



THE LAW SOCIETY
OF NEW SOUTH WALES

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6 June 2014

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

The Family Issues Committee of the Law Society of NSW ("Committee") assists the Law Society in the area of family law, particularly in respect of advocacy about the needs and family law rights and duties of people in NSW. The Committee includes a cross-section of experts in the areas of family law and children's law drawn from the Law Society's membership.

Thank you for the opportunity to provide comments. The Committee has also provided these comments to the Law Council of Australia in support of its submission.

The Committee sets out below its general observations, followed by comments addressing the Terms of Reference of this Inquiry.

1. General observations: public policy principles and international obligations

When considering the scope of the Inquiry, the starting point of the Committee's analysis is a reference to the public policy reasons for the establishment of the Child Support Scheme ("Scheme") in 1989. The public policy rationales are expressed in the objects sections of the *Child Support (Assessment) Act 1989* (Cth) ("CSA Act"). The principal object set out in s 4(1) is to ensure "that children receive a proper level of financial support from their parents".

The *Child Support (Registration and Collection) Act 1988* (Cth) has as two of its principal objects:

- a) that children receive from their parents the financial support that the parents are liable to provide; and
- b) that periodic amounts payable by parents towards the maintenance of their children are paid on a regular and timely basis.

Over time and since its inception, it is noted that the philosophy underpinning the Scheme has changed, particularly in the 2006-2009 period. However, the Committee

is of the view that these principles are still sound and form cornerstones of the Scheme.

Further, the Committee notes that both Acts refer to Australia's international obligations:

that Australia is in a position to give effect to its obligations under international agreements or arrangements relating to maintenance obligations arising from family relationship, parentage or marriage.

However, the Committee notes that there is no explicit mention of the welfare and best interests of the child in the objects of either of these Acts. The Committee refers to Article 3 of the *United Nations Convention on the Rights of the Child* which states that "In all actions concerning children...the best interests of the child shall be a primary consideration". The Committee suggests that this Article be included in the principles driving any reform and in any new legislation.

2. Matters addressed in the Inquiry Terms of Reference

2.1. Methods used by Child Support to collect payments in arrears and manage overpayments

The Committee notes that the total child support debt has been rising steadily and is now well over \$1billion. The Committee understands that in 2008-2009 over 50% of the total outstanding child support debt (\$625.4 million) was made up of individual customer debts greater than \$10,000.¹ The proportion of child support debts over \$10,000 and the steady increase in the total pool of child support debt suggests that there may be systemic problems, including with the operation of the government administration, particularly at the collection and/or enforcement stages. Some of the other issues contributing to the debt are outlined in these comments.

The Committee also understands that the total child support debt includes a substantial amount associated with international cases. The extent to which this proportion of debt will create collection challenges is unknown as globalisation of businesses continues and the numbers of expatriates increase. In this context, the Committee also notes that the New Zealand Government has recently reformed its child support legislation (*Child Support Amendment Act 2013*). Some reference to those changes in the course of the review may be helpful.

Enforcement of debt as a legal remedy is a specialised area of legal work, even within a public administration charged with functions and powers to enforce unpaid child support obligations. It is essential that paralegals and other paraprofessional staff that may work for the Department of Human Services ("Department") in the area of enforcement have a proper level of mentoring and supervision by those with technical legal expertise who also work for the Department.

Challenges in relation to collection and enforcement in international cases can be particularly great, both at technical and practical levels. Again, leadership and supervision by those with technical legal expertise in such cases is necessary to:

- a) achieve competence and confidence among internal child support teams;
- b) create and conserve positive work satisfaction in such teams over time;

¹ Australian Government Child Support Agency "Facts and Figures 08-09" p58.

- c) maximize the collection of child support debts, and
- d) ensure child support clients are receiving accurate information about the status of their case when there are non-standard collection and/or enforcement issues.

From a practical perspective the Committee has some concerns about the methodology of case selection in court enforcement matters. As litigation is expensive and difficult for payees to undertake on their own or at their own expense, the Committee's view is that it is important that the Child Support Agency ("Agency") plays a strong role in litigating the difficult and intractable cases (such as where there has been alienation of income, moving assets, complex business structures and trusts) rather than just the "easy wins", as is the case with payers with a property (even if that property is their home).

Managing overpayments can also be problematic and the approach does not seem to be consistent at the Agency. Many overpayments occur as a result of something beyond the control of the payee, and are entirely unexpected. In the Committee's experience, this can cause considerable hardship.

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

The Committee notes the legislative formula that has applied since 1 July 2008 and the key components of the formula pursuant to the CSA Act.

Sections 35 to 40 of the CSA Act take into account different family circumstances and articulate six variations of the formula. The Committee notes the "eligible carer" entitled to register under the Scheme must provide at least 128 nights of care from one or both of the parents. This potentially represents a challenge to the "income shares" approach.

It is contended that the changing nature of the "family" may require a review of the formula components.

The Committee notes the objection/review process enables a carer/parent to request a review of a child support decision and the criteria attaching. In 2012-2013 the Department received a total of 15,307 objection applications and completed 14,032 objection reviews in relation to the Scheme.²

In broad terms, the administration of the child support objection review process has operated a generally accessible and methodical review process.³ The Committee notes that 57.1 percent of child support care objections were partially or fully successful in 2012-2013⁴ and the proportion of Part 6A objections, which relate to varying child support assessments due to special circumstances have increased from 35.9 per cent in 2009-10 to 45.4 per cent in 2012-13.⁵ These statistics indicate a measure of accommodation.

² The Auditor-General Audit Report No 28 2013-14 Performance Audit "Review of Child Support Objections" p 13.

³ Ibid p 14.

⁴ Ibid p107.

⁵ Ibid p107.

The Committee does note, however, that the Department's public reporting on the objection review process has focused mainly on quantitative measures rather than the effectiveness of the decision making.⁶ It is submitted such an enquiry will offer another insight to the Scheme and changing circumstances of families.

All measures to improve accessibility to the objection review process are supported by the Committee. This will include properly meeting the needs of customers including those who may be physically, culturally and linguistically diverse.

2.3. The alignment of the child support and family assistance frameworks

Since October 2004 the Agency has been part of the Department. The Department's portfolio brings together key service delivery agencies including Centrelink and Medicare.

The Scheme and family assistance laws intersect and need to be considered in conjunction with each other. A person must provide at least 35% of the child's care to be eligible for both child support payments and Family Tax Benefit. The percentage care also affects the amount of child support and family assistance entitlements.

The Committee notes that since the amendments to child support and family assistance legislation came into effect on 1 July 2010, the Family Assistance Office and Department determine percentages of care in the same way. This means, percentage of care determinations are based on the actual care that is occurring and each agency will apply a percentage of care as determined by the other agency.

The Department of Families, Housing, Community Services and Indigenous Affairs ("FaHCSIA") and the Attorney-General's Department has seen the establishment of a range of services and projects including legal aid, family relationship centres and the establishment of community legal centres.

In the Report, *Delivering Quality Outcomes; Report of the Review of Decision Making and Quality Assurance Processes of the Child Support Program*, David Richmond observes that:

[t]he program has shifted from one focused primarily on collection and transfer of child support for the benefit of children, to a more holistic approach aimed at not only ensuring the financial support for children in separated families but to supporting separated parents to receive emotional, financial, and legal assistance to enable them to meet the emotional and financial needs of their children.⁷

The role of Government departments in the administration of the Scheme is significant. The alignment of legal frameworks, policy frameworks and collaboration between the agencies that administer child support and family assistance remains fundamental.

While the level of collaboration between the agencies that administer child support and family assistance is appropriately targeted at the most vulnerable and economically disadvantaged in our Australian communities, the Committee submits that there is scope for increased collaboration which draws upon the Family Dispute

⁶ Ibid p 19.

⁷ *Delivering Quality Outcomes - Report of the Review of Decision Making and Quality Assurance Processes of the Child Support Program* (2010) p 4.1.6.

Resolution ("FDR") capacity of the Family Relationship Centres ("FRCs"). Expansion of the current use and programs of the FRCs could occur through coordinated legally assisted family dispute resolution (in a wider range of cases; not simply cases involving a legally aided client), agency referred or party initiated FDR (in matters involving disputed parenting issues and child support issues) and interdisciplinary collaborative practice (in matters involving property settlement and/or child support and parenting issues).

From a practical perspective the Committee notes that the interaction between child support and family assistance can be complicated and this can make it difficult for clients to make arrangements about child support (especially private arrangements and child support agreements). Centrelink payments are reduced by the amount of the assessment, and sometimes this happens retrospectively if the assessment is increased. Payees can end up with a Centrelink debt if they have a "private collect" case and do not collect the full amount, and sometimes this is not well understood by payers and payees. For example, clients entering agreements, or considering discharging arrears are similarly at risk of adverse outcomes from Centrelink and it is hard to get clear advice on these outcomes before the event.

2.4. Linkages between Family Court decisions and Child Support's policies and processes

The Social Security Appeals Tribunal ("SSAT") has jurisdiction to hear and does hear most child support appeals. The number of appeals heard by a Court with family law jurisdiction by comparison is relatively small. An appeal from a decision of the SSAT is heard by a Full Court or by a single judge. These matters are concerned with errors of law and similarly few in number.⁸

The Committee notes anecdotal reports about parenting disputes being motivated by financial considerations. The extent to which parenting applications to the Court might be formulated or predicated on the child support thresholds for "regular" contact and "shared" contact is unknown. Parenting cases which come before the family law courts are rarely simple. The level of care which is provided by each parent and the resultant effect upon the calculation of child support under ordinary administrative assessment is only one variable among many factors that are present in parenting disputes.

Part VII of the *Family Law Act 1975* (Cth) contains the objects and principles underlying the Part and the matters the Court must consider when making a parenting order. These considerations are independent of child support policies. Financial disputes between parties will require the Court to have consideration of child support matters. Sections 79(4)(g) and 75(2)(na) the *Family Law Act 1975* require the Court when making orders in relation to spousal maintenance and the alteration of property interests between parties to have regard to "any child support under the CSA Act that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage".

⁸ The Auditor-General Audit report No 28 2013-14 Performance Audit " Review of Child Support Objections records on p 34 there were a total of 38 Appeals lodged in 2012-2013.

2.5. How the scheme could provide better outcomes for high conflict families

The Committee notes the Agency's Family Violence Project which since 2008⁹ has been working on a number of family violence responses to promote interagency information-sharing between the Agency, Centrelink and the Family Assistance Office and education including:

- a) improved education for staff;
- b) system support to identify customers where there are orders in relation to family violence; and
- c) improved referrals to services that can provide support.

The consistent definition of family violence across family assistance jurisdictions will provide customers/victims with clarity and certainty that family violence will be recognised and treated similarly in different legal and administrative contexts.

The importance around issues management around high conflict families and family violence is addressed at length in the Australian Law Reform Commission ("ALRC") Report *Family Violence and Commonwealth Laws - Improving legal frameworks*. The Committee acknowledges the Agency's aim to avoid actions which could contribute to family violence and the recommendations made by ALRC. Promotion of legal and administrative frameworks to increase safety and improved access to exemptions are identified as critical measures to improve the scheme.¹⁰

The Committee also notes that there is quite often conflict over levels of care and child support. The Committee is of the view that the changes to the "percentage of care" provisions that came in 2010 (bringing child support in line with family assistance legislation) were a positive move. These changes removed the previous (and highly complicated) "lawful/actual" distinction, ensuring that children still receive the benefit of child support if there is a parenting dispute between the parents. The Committee is of the view that parenting disputes are better resolved and dealt with under the Family Law system rather than through the suspension or reduction of child support.

2.6. Assessing the methodology for calculating payments and the adequacy of current compliance and enforcement powers for the management of child support payments

The Committee notes that it would be a complex task to reassess the formula and cautions against making change merely for the sake of change so as to prevent other unforeseen inequities arising.

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

While there is likely scope for greater use of mediation in child support and family assistance, there are a number of factors that affect its utility. There appears to be a

⁹ *Family Violence and Commonwealth Laws - Improving legal frameworks* (ALRC Report 117, November 2011) p 298.

¹⁰ *Ibid* 299. Exemptions permit a customer to receive the full amount of Part A FTB without applying for Child support in circumstances of identified family violence.

reluctance to discuss child support at mediation (from practitioners) and this reluctance may not be misplaced for the following reasons:

- a) There may a lack of expertise or confidence on child support matters on the part of Family Dispute Resolution Providers.
- b) Agreements about child support may have unintended impacts on Centrelink benefits or may not be capable of implementation through child support. This could cause frustration if clients are given the impression they can resolve child support issues with finality through mediation. The Committee has recommended a legally assisted model for any mediation about child support matters because of the complexities of the scheme, complexities of child support agreements, and the complex interaction with family assistance payments.
- c) The Committee is also of the view that there can be good reason to separate child support issues from parenting discussions. From a policy perspective, the Committee would be concerned about parties "horse-trading" over care percentages and money that may detract from family law principles, such as the best interests of the child.

Yours sincerely,

Ros Everett
President