

18 July 2014

Our ref: 340/15 – Child Support Program

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

By Post and website: [here](#)

Dear Committee Secretary

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We write on behalf of the Family Law Committee of the Queensland Law Society (**the Society**).

Terms of Reference and scope of the inquiry

We note the Terms of Reference include discussion and reporting of:

- methods used by the Department of Human Services (Child Support) (**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.

We note the committee has expressed 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

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- ensuring that children in high conflict families are best provided for under the child support scheme.

Discussion

Administrative Assessment Generally

It is the view of the Society that the establishment of Child Support (previously, the Child Support Agency) and the adoption of an administrative model for dealing with child support has been a positive development.

Removing these matters from the court system, other than upon appeal from the SSAT, has resulted in substantial savings of court time and public resources. Further it has been the observation of our members that child support is being received by caring parents more reliably and efficiently than was the case prior to the establishment of Child Support.

While accepting that a formulaic approach is inherently limited in the manner in which it can have regard to the many factors which impact upon the care responsibilities of modern families, the current formula attempts to have regard to these factors, and is broadly successful in doing so. Further, where the formula is unable to provide an equitable outcome the mechanism for review or departure affords the opportunity for a reconsideration of the matter based on the particular circumstances of the case.

The assessment process itself is easily accessible by families. Further, the mechanisms for review of the formula assessment through a change of assessment or departure is, in most instances, accessible to clients without the need for significant input from lawyers.

The court retains discretion, as set out in s116(b)(i) and (ii) of the *Child Support (Assessment) Act 1989* (Cth), to hear a departure application in circumstance where proceedings are on foot and where it is in the interests of the caring and liable parent based on the special circumstance of the case. However, the court has shown that it will exercise this discretion sparingly, and that appears appropriate having regard to objects of the child support regime.

Notwithstanding the above, clients have expressed difficulty with the formula assessment in a number of circumstances:

1. Grounds for Departure

One of the most commonly expressed concerns by clients is that the formula assessment is inappropriate having regard to either:

- a) the needs of the children; or
- b) the income and resources of one or both parents which are not taken into account.

It is noted that the child support regime has by way of its grounds for review the flexibility to respond to these concerns, though the decisions reached often give rise to further concern by

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liable or care parents, including by reason of a lack of uniformity in approach by case officers conducting those reviews.

For example, clients have reported that they are advised by representatives of Child Support that they may be "worse off" if they lodge an application for review and that they are discouraged from seeking a review of the assessment, including with respect to matters such as the payment of private school fees, an issue that affects many families and which can create considerable conflict between separated parents. The treatment of such an expense within the child support regime therefore creates additional conflict and uncertainty, particularly as our members can have little certainty about advising clients of the potential outcome of such applications.

2. Direct Care Percentages

The calculation of the direct care percentage, based on the 'number of nights' which children are spending with each parent is seen as arbitrary.

The emphasis on 'nights' places a premium on overnight time, which may result in a parent seeking or alternatively resisting overnight time or greater overnight time to the detriment of the children.

Further, the width of the bands often causes difficulties. The 'first band' of care covers arrangements from 14% to 34% of time. Accordingly, a parent with care of their children for four nights each fortnight and some school holidays may receive exactly the same care percentage as a parent with whom the children spend time one night per week.

Further, while extraordinary needs may be the subject of a departure application, the formula based on an expenditure survey is calculated to cover the day to day costs associated with education, clothing and health. Accordingly where a parent is assessed to have a 'direct care component' their child support is calculated on the basis that they will be meeting some of these day to day costs. It is the experience of many clients, that notwithstanding that expectation, it is often one parent who incurs the 'lion's share' of day to day health, education and clothing costs.

3. Difficulties with Collection and Administration

Enforcement of child support liabilities remains particularly problematic, with many care parents expressing concern as to delay in resolving arrears. There is uncertainty about steps that Child Support will take with respect to arrears and no avenue, outside of an application to the Court, for enforcement of non-periodic support.

With respect to the provision of estimates of income, the ability to provide an estimate of income for an upcoming child support period is too broad and not subject to sufficient scrutiny as to veracity with possibility of penalties being applied or a child support arrears accruing as a result of an incorrect estimate an insufficient disincentive.

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4. Legal Involvement

Given the above, members are most likely to see child support 'disputes' where a decision of a review officer is unacceptable to one party and an appeal to the SSAT or the Federal Circuit Court is sought. Appeals to the Federal Circuit Court, being limited to errors of law, naturally create a significant filter against appeal; however it has been noted that:

- The matter has often been dealt with by clients personally to that point, and the distinction between an error of law and one of fact is often not understood by them. A great deal of court time appears to be spent dealing with litigants in person, appealing a decision in which no error of law is pleaded, nor could be pleaded on any objective consideration of the case.
- The review officers, in carrying out a less formal, more inquisitorial review of the matter than would take place in a court, are on occasion careless in the expression of their decisions or in their reasoning, and as such this can give rise to errors of law, which might have been avoided if the review officers had more legal training or were lawyers.

The review process, even before consideration of any appeal to the Federal Circuit Court, is often a time consuming process, involving, multiple submissions, considerations and eventual hearings. Throughout this process parties remain uncertain as to their liability and entitlement, and there is at the very least a perception by one parent that the liability in place is incorrect.

Child Support Agreements

The greatest level of flexibility may be afforded to clients by use of limited or binding child support agreements; however these are not utilised by lawyers as regularly as they might be. There are a number of possible reasons for this:

- Those cases likely to be seen by lawyers are involving a dispute and often a dispute that has been ongoing for some time, parties are accordingly not necessarily predisposed to a negotiated resolution;
- Binding agreements can only be set aside for extremely limited reasons yet can last for a significant time for parties whose lives post separation are still in a state of flux. Parties see this as further fettering their capacity for flexibility as their new lives settle after separation;
- Where parties fail to reach an agreement in respect of property matters, child support frequently also remains unresolved. Similarly, substantial uncertainty remains where no agreement or resolution of parenting matters is made. Where parties do not agree on child support arrangements there remains an assessment as a fall back. Accordingly many families are accepting of an assessment by Child Support which may be less than ideal rather than invest the energy and resources in negotiating a more suitable arrangement; and

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- o Further with respect to Binding Child Support Agreements, being a form of binding financial agreement, lawyers are wary of and reticent to use them because of the state of the law and the real possibility of them being overturned for technical legal reasons.

High Conflict Cases

It is our members' experience that child support can be a significant contributor to conflict in parenting cases. Beyond the 'trading for nights' referred to above, the perception of child support payments as a payment to the other parent rather than as a payment towards the upkeep of a child remains a significant hurdle in many cases.

The recognition of Non-Agency Payments and the provision of some credit for Non-Agency Payments provide some amelioration to this perception but does not resolve the issue as:

- o Prescribed payments can often be substantially greater than the assessed child support liability. Whilst it is appropriate that a liable parent not, through a unilateral decision to make non agency payments to a particular purpose, dictate the care priorities of the receiving parent, a lack of flexibility in the credit afforded can be inequitable; and
- o In our members' experience where clients are in the "high conflict" category they are less likely to agree on a liable parent's non-agency payments being offset at a greater rate.

Child support is likely also to arise as an issue in cases in which child support is not itself the cause of conflict.

It is not uncommon for high conflict parents to be in dispute over parenting decisions particularly in respect of the child's perceived medical, developmental or educational needs. Findings made or not made by a court in respect of these needs have capacity to impact upon possible departure applications under s117 of the Act.

Further high levels of conflict and poor parental communication are more likely to result in orders for sole parental responsibility, placing one parent in a position where they will have the capacity to pursue medical and developmental support which may be considered superfluous by the other parent.

This may likewise lead to and impact upon possible departure applications under s117.

It would be of some assistance to families if the ability to seek a child support departure order from the Family Law Courts is widened in s117 of the *Child Support (Assessment) Act*. Frequently a situation will arise where parties do agree to some arrangements in parenting matters where it impacts on child support but legislatively there is not the ability for the Court to make an order that then binds the parties to their agreement. An example is where parties to a parenting application agree that a child is to attend a particular named school and that the parties will share equally the school fees. Family Law Courts are unable to make orders for parties to share school costs equally and at best an agreement of this kind can be included as

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a notation to the order only. At that point parties frequently do not then want to incur additional costs or delay their settlement to have a child support agreement prepared. It goes without saying that such an outcome is considered unsatisfactory by parties in this situation because they have lost the ability to trust each other after separation.

Thank you for the opportunity to provide feedback on the program.

Please do not hesitate to contact either myself or have a member of your staff contact our Policy Solicitor, Louise Pennisi on (07) 3842 5872 or l.pennisi@qls.com.au if you wish to discuss these concepts further.

Yours faithfully



Ian Brown
President