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The Secretary,
Senate Community Affairs Committee
Parliament House
Canberra Act 2600

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Dear Secretary,

Re: Child Support Legislation Amendment (Reform of the Child Support Scheme – New Formula and Other Measures) Bill 2006

Thankyou very much for the invitation to make a submission to the Committee in relation to this important Bill. As you will be aware, I chaired the Ministerial Taskforce on Child Support and the Bill aims to give effect to the recommendations in our Report.

Since we submitted our Report in May 2005, a great deal of work has been done within the Government to analyse our recommendations and to road-test them. I have been consulted throughout this process on the policy issues involved. While I have not had much time yet to examine the Bill in detail, I am generally comfortable with the way in which the policy recommendations have been translated into legislation. Parliamentary Counsel has gone to great efforts to try to draft the legislation in a manner that is as simple and clear as possible, given the complex subject-matter.

Overview

The legislation to give effect to these changes must of necessity be quite complex. It has to present a precise methodology for use not only by the Child Support Agency but, where departures are necessary, by the courts. The legislation must take account of all the possible permutations of family arrangement, including situations where the children are being cared for in whole or in part by someone other than the parents, situations where different care arrangements apply to each child in the child support case, and a multitude of other complexities.

Although the formula will be legislatively more complex than the current formula, I do not believe there will be any greater complexity for members of the general public. At the present

time, people can use a calculator available on the Child Support Agency website to obtain an estimate of a child support liability if they know the father's income, the mother's income, and the number of children. With the addition of the requirement to enter the ages of the children, it will be as simple for most parents to obtain an estimate of the new child support liability as at present. The Agency has an advanced calculator for more complex cases at present, and I would expect them to be able to devise a similar advanced calculator for the cases where the simple formula is inapplicable under the new legislation.

Specific Issues

There are a few specific issues which the Committee may wish to consider, and which, in my view, can readily be addressed by amendment to the Bill.

Schedule 1: Section 65B(2)

Section 65A is an important provision aimed at ensuring that those who claim to have a taxable income below the maximum amount of Parenting Payment (single), but who were not on an income support payment, either pay $20 per week per child or justify to the Child Support Registrar that they really do have such a low income.

As section 65B is currently drafted, the courts might be presented with an argument that the payer is entitled to rely upon the Commissioner of Taxation's assessment notice as evidence that the stated income is the real taxable income of the payer, because the Commissioner has accepted his or her self-assessment at face value. This would defeat the purpose of the section. The assumption behind this reform is that the claimed low income is not a real statement of the person's capacity to pay child support, whether or not the Commissioner of Taxation has chosen to investigate it further.

I suggest an amendment along the following lines:

(2) "The parent making the application must provide evidence to the Registrar concerning the parent's income (within the meaning of s.66A(4)) to demonstrate that his or her current income is:
(i) actually less than the pension PP (single) maximum basic amount **and**
(ii) that it would be unjust and inequitable to expect him or her to pay the amount assessed under this section."

(3) An assessment issued by the Commissioner of Taxation for the last relevant year of income shall not be sufficient evidence of the income of the parent for the purposes of this section.

(4) [Current wording of (2) - Registrar may make a determination.]

Schedule 3: SSAT

Section 103W

This section sensibly makes provision for the SSAT to make orders by consent where the parties agree. While I have no problem at all with this, it is important that consent decisions

under this provision do not become a means of getting arrangements in place that would be disadvantageous to the taxpayer and which could not otherwise be made under the legislation.

The situation I have in mind is where one parent makes an application to the SSAT in relation to a change of assessment. If such an application were being heard by a court as a departure application under ss. 116 of the Child Support (Assessment) Act 1989, the Court would need to be satisfied that:

(i) it has the power to make the proposed order
(ii) it is just and equitable to make the order.
(iii) it is otherwise proper to make the order.

The second issue is concerned with whether it is fair as between the parents and the children (s.117(4)). The third concerns the community, because child support payments have an impact on how much Family Tax Benefit is paid to a parent (s.117(5)). The taxpayer may therefore be disadvantaged by a reduction in child support payments that would be improper, having regard to the circumstances of the case.

On my interpretation of the Bill, the SSAT, presented with an agreement for a departure order under s.103W, would only have to be satisfied about the first of the three matters listed above and that it is "appropriate" to make the decision. Subsection (1)(c) requires the SSAT to be satisfied that it has the power to make the decision. However it does not require it to consider whether the proposed decision is just and equitable having regard to the interests of the children, or proper as regards taxpayers.

In relation to departure orders, the problem could be remedied if the Bill had a new subsection (4) along the following lines:

The SSAT shall not make a decision by consent under subsections (2) or (3) in relation to a departure from administrative assessment of child support in accordance with Part 6A of the Act, unless it is satisfied that it is just and equitable, and otherwise proper to do so having regard to the matters set out in s.117(4) and (5)."

Schedule 5: Child Support Agreements

Section 136

I think the drafting of section 136(2) (c) and (d) is problematic. It is consistent with the policy intent of the Taskforce in relation to limited child support agreements but not binding child support agreements.

The Taskforce was concerned that child support agreements currently do not require legal advice and the safeguards against unfair agreements are limited (see Chapter 13 of the Report).

The Taskforce was also aware however, that the option to have a child support agreement is a useful one and such agreements are appropriate in some circumstances. Requiring people to get legal advice for any child support agreement to be valid would not be an acceptable reform given the cost of privately funded legal advice.

The Taskforce therefore proposed two kinds of agreements. One could be made with very little formality (as at present) but would only last three years and could be readily set aside if it is unfair. The other kind of agreement would require independent legal advice for both parents and could only be set aside in certain very limited circumstances. Binding financial agreements may already be made under the Family Law Act 1975 in relation to property, spousal maintenance and the splitting of superannuation. Accordingly, the Taskforce recommended that:

> Parents should be able to make binding financial agreements under the Child Support (Assessment) Act 1989, registrable with the Child Support Agency, under the same conditions and with the same effect as binding financial agreements under the Family Law Act 1975.

Binding child support agreements may be very useful as part of an overall property and financial settlement on the breakdown of a relationship. For example, an agreement may make provision for the primary carer to be given the home outright in return for lower child support payments. It might address concerns that a parent has about the payment of private school fees, or other such matters. It may also help the parents to reach a final settlement where one parent is going to be living overseas and enforcement of an ongoing child support obligation could be difficult. However, binding child support agreements depend for their usefulness on their capacity to provide finality and certainty. If they could be too readily set aside, they will not be used, and the purpose of this reform will be defeated.

The Bill properly gives effect to the intentions of the Taskforce in relation to child support agreements made where one or both parents do not have independent legal advice. These are known in the Bill as limited child support agreements (s.80E), and they can be terminated in the circumstances given in s.80G. However, binding child support agreements (s.80C) are much too easily set aside.

The problem is that the same grounds for setting aside agreements apply to limited child support agreements and binding ones (s.136). In particular, they can be set aside:

> 136(2)(c): if the court is satisfied that because of a significant change in the circumstances of one of the parties to the agreement, or a child in respect of whom the agreement is made, it would be unjust not to set aside the agreement; or
>
> (d): the agreement provides for an annual rate of child support that is not proper or adequate, taking into account all the circumstances of the case.

These provisions, if they apply to binding child support agreements, will mean that they are not really binding at all. The problem is that because there are always significant changes of circumstances in the ordinary course of life, and people's income will vary up and down for all kinds of reasons, subsection (c) will create a great deal of uncertainty. Subsection (d) is also problematic. The adequacy of a level of child support has to be assessed in its context, and taking account of the property settlement reached and other such matters that may have been subject to the private negotiations of the parents. Even if courts take a sensible view of these provisions, and do not set aside a binding child support agreement lightly, the fear that there might be a subsequent application to set aside the agreement may make people most unwilling to enter them.

Recommendation

My recommendation is that the present subsections (c) and (d) should only apply to limited child support agreements and that a different provision should apply to binding child support agreements. The sections would then read as follows:

(c) In the case of a limited child support agreement:

(i) that because of a significant change of circumstances of one of the parties to the agreement, or a child in respect of whom the agreement is made, it would be unjust not to set aside the agreement; or

(ii) the agreement provides for an annual rate of child support that is not proper or adequate, taking into account all the circumstances of the case.

(d) In the case of a binding child support agreement, that as a consequence of exceptional circumstances that could not have been foreseen at the time that the agreement was made, the child will not have adequate financial support unless the agreement is set aside.

The section also needs an additional provision, a new subsection (5), that when making new arrangements, the Court should have regard to the exchange which has already taken place as a result of the previous agreement. Such a provision would be along the following lines:

(5) If:
(a) the court sets aside a child support agreement under this section; and
(b) the court is not satisfied as mentioned in paragraph 117(1)(b) (departure orders);

the court may still may make an order that departs from the administrative assessment where it is just and equitable to do so having regard to the benefits that the payee has already received pursuant to the agreement.

The reason for this is that the agreement which is set aside may have made provision for the payee to receive property that she or he would not have received but for the agreement. It would be unreasonable not to take account of this benefit already received in setting a new child support rate.

Please let me know if I can be of further assistance.

Yours sincerely,

Patrick Parkinson
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