was prevented from boarding the flight because of a DPO. This meant he could not return to his job in New Zealand. When he rang the Child Support officer, he was told that he would need to find a job here in Sydney and new accommodation in order to meet his debt before he would be allowed to leave the country. I was able to give them some advice, and I hope that the matter was resolved for the time being on the basis that I suggested.

Again the issue in this case was an argument about what the father justifiably owed. The Department of Human Services (Child Support) had used an estimate of his income which was much more than he had actually earned. Where the Department has no record of the income of a father, it will utilise an estimated or default income under the legislation. It is not uncommon with overseas' residents that the CSA does not have recent information about taxable income and so uses an estimated income. If the resulting child support obligation is not paid, then the debt increases exponentially with penalties and interest. In my experience it is quite often the case that when the true facts are known it turns out that the father was unemployed for a period or had an income much lower than the estimated income. Given that information, the Department will normally then adjust the previous assessments and the real debt will be much lower, but until that communication occurs, the Department may insist on trying to enforce the artificially inflated debt. This was the situation, as told to me, in the New Zealand case.

These two cases illustrate a significant problem with the Registrar's power to issue a DPO in relation to a non-resident of Australia. In both cases, in my view, the decision to issue a DPO was improper, but not illegal. I understand the officers are only doing their job, often in difficult circumstances, but it is clear that there needs to be some control by the Government and Parliament over the misuse of DPOs, particularly in situations where the alleged child support debt is seriously contested or arises from the conflict of laws between residents of different countries.

For these reasons I recommend amendments to the legislation on DPOs in order to ensure that such an Order can only be issued against a person who is domiciled in, or habitually resident in, or a taxpayer of Australia. In the meantime, it may be that the Minister for Human Services could issue instructions to the Child Support Registrar to give effect to that policy.

3. Whether the child support system is flexible enough to accommodate the changing circumstances of families

In my view, the Australian child support system is one of the best in the world at accommodating the changing circumstances of families. This is because the system operates on the basis of reviews of the amount of child support every 12 to 15 months as new data is obtained concerning taxable income of each parent. There are also processes by which changes of family circumstances such as new children, or changes to the care arrangements, can be notified to the Department of Human Services (Child Support) and a new assessment

issued accordingly. However, the system for dealing with departures from the formula in order to give individual attention to the circumstances of particular families needs reform.

The way in which the legislation balances the need for certainty and simplicity with the need to take account of individual financial circumstances, is by allowing either parent to seek a change of assessment initially by application to the Department of Human Services (Child Support). There are 10 grounds for departure from the formula, and these are based upon the Child Support (Assessment) Act s.117. Reason 8 is particularly broad and vague. It refers to ‘ income, property and financial resources or earning capacity of one or both parents of the child for whom child support is payable’.

There are numerous problems with the practical application of Reason 8. One problem is how to deal with the situation where the liable parent has significant assets, for example a farm, but limited income. Should he have to sell the farm, or part of it, to enable him to make a higher child support payment? May he continue as a farmer even if the economic rewards of so doing may not be as great as if he were to find work elsewhere? Another question is whether very high income fathers (or mothers) should pay more child support than required under the formula despite the cap which was built into it? In my view, the answer ought to be no, but there are Australian judges who have thought otherwise. One judge in Kansas put the issue very well when he wrote that "no child, no matter how wealthy the parents, needs to be provided [with] more than three ponies." [In re Patterson, 920 P.2d 450, 455 (Kan. App. 1996)]. Another problem is how to deal with the added value of being able to organise financial affairs through a company or trust structure.

Because of the administrative process, very few of these cases go to court, and it would be fair to say that only a small number of Family Court or Federal Circuit Court judges claim much expertise in child support matters. The consequence is that some recent judicial decisions have not reflected a good understanding of the principles of the child support system, and the courts have not always been able to speak consistently. In my experience the decisions of child support review officers and the SSAT are also quite variable.

Another area where some revision might be needed to the grounds for departure is in relation to private school fees. Decisions in this area can be somewhat arbitrary depending on the circumstances. The law at present is essentially that the formula will be varied to take account of school fees if the parents had planned on a private school education while they were together and it remains reasonable for the liable parent to contribute to these costs now. I would prefer to see a test along the lines of whether it is reasonable in all the circumstances that a child should have an education at a particular private school taking into account a) the income of the parties b) the previous educational plans of the parties c) the circumstances in which the child has been educated to date and d) the current needs of the child. There are circumstances where due to the particular needs of a child, he or she may best be educated at a private school which can cater to those needs. If the father has sufficient income, it may well be reasonable to ask him to contribute notwithstanding that this had not been planned by the parents at a time before those needs emerged.

I have previously called for a formal review of the grounds for departure from the formula, which would best be conducted by a specialist committee or Taskforce. I understand that during the first Rudd government, there was some work done on this within the Department of Family and Community Services (or whatever it was then called). However nothing seems to have made it to the legislative agenda arising from that work.

4. High conflict families

One of the recommendations of the Child Support Taskforce was that the Family Relationship Centres should have funds to help mediate in child support matters. My recollection is that there was some allocation for this purpose in the budget for implementation of the child support reforms. However, to the best of my knowledge this has not translated into the active use of Family Relationship Centres to deal with arguments over child support where a change of assessment is being sought.

I would like to see a targeted trial of referral of some Change of Assessment cases to the Family Relationship Centres for the purposes of mediation. In my experience there are many families who are in continual conflict over child support issues and make repeated Change of Assessment applications year after year. The underlying conflictual dynamics are not addressed through the Change of Assessment process, and it may well be that mediators, able to address the issues in a more holistic way, will be able to achieve better outcomes for similar cost than can be achieved through the Change of Assessment process and subsequent SSAT appeals.

That mediation service might take a different form from the normal track of parenting disputes. For example I would see no point in parents been required to attend a three-hour seminar on raising children after separation in order to deal with the child support issue.

I trust this is of assistance.

Yours sincerely

Patrick Parkinson AM
Professor of Law