Mr Elton Humphery
Committee Secretary
Community Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email

22 September 2006

Dear Mr Humphery

Inquiry into Child Support Legislation Amendment (Reform of the Child Support Scheme - New Formula and Other Measures) Bill 2006

While there is much to be said in favour of the proposed reforms to the Child Support Scheme (CCS) contained in the above bill, the new regime presents some potential problems and may not resolve all of the old difficulties. In this submission, we identify and discuss what we see, at this early stage, as some troubling aspects of the proposed changes.

1 The Ideal of Shared Post-separation Parenting vs Empirical Reality

The changes will certainly result in greater consistency between the CSS and *Family Law Act 1975* (Cth) (*FLA*) provisions regarding parenting orders: the clear legislative preference is that parents will share the care and the financial cost of their children. The continuing empirical reality, though, is that the patterns of paid and unpaid work in intact relationships remain highly gendered, and genuine shared care post-separation is rare (the *Every Picture* report indicated that in 93% of Child Support Agency (CSA) cases the children were in the sole care of the payee (usually the mother)).[1] (Whilst it appears this figure may have changed somewhat over the very

[1] House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the event of Family Separation* (Canberra: Parliament of Australia, 2003), 126, Table 6.1. For an examination of the reasons why shared care is rare, see: Bruce Smyth (ed), *Parent-Child Contact and Post-Separation Parenting Arrangements* (Melbourne: Australian Institute of Family Studies, 2004).

recent past, this does not necessarily mean that the financial consequences of child care do not continue to fall predominantly on women.) The unintended consequences of this disjuncture between legislative ideal and empirical reality in the CSS context are yet to be seen. The possibility certainly exists for increased expectations, particularly the expectation of payers that both care and child support payments will be more equally shared. Yet both of these outcomes would seem unlikely to occur in most cases, due fathers' much greater participation in paid work, and mothers' lesser workforce participation due to child care responsibilities.[2]

A further issue arising from this disjuncture between the ideal of shared parenting and empirical reality is its potential impact on child support payments. This is arguably less of a problem if shared time arrangements are complied with, but in cases where the court ordered or private arrangements for shared parenting time differ from the reality of the children's subsequent living arrangements, the result may be that the primary carer (usually the mother) and children may be financially disadvantaged.

The reasonable likelihood that shared care arrangements will become sole care arrangements is suggested by Canadian longitudinal research commissioned by the Canadian Department of Justice, which has consistently identified a gap between initial arrangements for shared living arrangements and the actual arrangements that evolve over time.[3] The project's most recent report, drawing on three waves of data collected between 1994 and 1999, found that there was a 'tenuous relationship between shared physical custody included in a court order and actual living arrangements'. Although court orders for shared custody for children aged 0-15 years were increasing (but still rare):

> an earlier analysis of Cycle 1 data … showed that this still did not mean that children had shared living arrangements, either at separation or later on. In fact, among children aged 0-11 years, under one-quarter of children with shared custody as part of the court order actually lived part of the time with each parent. More than two-thirds lived exclusively with their mother at separation, and 11% exclusively with their father.[4]

In other words, existing court orders for children's living arrangements frequently did not reflect the reality of their physical placement, which was usually (but not always) that they lived with their mother.

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[2] Human Rights and Equal Opportunity Commission (HREOC), *Striking the Balance: Women, Men, Work and Family*, Discussion Paper (Canberra: HREOC, 2005), available at: http://www.hreoc.gov.au/sex_discrimination/strikingbalance/index.html.

[3] The research draws on data collected by the National Longitudinal Survey of Children and Youth, collecting information about the same children every two years, with the most recent research being based on data from the first three survey cycles, conducted during the winters of 1994-95, 1996-97 and 1998-99. By Cycle 3, the original longitudinal cohort numbered approximately 15,000 children aged 4-15 years; additional samples of young children were added at Cycles 2 and 3, bringing the total number of children participating in the survey at Cycle 3 to approximately 32,000: Heather Juby, Céline Le Bourdais and Nicole Marcil-Gratton , *When Parents Separate: Further Findings from the National Longitudinal Survey of Children and Youth* (Ontario, Canada: Ministry of Justice, 2005), Executive Summary, http://www.justice.gc.ca/en/ps/pad/reports/2004-FCY-6/index.html, at 23 July 2006.

[4] Citing Nicole Marcil-Gratton and Céline Le Bourdais, *Findings from the National Longitudinal Survey of Children and Youth*, (Ontario, Canada: Ministry of Justice, 1999), Table 7.

The study found that shared living arrangements were considerably more likely when parents came to an agreement without legal intervention (11.6 per cent) than with it (5.6 per cent), and were likely to be more durable than court-ordered shared arrangements, but there was still a drift over time toward sole physical custody. Of the 318 children aged 0-15 in the sample who had been in shared care arrangements as a result of parental agreement at separation, 49 per cent were living in sole custody arrangements by 1998-9. Of the 49 per cent, 32 per cent were now living with their mother and 17 per cent were now living with their father (although with a much higher frequency of contact than was evident between non-resident parents and children living in sole custody from the moment of separation).[5] The study found that a move from shared to sole physical custody was more likely in certain circumstances, including the longer the time since separation, and where shared arrangements had been put into place for children who were of secondary school age when their parents separated. The study, however, was not able to uncover in a great detail the reasons why shared custody arrangements were likely to transform into sole custody over time.

This research suggests the tenuous nature of shared care arrangements (particularly court-ordered shared care arrangements), with the outcome over time in many cases being for children to live with one parent – usually, but not always, their mother. There would seem to be a risk in these cases of a mismatch between child support outcomes and children's living arrangements. This is especially so in the case of child support agreements, which are more difficult than child support assessments to revisit once made (see later). Although there are avenues for varying child support assessments, this depends on one or both parties having the emotional and financial resources to activate the relevant processes. These problems may be avoided if courts and practitioners take the approach of building into parenting orders and agreements contingency arrangements to apply if the children's living arrangements change. This approach, however, would seem unlikely due to the difficulty of predicting the future, and so the extent to which problems arise from the disjuncture between orders and agreements and children's subsequent living arrangements is likely to depend in the end on CSA's (and Centrelink's) willingness to look beyond those orders and agreements to other evidence of children's current living arrangements. Currently, the CSA collects information to determine the level of shared care, which may include statements, diaries, receipts or other evidence, and strongly recommends that payers and payees keep records of their care arrangements, such as a diary or calendar,[6] and the proposed changes would allow the Registrar to determine the percentage of care where parents disagree on whether the same level of care is occurring as was provided in their agreements, parenting plan or court order. Once again, however, this process is activated by a parent who disagrees on the level of shared care. Ultimately, it is likely to be pressure from Centrelink (in its application of the Maintenance Action Test) that will prompt payees to seek a variation of their original child support arrangements.

Further issues arise even where the proposed share care eventuates and is sustained. In particular, one aspect of the division of child care responsibilities that remains a concern is that shared care arrangements between parents appear very much

[5] Juby, Le Bourdais and Marcil-Gratton , *When Parents Separate*, Chapter 3.
[6] Australian Government, Child Support Agency, CSA website, 'Information for Payees: Care Arrangements', http://www.csa.gov.au/payee/care.php#level, at 23 July 2006.

to facilitate the work patters of payers. Thus, whilst there might be more care by payers, shared care is likely to be structured so as to allow payers to work, whilst still depriving payees of the opportunity for significant paid employment. A very obvious example of that is 50/50 shared care arrangements where one parent works 'fly-in, fly-out' on the mines, which are becoming increasingly common in Western Australia in particular. The fact of not having to care for children one week out of two does not mean most payees can easily find paid employment. Although the proposed changes take both parents' incomes into account, the impact of these changes is that child support in such cases will be driven down. At the same time, welfare to work arrangements will assume the parent should be able to work 15 hours per week. Even in lesser shared care arrangements, shared care is very often achieved by the payer having more chunks of time outside of their work hours, rather than working less. Indeed, there seems to be little evidence that fathers in Australia are working less, as evidenced by the most recent HREOC report on the matter, which shows increased male labour force participation.[7] We would suggest that the twin goals of promotion of shared parenting AND the fair sharing of parenting costs conflict when shared parenting does not involve some sharing by payers of the loss of income that parenting normally brings payees. Empirical research has already pointed to payees as being more financially disadvantaged by separation[8] and this gap is most likely to be widened by these changes.

2 Private agreements

The proposed changes place considerable emphasis on the desirability of private agreement, and in doing so are over-optimistic regarding the role of independent legal advice in overcoming inequality of bargaining power likely to exist between parents, and provide inadequate procedural protections, to the likely detriment of women and children.

Most obviously, inequality of bargaining power may exist in this context between parents making private agreements due to gender inequality: 'Women's inferior social and economic position constrains their ability to make agreements that benefit them'.[9] As a result, women often have less ability than men to pay legal expenses, less information about the parties' overall financial circumstances, less sense of entitlement to financial assets, and are more likely to be the victims of domestic violence, and to feel that they should behave cooperatively in the negotiation process.[10] Unsuprisingly, there is a lack of evidence suggesting that independent legal advice resolves these issues. Rather, it seems that the most likely impact of independent legal advice is to sure up the interests of more powerful parties to agreements by making the agreement more enforceable.[11]

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[7] Above n 2.
[8] Eg Bruce Smyth and Ruth Weston, *Financial Living Standards After Divorce: A Recent Snapshot* (Melbourne: Australian Institute of Family Studies, Research Paper 23, 2000).
[9] Marcia Neave, 'Private Ordering in Family Law – Will Women Benefit?', in Margaret Thornton (ed) *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995) 144, 168.
[10] Neave, 'Private Ordering in Family Law', 168-72.
[11] On the limited effectiveness of independent legal advice in other contexts, see further: Belinda Fehlberg and Bruce Smyth, 'Binding Pre-Nuptial Agreements in Australia: the First Year' (2002) 16 *International Journal of Law, Policy and the Family* 127, and Belinda Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* (Oxford: Clarendon, 1997).

Indeed, the apparent assumption in relation to 'binding child support agreements' that independent legal advice really protects vulnerable parties seems particularly problematic, given that children are not parties to, yet are directly and seriously affected by, entry into such agreements. Any expectation that independent legal advice will be offered and received in a way that includes specific consideration of children's interests (rather than equating these with the interests of the payee) would seem over-optimistic, given that the provision of such 'advice' typically extends to a general and concise explanation of the legal effect of the agreement (in order to reduce both the parties' legal costs and potential solicitor liability).[12]

A second problem with the proposed changes is that a successful court application is required to unilaterally set aside a 'binding child support agreement'. It would seem likely that for most women, the emotional and financial cost of going to court would operate against such applications being made, particularly given the uncertainty that is likely to surround whether the technical grounds for avoiding agreements will be satisfied. The process for requesting the Registrar to terminate a 'limited child support agreement' on the basis of a more than 15% variation between 'notional assessments' is also likely to be daunting for applicants. As noted earlier, it would seem likely that applications are most likely to be made where they are prompted by Centrelink.

Better (although still not failsafe) options for improving procedural protections for vulnerable parties might have included the provision of a 30 day cooling off-period, and strict disclosure requirements with heavy sanctions for non-disclosure in all cases (in addition to non-disclosure being a ground for setting aside binding child support agreements, as proposed).

3 Fairer Treatment of First and Second Families?

The risk that second families will be prioritised over first families would seem to arise from the proposed approach in the new formula of subtracting liability to support new dependants from the parent's income before calculating the cost of child support for the first family. The prioritising of second families may be further reinforced by proposals to take greater account of re-establishment costs and liability to support step-children.

Ideally, all children the payer is liable to support should be treated equally in the formula. Such an approach would also seem consistent with what we know of children's preferences. The Australian Institute of Family Studies' Australian Divorce Transitions Project (ADTP) included some consideration of children's attitudes to fairness regarding child support and thus begins to address this problem. In particular, an analysis of ADTP interviews conducted in 1997 with 60 young people aged 12-19 in Australia whose parents had divorced underlined:

> the importance to young people of equal treatment by parents of all their children. This was particularly important in terms of young people's perceptions of fairness as between a parent's first and second families. … Five out of the 11 young people whose father was living with a new partner and other children, considered that the father did not divide his time fairly

[12] See further Belinda Fehlberg, *Sexually Transmitted Debt*.

> between them and the other children. They also had an acute sense of injustice if a parent spent more money on the children in a new family than on themselves.[13]

This finding suggests that children in separated families view child support obligations (and parental obligations more broadly) as less conditional than do adults: rather, the message seems to be that children should be treated equally, at least in relation to new siblings where there is a biological link (it is not clear from the analysis of ADTP data whether children's preference for equal treatment also extended to new stepchildren).

4 A Selective Approach to Addressing Serious Problems that Exist in the CSS?

Notably, the Ministerial Taskforce's recommendations regarding better enforcement of child support obligations in relation to self-employed non-resident parents who are defaulting on their obligations were not as detailed as its recommendations regarding the more equal treatment of payers and payees for the purposes of the formula.[14] This was to be expected given that compliance and enforcement were 'issues which were not directly raised by the terms of reference'.[15] Indeed, as Lisa Young has written, the focus of the Terms of Reference on issues of concern to payers is part of a broader pattern in family law reform over the past ten years, which has been driven most obviously by father's rights advocacy groups.[16] The focus in the past has been more obviously on reducing payer liability rather than on compliance and enforcement of child support obligations.

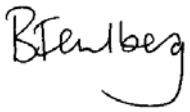
A recent example of the selective and arguably inconsistent approach in these reforms is the failure to take account of the link between self-employment and earning capacity issues. While we applaud the introduction of proposed s 65A, we also consider that given the problems in ensuring that self-employed payers not on benefits, but with minimal child support liabilities, meet their obligations, it is unfortunate that the earning capacity provisions have been recast in a way so as to stop decision makers from making more realistic assessments of child support in such cases. Nearly one-quarter of all payers of child support are paying the minimum rate, and not on unemployment benefits. Under the previous earning capacity provisions, it was possible for decision makers to find that reasonable employment choices were not being made when self-employment resulted in the apparent ability of the payer to meet all their personal commitments, yet not apparently derive sufficient income to pay any child support. Indeed, many payers of child support would, when faced with that proposition as the result of an application to change the assessment, agree to some more appropriate payment, with no link needing to be drawn to actual income. The reality is that we know there is undeclared cash income in some industries. It is very difficult to establish the amount of any undeclared income. However, by assessing parents in appropriate cases based on what they might earn if they chose third-party employment over self-employment, fair results were able to be achieved. The new earning capacity provisions will have the effect of severely limiting the

[13] Patrick Parkinson, Judy Cashmore, and Judi Single, 'Adolescents' Views on the Fairness of Parenting and Financial Arrangements after Separation' (2005) 43 *Family Court Review*, 429, 441.
[14] Ministerial Taskforce on Child Support, *In the Best Interests of Children*, at 15.
[15] Ministerial Taskforce on Child Support, *In the Best Interests of Children*, at 170. See further: Lisa Young, 'Reforming Child Support Laws: Breaking the Cycle' (2005) 30 *Alternative Law Journal* 29.
[16] See further: Young, 'Reforming Child Support Laws'.

ability of decision makers to set self-employed people an ‘earning capacity’, which was one of the two most common ways of increasing payments in these cases. Addressing this issue through enforcement is highly problematic, as enforcement only becomes relevant after you have a reasonable child support payment in place, and what is reasonable cannot accurately be calculated by some guess at a flat rate payment by all people in a category. The effect of the reforms in this regard thus appears to be appease both disaffected groups, whilst in reality making it far less likely that many self-employed parents will be called on to significantly support their children.

Given the sizeable problems that continue to exist regarding compliance and enforcement, it is unfortunate that the Terms of Reference did not extend to this issue and particularly impressive that the Taskforce addressed them to the significant extent that it did. The end result is that the Government has allocated $165.1 million over five years to improving compliance so that some improvement in this area is likely to occur, although the available detail regarding the changes to occur is not as great as it is regarding changes to the operation of the formula. It is to be hoped that the current round of reforms will not result in payees (who as a group are generally poorer than payers) paying their ‘fair’ share of child support while the position regarding payers who avoid their obligations remains relatively unchanged.

Yours sincerely



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