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Child Support Legislation Amendment Bill (No.2) 2000

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Child Support Legislation Amendment Bill (No.2) 2000

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Contents

Child Support Legislation Amendment Bill (No.2) 2000

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House: House of Representatives

Portfolio: Family and Community Services

Commencement: Schedules 1 & 4 commence on 1 July 2001 or on proclamation (if the Act does not receive Royal Assent on or before 1 July). Schedules 2 & 3 commence on 1 January 2001 or on proclamation (if the Act does not receive Royal Assent on or before 1 January). In general, Schedules 5-9 commence on Royal Assent. Items in Schedule 10 commence on a variety of dates.

Purpose

To make changes to the administrative formula for child support, enable the Child Support Registrar to issue departure prohibition orders to prevent payers who have persistently failed to meet their child support obligations from leaving the country, and to make administrative changes which recognise the relocation of the Child Support Agency from the Australian Taxation Office to the Department of Family and Community Services.

Background

The Child Support Scheme

The Child Support Scheme aims to ensure that, after separation, parents capable of doing so contribute to the financial support of their children. The Scheme was introduced in two stages. The first stage commenced in June 1988 and enables the Child Support Agency (CSA) to collect maintenance payable under court orders or registered court agreements. The second stage commenced on 1 October 1989 and enables CSA to assess child support payments according to the formula contained in the *Child Support (Assessment) Act 1989*. CSA is part of the Department of Family and Community Services. Collection can occur through deductions from a person's salary or wages. Child support legislation also enables

parents to enter into private agreements about child support and to provide child support in forms other than cash.

The Child Support formula—background

The child support formula introduced with the CSS in 1988 was unchanged until the amendments arising from the *Child Support Legislation Amendment Act 1998*, which took effect from 1 July 1999. The original formula was arrived at after community consultation and research into the cost of supporting children.

The Child Support formula—objectives

The percentage rates in the child support formula are not set to arrive at an exact cost of caring for a child or the costs of raising a child, or even half of any such costs. Rather the formula is constructed to take into consideration a range of issues and aims:

- the additional costs of raising a child where parents do not live together
- the extra indirect costs of children for payees
- contact costs incurred by payers
- retention of appropriate incentives for payers to earn income from employment
- the views of the community on what would be considered a fair level of child support
- by using percentages, to arrive at a reasonable contribution amount recognising there will be range of payer and payee income levels
- by setting higher exempt income levels for payees, to acknowledge that payees bear the main financial and daily burden of child raising being the primary care giver
- by using percentages, to attempt to accommodate changes, as the costs of children rise.

The formula was designed to provide a predictable, accessible, simple, inexpensive and readily understood system.

The percentages applied to payers gross taxable incomes (after the excluded amount is deducted) have been unchanged since the CSS was introduced in 1988 and currently are:

- 1 child 18%
- 2 children 27%
- 3 children 32%

- 4 children 34%
- 5 or more children 36%

Calculating child support

Child support is assessed by the CSA using a statutory formula. In general, the liable parent's taxable income is calculated and an amount is deducted for the living expenses of that parent and any children living with them. There may be a further deduction from the liable parent's income if the eligible carer earns over a certain amount. Finally, a proportion of the liable parent's remaining income is paid as child support based on child support percentages. For example, if there is one child, the person pays 18 per cent of their remaining income in child support and retains 82 per cent. If there are two children, the person pays 27 per cent of their remaining income in child support and retains 63 per cent. This basic formula can be modified—if, for example, the care of the child is shared by the parents or the parents are low or high income earners.[1]

1994 Report of the Joint Select Committee on Certain Family Law Issues

In 1994 the Joint Select Committee on Certain Family Law Issues reported on the Child Support Scheme[2] (the Price Report). The Price Report is probably the most definitive and significant public document written about the Child Support Scheme. The Report contained 163 recommendations which reflected two major areas of interest:

- the track record of the Child Support Agency and the Department of Social Security. These two agencies were responsible for administering and delivering the scheme and had been the subject of criticism directed at their administrative practices, delivery and client service. The Report's recommendations 7-115 generally dealt with such matters.[3]
- legislative rules and administrative practices that apply under the Child Support Scheme. These rules and practices reflect the inherent difficulties of any scheme designed to collect and pay maintenance.

Response to the Price Report by the then Labor Government

The then Labor Government did not agree to all of the Price Report recommendations but responded to many of them. However, much of its response addressed administrative issues. This was probably because much of the impetus for the Price Report came from concerns about the performance of the Child Support Agency. The Labor Government also considered it too early to be contemplating substantive changes to the formula because the Child Support Scheme had only been operating for a short time and it thought that

research was needed into the impact of the formula and the likely impact of any amendments to it.

Child Support Scheme Developments 1996 to 2000

Prior to the General Election in March 1996, the then Opposition undertook to examine and respond to the residual issues and recommendations in the Price Report. In 1997, the Government convened a backbench committee to examine the Child Support Scheme and recommend reforms. The committee's report was not made public. However, the Coalition Government has addressed many of the remaining issues through three Acts passed in 1997, 1998 and in 2000.[4] Further changes were achieved administratively. The Acts and their main provisions are listed below.

Child Support Legislation Amendment Act (No. 1) 1997

Under legislative changes made in 1997:

- eligible carers do not have to refund overpayments, but, instead, have future payments for the year reduced commensurately
- liable parents are able to make their payments direct to the Child Support Agency, rather than through their employer
- when making property or maintenance decisions, the Family Court is able to take into account future liabilities under the *Child Support (Assessment) Act 1989* even if an assessment has not been made.

Child Support Legislation Amendment Act 1998

Legislative changes made in 1998 provide for:

- a 10 per cent increase in exempt income under the formula for payers of child support
- a reduction in the amount of a carer's income that is disregarded under the formula
- the introduction of a minimum child support liability of $260 per annum for all payers
- greater flexibility for payers and payees in making agreements relating to child care payments
- the situation where child care arrangements have changed from that specified in various orders
- child support to continue until the end of a school year where a relevant child turns 18 during that year

- the introduction of an internal review mechanism as the first step in a review process
- the Registrar to initiate a departure from an administrative assessment of child support
- the inclusion of exempt foreign income and rental property losses in the calculation of income
- determinations to be based on more recent years of income
- a relevant payer seeking an administrative assessment of child support
- 50 per cent of child care expenditure to be excluded from a person's income for the purpose of the family allowance; and
- more flexible arrangements for direct payment of child support (non-agency payments).

Child Support Legislation Amendment Act 2000

This Act makes changes to facilitate arrangements for the enforcement of child support obligations when payers are overseas.

More reforms announced

The 1998-99 Budget included a number of measures:[5]

- the introduction of legislation to prevent persons with substantial child support debts leaving the country
- the establishment of an inter-departmental Committee to consider the diverse forms of income received and taken into account for determining child support
- a review, by the Child Support Registrar, of the departure from assessment process; and
- the establishment of a number of pilot schemes to assist parents to comply with contact orders.

The 2000-01 Budget included the announcement of further measures:[6]

- A pilot program to help payers improve post separation relationships and parenting skills. This will give access to parenting skills training, peer support, relationship management help, legal advice and financial counselling.
- The incorporation of a specific, transparent allowance for caring for a child for between 10 per cent and 30 per cent of the nights of the year into the child support formula.

- Aligning the measure of average weekly earnings, which sets the upper limit on payer taxable income used in their child support assessment, with that used for the payee's disregarded income amount.

- Allowing a child support payer to apply to the Child Support Agency to have income from a second job, regular overtime or other additional income to be excluded from their child support assessment—if several specific criteria are met.

- Letting payers with second families claim 100 per cent of child support paid as a deduction from the household income used for determining Family Tax Benefit and Child Care Benefit entitlements.

General Themes Running through Recent Reforms

When the mass of changes since 1996 are examined several themes emerge. The influence of the Price Report recommendations is clear. Many changes are sourced to particular recommendations of the report. Some major themes that emerge are:

- The balance between the needs of payees and payers has shifted. Measures which assist second families of payers and formula adjustments, which favour payers, appear repeatedly.

- Private arrangements have been encouraged and facilitated. This is partly due to the growth in workload for the Scheme. Greater use of private arrangements reduces intrusiveness and cost.

- A definite nexus between contact and the amount of financial support has been established, which was originally avoided.

Background to major changes in the Bill

The formula and shared care

Currently, the child support maintenance formula makes no allowance for shared care cases where one carer (ie the payer) provides less than 30% of the care. This has been unchanged since the introduction of the formula in October 1989. The 1988 report, *Child Support: Formula for Australia*, on which the formula was based, suggested a high minimum because of concerns that recognising smaller amounts in the formula might encourage disputes over contact motivated by a desire to reduce child support liabilities. It wished to avoid creating a nexus between the issues of contact and child support. A minimum of about 35% was considered to account for the common case of regular weekend and holiday care. Administrative complexity was also cited as an obstacle to a lower minimum and a gradual reduction in the child support liability.[7]

Since then shared care has become more common.[8] Problems with the present minimum were the subject of much debate in the context of the Price Committee's examination of the formula.

The cap on income subject to formula assessment

Child Support: Formula for Australia suggested that the cap be set at twice average weekly earnings (AWE), but the cap was set at two and a half times AWE in the original legislation. The Price Report recommended that the cap be reduced to twice AWE. The notion of having a cap represents a compromise. The principle that children should share fully in the resources of their parents is set against the concern that very high levels of income support would encourage avoidance, serve as a work disincentive and effectively be transfers to ex-partners rather than child support.[9] The exact level of the cap is the main concern. Too low a cap excludes children from the benefits of their parent's wealth, while too high a cap raises the issues mentioned. An estimated 4000 child support payers with incomes between $78,000 and $101,000 per annum will benefit from the proposed change—particularly when combined with the 10 per cent increase in exempt income under the formula introduced in 1998. These income levels are equivalent to senior officer and SES salaries in the Commonwealth Public Service.

Income earned for the benefit of second families

Presently there is no mechanism for modifying the formula to exempt from assessment income from second jobs or overtime undertaken to improve the situation of the new families of payers or payees. The original design of the formula sought to cover the needs of second families through other means. The Price Report examined this issue and recognised the disincentives inherent in the present arrangements. However it stopped short of recommending changes due to reservations about the effects of such a provision on the obligation of payers to support their children in line with their capacity to pay.[10]

Child support and the Family Tax Benefit income test

In 1998 the Social Security Act was amended to allow 50% of child support payments to be disregarded when assessing income under Family Allowance income test. This amendment partially addressed a recommendation of the Price Report—that child support payments should be deducted totally from the income assessed for family payment purposes.[11]

Reaction to the 2000 Budget measures

Media reports soon after the Budget suggested that groups representing payers were pleased with the Government policy direction. Lone Parent Association president Barry Williams[12] was reported to be 'amazed' at the success of his lobbying.[13] His concerns about the situation of second families and those in shared care situations had clearly been addressed. However representatives of sole parent groups pointed to the reduced child support payments that would result from the measures. Sole Parent Union president,

Kathleen Swinbourne, was reported to have said that the package would increase hardship for sole parents. She also reportedly questioned the need for financial incentives for fathers to see their children.[14]

The Australian Council of Social Service has also expressed grave concern about the reduced level of child support which it is claimed the measures would produce. It does, however, support the increase in the disregarded income for child support payments when assessing income for Family Tax Benefit from 50% to 100%.[15]

Main Provisions

Schedule 1—Lower child support percentages for children with whom liable parent has 10% to 30% contact

Moderate contact and intermediate contact

Item 1 inserts two new definitions into the *Child Support (Assessment) Act 198*9 (the Assessment Act). **New subsection 8AA(1)** defines 'moderate contact' as occurring when a parent has care of a child for at least 10% and less than 20% of the time. In this case, the parent is taken to have care of the child for 15% of the time. **New subsection 8AA(2)** defines 'intermediate contact' as occurring when a parent has care of a child for at least 20% and less than 30% of the time. In this case, the parent is taken to have care of the child for 25% of the time.

Item 7 inserts **new Subdivision DA** into Division 2, Part 5 of the Assessment Act. The new subdivision contains a modified table of child support percentages which apply when a liable parent has moderate or intermediate contact with a child and the carer is the principal or sole provider of care. Moderate contact will generally result in a reduction in the child support percentage by two percentage points. Intermediate contact will generally result in a reduction in the child support percentage by three percentage points.

Item 8 replaces paragraph 48(1)(e) with a new paragraph modifying child support percentages in the case of shared parenting arrangements where there is moderate or intermediate contact in relation to some of the children.

Consequential changes flowing from the introduction of 'moderate contact' and 'intermediate contact' are made to the definition of 'number of children in carer's care' by **item 10** which amends section 54 of the Assessment Act (dealing with the application of the basic formula for child support).

The new categories of moderate contact and intermediate contact also result in amendments to Subdivisions F & G of Division 2, Part 5 of the Assessment Act. Subdivision F modifies the basic formula for child support in relation to children who are being cared for by someone other than their liable parents. Subdivision G modifies the

basic formula where a child has two or more carers who are entitled to child support from a liable parent. **Item 9** amends Subdivision F. **Items 10-13** amend Subdivision G. **Item 14** also amends Subdivision G by inserting a new example into the Assessment Act which shows how the provisions relating to moderate and intermediate contact will work.

Consequences of breaching court orders or parenting plans in relation to moderate and intermediate contact parents

Section 8A of the Assessment Act deals with the child support consequences of a person allegedly contravening a court order or parenting plan dealing with residence or contact. Under the Assessment Act, if a person has more care of a child than a court order or parenting plan provides then he or she is taken to have care of the child only to the extent allowed by the order or plan [paragraph 8A(2)(a)]. If a person allegedly has less care of a child than provided in a court order or parenting plan, then the amount of care is worked out on the basis of the actual care (if any) that the person has [paragraph 8A(2)(b)].

Item 2 amends paragraph 8A(2)(b) of the Assessment Act. In the case of a person who is allegedly providing less care than mandated by a court order or parenting plan, the amount of care will continue to be determined by the actual care (if any) that the person provides—except in the case of a person with moderate or intermediate contact. The Explanatory Memorandum states that if, after a comparison with total care levels, less than the full available amount of care is allocated then the liable parent is taken not to have moderate or intermediate contact but to have 'zero care'[16][**item 6** inserting **new subsection 8A(6A)**].

Schedule 2—Lower cap on income subject to child support formula assessment

At present, section 42 of the Assessment Act imposes a cap on child support paid by a liable parent if that person's child support income exceeds 2.5 times the full-time adult average weekly earnings (AWE). **Item 1** of **Schedule 2** repeals existing section 42 and inserts a new section. **New section 42** will apply a cap if a liable parent's income exceeds 2.5 times the EAWE amount (ie the all employees average weekly earnings).

Schedule 3—Income earned for the benefit of resident children

Part 6A of the Assessment Act allows the Child Support Registrar to determine that there should be a departure from the provisions of the Act relating to administrative assessment of child support. For example, the Registrar can vary the rate of child support, the child support percentage, the child support income amount of a liable parent or the child support income amount of an entitled carer.[17] A determination can be made on the application of a liable parent or entitled carer or on the initiative of the Registrar. The grounds for departure include reduced financial capacity to support the child because of a duty to maintain another child or person and commitments necessary to enable the parent to

support himself, herself or another person.[18] The grounds for departure are set out in subsection 117(2) of the Assessment Act.

Item 5 of **Schedule 3** adds **new subparagraphs 117(2)(c)(iii) & 117(2)(c)(iv)** to the Assessment Act. The new subparagraphs add two additional grounds for departure. The first ground is that the liable parent's child support income includes income earned for the benefit of that person's resident child or children ('an additional amount'). The second ground is that the entitled carer's child support income includes income earned for the benefit of that person's resident child or children ('an additional amount').

Item 6 inserts **new subsections 117A(1) & (2)** which define the expressions 'resident child of a liable parent' and 'resident child of an entitled carer', respectively. **New subsection 117A(3)** excludes certain earnings from the expression 'additional amount'. Thus, if the amount earned was part of a pattern of earnings established before a child became a resident child of the liable parent or entitled carer it will not be regarded as an 'additional amount'. Further, income will not be regarded as being an 'additional amount' if it relates to earnings established before a person could have reasonably been aware of a pregnancy that resulted in the child's birth. The Explanatory Memorandum states that '[t]his is to establish that the motivation in earning the extra income was to benefit a child who, if not already born, was at least clearly expected.'[19] One possible consequence of the drafting is that a liable parent who continues, for example, to work overtime because of the new child would not qualify.

A determination made by the Registrar to vary child support under Part 6A cannot reduce a person's child support income amount by more than 30% [**new subsection 98S(3A)** inserted by **item 1**]. **Item 7** adds **new subsection 118(2)** which inserts an identical provision relating to court orders which vary child support income amounts.

Schedule 4—Increase in deductible child maintenance expenditure for family tax benefit and child care benefit

Item 1 amends subclause 8(1) of Schedule 3 of the *A New Tax System (Family Assistance) Act 1999*. The effect of the amendment is to reduce a person's taxable income for family tax benefit and child care benefit purposes by an amount equivalent to 100% of that person's child support payments. Currently, income is reduced by an amount equivalent to 50% of a person's child maintenance expenditure.

Schedule 5—Administrative arrangements

In 1998, the Child Support Agency was moved from the Australian Taxation Office to the Department of Family and Community Services. The changes in Schedule 5 flow from that relocation.

Section 11 of the *Child Support (Registration and Collection) Act 1988* (the Registration and Collection Act) gives the Child Support Registrar the general administration of that Act. Section 147 of the Assessment Act confers the same responsibilities on the Registrar in relation to the Assessment Act.

Amendments effected by Schedule 5 confer these functions on the Secretary of the Department of Family and Community Services (**item 39** amends section 11 of the Registration and Collection Act, **item 13** amends section 147 of the Assessment Act).

The position of Child Support Registrar will be retained. The Registrar will exercise all other functions under child support legislation.

At present, the expression 'Child Support Registrar' is defined as the Commissioner of Taxation in subsection 10(2) of the Registration and Collection Act. **Item 38** repeals subsection 10(2). **New subsection 10(2)** provides that the Child Support Registrar is the person who is the General Manager of the Child Support Agency or, if there is no such position, an SES (Senior Executive Service) officer specified by the Secretary.

Child support legislation confers certain responsibilities on Deputy Child Support Registrars. These positions, established under section 12 of the Registration and Collection Act and occupied by Second Commissioners and Deputy Commissioners of Taxation, will be abolished (**items 36 & 40**).

As a result of these changes in administrative arrangements, a number of formal and substantive amendments are made to the Assessment Act and the Registration and Collection Act. Formal amendments—for example, omitting the words 'Commissioner' or 'Deputy Registrar'—are effected by a number of items including **items 1-7, 10-12, 14-29, 31-37, 41-56, 59-67**. Substantive amendments are necessary because the Child Support Registrar is no longer the Commissioner of Taxation.

Item 30 inserts **new sections 150B-150D** into the Assessment Act. These new sections enable the Child Support Registrar to request tax file numbers, deal with a person who refuses to comply with such a request, and require the Commissioner of Taxation to supply information, including tax file numbers. Under **new section 150D** information provided by the Commissioner can only be used by the Registrar for certain purposes. These include deciding whether an application for child support can be made and making or varying a child support assessment.

Under **new section 150C** if a person fails to give the Registrar their tax file number, does not explain their failure or does not authorise the Registrar to obtain their tax file number, the Registrar can apply section 58 of the Assessment Act to work out the person's taxable income for child support purposes.

Item 57 inserts **new sections 16B & 16C** into the Registration and Collection Act. These amendments enable the Child Support Registrar to ask a person for their tax file number. The Registrar can also require the Commissioner of Taxation to provide information about

people including their tax file number. Information obtained from the Commissioner of Taxation can only be used by the Registrar for the purposes set out in **new subsection 16C(2)**. These purposes are to facilitate the recovery of a debt due to the Commonwealth under the Child Support Scheme or to identify a person for a related purpose.

Item 58 repeals existing section 72 of the Registration and Collection Act and substitutes **new section 72**. Existing section 72 enables the Commissioner of Taxation (currently the Child Support Registrar) to apply monies from a tax refund owed to a liable parent to pay off that person's child support debt. New section 72 takes account of the fact that the Commissioner of Taxation and the Child Support Registrar will no longer be the same person. It permits the Registrar to require the Commissioner of Taxation to pay to the Registrar all or part of a person's tax refund to satisfy a child support debt. It details what happens to the money if the child support debt has already been wholly or partly paid.

Item 68 amends a secrecy provision in the *Income Tax Assessment Act 1936* to ensure that information can be provided to the Child Support Registrar for the purposes of child support legislation. **Item 69** amends the objects section of Part VA of the *Income Tax Assessment Act 1936* (dealing with tax file numbers) to provide that one of the purposes of the tax file number system is to facilitate the administration of child support legislation.

At present, the Assessment Act and the Registration and Collection Act are deemed to be taxation laws by section 8WD of the *Taxation Administration Act 1953*. Disclosure and use of tax file numbers is permitted under 'a taxation law'. **Item 73** repeals section 8WD. **Items 71 & 72** amend the *Taxation Administration Act 1953* so that the Child Support Registrar (who is no longer the Commissioner of Taxation) can ask for, record or use a person's tax file number.

Schedule 6—Departure prohibition orders

Item 1 of Schedule 6 inserts **new Part VA** into the Registration and Collection Act. **New Part VA** deals with departure prohibition orders and departure authorisation certificates. These orders and certificates apply to certain child support payers who may wish to leave Australia—irrespective of whether they intend returning to Australia (**new section 72Y**).

New section 72D enables the Child Support Registrar to make an order prohibiting a person leaving Australia if the person has a 'child support liability', has not made arrangements to meet the liability, and has persistently and unreasonably failed to pay child support debts. These orders are called departure prohibition orders (DPOs). The Registrar must believe on reasonable grounds that it is desirable to make the order to ensure that the person does not leave the country without paying out their child support liability or making arrangements to do so. In deciding whether the person has persistently and unreasonably failed to pay child support debts, the Registrar must consider the number of times the person has failed to pay child support, the number of times recovery action has been taken, the person's capacity to pay and other 'appropriate matters'.

The expression 'child support liability' is defined in **new section 72E**. In brief, it means that the person has a child support debt which has fallen due without being paid either wholly or partly.

A person who knows that he or she is the subject of a DPO commits an offence by leaving Australia—unless a departure authorisation certificate (DAC) has been granted. A person who leaves Australia and is reckless about whether he or she is the subject of a DPO also commits an offence. In either case, the maximum penalty is 60 penalty units ($6,600) or 12 months imprisonment, or both (**new section 72F**).

If a DPO is made, the Registrar must notify the person who is the subject of the order, give a copy of the order to the Secretary of the Department of Immigration and Multicultural Affairs (unless the person is an Australian citizen) and give a copy to prescribed persons (**new section 72G**).

A DPO remains in force from the time it is made until the time it is revoked or set aside by a court (**new section 72H**).

The Registrar must revoke a DPO if the person who is the subject of the order no longer has a child support liability, has made satisfactory arrangements to discharge it entirely or the Registrar is satisfied that the liability is 'completely irrecoverable' [**new subsection 72I(1)**]. However, **new subsection 72I(2)** provides that the Registrar must not revoke a DPO if he or she is satisfied that 'the person may later become subject to a child support liability in respect of, or arising out of, matters that have occurred'. **New subsection 72I(3)** also enables the Registrar to revoke or vary an order at his or her discretion. A person subject to a DPO can apply to the Registrar to have the order revoked or varied [**new subsection 72I(4)**]. **New section 72J** provides that the Registrar must notify the person about decisions to revoke or vary an order.

A person who is the subject of a DPO can apply to the Registrar for a departure authorisation certificate (DAC) (**new section 72K**). The Registrar must issue a DAC if satisfied that the person is likely to return to Australia within an appropriate period, it is likely that the departure prohibition order would have to be revoked, and it is not necessary for the person to provide security for their return to Australia [**new subsection 72L(2)**]. Even if the Registrar is not satisfied about the matters specified in new subsection 72L(2) he or she must nevertheless issue a DAC if the person has provided security against their return to Australia, the certificate should be granted on humanitarian grounds or refusal to grant the certificate would be detrimental to Australia's interests. **New section 72M** provides that the Registrar may require a person to provide security (eg a bond, deposit etc) for their return to Australia.

A DAC cannot authorise a departure from Australia that is more than 7 days from the date the certificate is issued [**new section 72N**). Notification requirements related to DACs are found in **new sections 72O and 72P**.

An 'aggrieved' person can appeal against a DPO to a single judge of the Federal Court (**new sections 72Q & 72R**). This appeal provision is subject to Chapter III of the Constitution [**new paragraph 72Q(2)(a)**]. This provision appears to mean that in exercising its functions, the Federal Court cannot act administratively or exercise administrative or executive powers by substituting its own discretion for that of the administrative decision maker. In other words, the Court can only exercise its constitutionally mandated function of exercising judicial power.[20]

New paragraph 72Q(2)(b) provides that the appeal provision operates 'despite anything contained in section 9 of the *Administrative Decisions (Judicial Review) Act 1977* (the AD(JR) Act). The intention and effect of new paragraph 72Q(2)(b) is not clear. Section 9 of the AD(JR) Act limits the jurisdiction of State courts to review administrative decisions of Commonwealth decision makers.[21] New paragraph 72Q(2)(b) contains wording similar to that in paragraph 14V(2)(b) of the *Taxation Administration Act 1953*. Section 14V of the *Taxation Administration Act 1953* enables a person aggrieved by the making of a DPO under that Act to appeal to the Federal Court or a State or Territory Supreme Court. In those circumstances need for a 'notwithstanding' reference to section 9 of the AD(JR) Act—which limits AD(JR) Act jurisdiction in State courts—is clear.[22] It is not clear why the reference to section 9 of the AD(JR) Act is needed in the case of DPOs made by the Child Support Registrar when new subsection 72Q(1) makes no reference to State Supreme Courts.

A person can also apply to the Administrative Appeals Tribunal[23] for a review of the Registrar's decision to revoke or vary a DPO or issue a DAC. The Registrar's decision about security for a person's return to Australia can also be reviewed (**new section 72T**).

New section 72U enables an authorised officer to prevent a person leaving Australia if he or she believes on reasonable grounds that a person is about to leave Australia, is subject to a DPO and does not have a DAC. A person who fails to answer a question or produce a document as required by the authorised officer commits an offence and is liable to a maximum penalty of 30 penalty units ($3 300). It is also an offence to provide an answer that is false or misleading in a material particular. In this case, the penalty is a maximum of 30 penalty units or 6 months imprisonment, or both. While a person is not excused from answering a question or producing a document on the grounds of self-incrimination, the answer or document cannot be used in evidence in any criminal proceeding against the individual [except for proceedings under **new subsection 72U(5)**]—**new section 72V**.

A person who is the subject of a DPO and who is about to leave Australia must give a copy of a DAC to an authorised officer if requested to do so. The penalty for failure to comply with such a request is 5 penalty units ($550).

An 'authorised officer' is defined in **new section 72X** to mean a officer under the *Customs Act 1901* or a member of the Australian Federal Police.

Schedule 7—Minimum rate of child support

Under section 66 of the Assessment Act the minimum rate of child support is generally $260 per annum. Section 66 does not apply in some circumstances—for example, if both parents are eligible carers of a child (see section 66B). Additionally, the Registrar may reduce an assessment to nil in the circumstances set out in section 66A ie if he or she is satisfied that a payer's income is less than $260. The Explanatory Memorandum comments:

> The narrow scope of this [latter] exception has been a problem. For example, disability support pensioners who are long-term nursing home residents, have the majority of their pensions taken directly by the nursing home for costs associated with the care.[24]

Item 1 of **Schedule 7** amends paragraph 66A(4)(a) to exclude from the definition of 'income' money 'earned, derived or received in a manner, or from a source, prescribed by the regulations for the purposes of this paragraph.'

Item 2 amends paragraph 66A(4)(b) to exclude from the definition of 'income', 'a payment prescribed by the regulations for the purposes of this paragraph'.

Schedule 8—Supporting documents

Items 1-3 amend section 98G of the Assessment Act. Section 98G appears in Part 6A of the Assessment Act—dealing with the power of the Registrar to make a determination allowing a departure from the child support assessment provisions of the Act. Applications for a departure determination can be made by a liable parent or an entitled carer. A departure determination can also be initiated by the Registrar.

Existing section 98G provides that if a departure application is made, the Registrar must provide a copy of the application and any accompanying documentation to the other party to the proceedings. The proposed amendments repeal the requirement to provide accompanying documents. The Registrar will only be obliged to provide the other party with a copy of the application.

Schedule 9—Definition of eligible carer

Item 1 of **Schedule 9** repeals the definition of 'eligible carer' in the Assessment Act. At present, an eligible carer is defined for child support purposes as a person who is the sole or principal carer of the child, has major contact with the child, shares in the care of a child or has substantial contact with the child.[25]

Item 2 inserts **new section 7B** which contains the new definition of 'eligible carer'. **New subsection 7B(1)** replicates the existing definition of 'eligible carer'. However, if a person

satisfies one of these criteria but is not a parent or legal guardian of the child and the child's parent or legal guardian has not consented to the arrangement then the carer is not eligible to receive child support [**new subsection 7B(2)**]. An exception exists if the Registrar is satisfied that there has been 'extreme family breakdown' or there is a 'serious risk to the child's physical or mental wellbeing from violence or sexual abuse in the home' of the parent or legal guardian [**new subsection 7B(3)**].

Schedule 10—Technical amendments

Item 1 of **Schedule 10** removes a reference to the *Family Court Act 1975* (WA) and replaces it with a reference to the *Family Court Act 1997* (WA). The 1997 Act repealed and replaced the earlier statute.

Item 21 amends paragraph 151D(1)(b) of the Assessment Act. As it stands, this paragraph enables child support payments to continue if a child turns 18 but is still at secondary school. In these circumstances, child support ceases on the last day of the secondary school year. **New paragraph 151D(1)(b)** enables child support to cease either on the last day of secondary school or the day on which the child stops being in full-time secondary education (whichever occurs first).

Concluding Comments

The Bill has attracted comment and controversy[26] and was the subject of a report by the Senate Community Affairs Legislation Committee.[27]

Lower child support percentages applying to liable parents who have moderate or intermediate contact with their children

The Bill provides for a reduction of child support percentages for liable parents who have moderate or intermediate contact with their child. The reduction will generally be two percentage points where there is moderate contact and three percentage points where there is intermediate contact. For example, where there is moderate contact, the child support percentage will be reduced from 18% to 16% for one child. The Second Reading Speech says of these changes:

> …[they] provide a modest acknowledgment of the costs to non-resident parents of ongoing contact. It also distinguishes between parents who have little or no contact and those who have regular contact with their children. … By recognising that parents incur costs during contact, the measure will improve the ability of non-resident parents to maintain contact with their children. Contact with both parents is important for the emotional needs and development of children. If parents have ongoing contact with their children, they are also more likely to meet their child support obligations.[28]

The proposals were criticised in some of the submissions made to the Senate Community Affairs Legislation Committee. For example, the Family Law Section of the Law Council of Australia and the Women's Electoral Lobby (WEL) expressed concern that the reforms create an undesirable and counter-productive link between contact and financial support.[29] Potential consequences identified by the Law Council were that the primary carer of a child might minimise contact with the payer in order to obtain greater child support, that parents may focus on the financial consequences of sharing the care of a child rather than the child's best interests, and the likelihood that parents bearing the principal costs of children will receive less child support. WEL argued that the costs of contact are already taken into account in the child support formula.[30]

Creating a direct nexus between contact and financial support was avoided in the initial policy direction of the Child Support Scheme. Such a nexus has the potential to create ongoing disputes about contact in a non-family law context. For example, amendments in 1998 providing that 'major contact' occurs when a parent has 60-70% of time with a child[31] but that such a carer is not a principal carer[32] are difficult to reconcile with family law principles.

Lower cap on income subject to child support formula assessment

The amendments place a lower cap on the income of a payer which is taken into account when child support is assessed. The changes will result in a cap of $78,378 instead of the present cap of $101,153.[33] The Explanatory Memorandum comments that the new income measure:

> … is a more realistic measure of income, is consistent with the treatment of the entitled carer'' income and effectively lowers the cap on liable parent income used in the child support assessment.[34]

The proposed reform has been criticised on the grounds that research has not demonstrated that the present cap is inappropriate—a claim contested by the Department of Family and Community Services.[35] Submissions to the Senate by the Law Council of Australia and the WEL argued that a reduction in the cap will lead to a reduction in child support for some children, a growth in poverty in resident parent households and a consequential increase in claims for spousal maintenance.[36] In evidence before the Senate Committee, the Sole Parents Union and the Lone Fathers' Association of Australia supported a reduction of the cap but argued that the proposed reduction was insufficient.[37]

Income earned for the benefit of resident children

The Minister's Second Reading Speech states:

> Parents who take on additional work to support their new family will be able to apply to the Child Support Agency to have the additional income excluded from the

> assessment of child support. … This measure will assist parents in their efforts to improve the position of their new family, without unduly affecting their first family.[38]

It has been suggested that the proposed reforms will promote avoidance behaviours, disadvantage payees and children, and are unnecessary given adjustments to the child support formula which take account of the costs of subsequent households to non-resident parents.[39] Other submissions to the Senate Committee considered that second families should be given additional assistance but commented that more significant reforms were needed.[40]

Incorporating the notion of 'resident child' in this second family context is at odds with the tenor of the child support scheme which puts considerable emphasis on the concept of 'contact'. Even where a child lives with a parent 70% of the time, this is 'major contact', not 'residence' in child support legislation. It is, therefore, unclear what amount of time a second family child will need to spend with the payer parent for the payer parent to be eligible for this adjustment.

Departure prohibition orders

Departure prohibition orders are designed to enable the Registrar to prevent child support payers who fail to meet their child support obligations leaving the country until they have either done so or made satisfactory arrangements to do so. 'The system will mirror closely the existing departure prohibition order system in place under the *Taxation Administration Act 1953*.'[41] A departure prohibition system is established under Part IVA of the *Taxation Administration Act 1953*. Departure prohibition orders under that Act are made by the Commissioner of Taxation and apply to tax debtors.[42]

A number questions about process might be raised about these reforms. For example, there is no procedure for notifying a person that the Registrar is considering making a DPO. A person is notified only after the event. As a result, there is no procedure for a person to make submissions to the Registrar before an order is made. His or her only recourse is an appeal or review application after the decision is made. Concerns have also been expressed that the Bill enables the Registrar to make a DPO 'in anticipation of a prospective assessment' under new section 72I.[43]

Supporting documents

The changes proposed in Schedule 8 are explained in the following way:

> All pertinent information in a departure process is contained in the application or response form—natural justice requires that this continue to be made available to both parties. However, this measure removes the compulsion on the Registrar to supply supporting documentation to the other party. Thus, privacy will be maintained, while still allowing the relevant documentation to be used in the decision making process.[44]

Once again, questions of process might be raised about the reforms contained in Schedule 8. The amendments may prevent the parties being able to effectively test each others information—information which may be crucial and relied upon in the Registrar's decision about a departure application.

Definition of 'eligible carer'

The definition of 'eligible carer' will be altered by the amendments contained in Schedule 9. A person who is not a child's parent or legal guardian will not be regarded as an 'eligible carer' for child support purposes unless the child's parent or legal guardian has consented—subject to two exceptions. The first is that the Registrar is satisfied that there is 'extreme family breakdown'. The second is that the Registrar is satisfied that there is a serious risk to the child's wellbeing as a result of violence or sexual abuse in the home of the parent or legal guardian.

The Explanatory Memorandum comments:

> Currently, an assessment may be made of child support payable to a non-parent who is providing care to a child who has left home, whether with or without parental consent, and whether with or without reasonable cause. The child support scheme should not be seen to condone or assist the breakdown of families.[45]

Whether the Registrar is an appropriate person to make an assessment under new subsection 7B(3), how such an assessment will be made and whether the tests of 'extreme family breakdown' and 'serious risk' are appropriate ones are some of the questions raised by these proposals. In addition, it is not clear how 'consent' is to be determined and by whom or how evidence about allegations of family breakdown, abuse or violence will be collected, tested and determined. Further, the proposed amendments do not provide for the situation where one parent agrees to the arrangement. The other parent's refusal to consent is sufficient. A dispute about where a child should live is, more appropriately, a family court matter. Last, the proposed amendments do not appear to take account of extended families or Indigenous cultural/family practices.

Endnotes

1 See CCH, Australian *Family Law Child Support Handbook*, CCH Australia Ltd, Sydney, 2000. Some modifications to the formula took effect in 1999. For example, rental losses and exempt foreign employment income are added back into the liable parent's taxable income.

2 *Child Support Scheme. An Examination of the Operation and Effectiveness of the Scheme*, AGPS, Canberra, November 1994.

3 A few of these recommendations were directed at legislative change but the vast majority were aimed at improving the administration and service delivery of the Child Support Scheme.

4 Information can be found at the Child Support Agency website http://www.csa.gov.au/legal/page2.htm (current at 23 October 2000). The Bills Digests for the three Bills provide greater detail and can be found on the parliamentary website at the following addresses (current at 23 October 2000):
http://www.aph.gov.au/library/pubs/bd/1996-97/97bd030.htm

http://www.aph.gov.au/library/pubs/bd/1997-98/98bd174.htm

http://www.aph.gov.au/library/pubs/bd/1999-2000/2000BD141.htm

5 Details of these proposals are contained in the original media release available at: http://www.facs.gov.au/internet/newman.nsf/d0dee2a74f741679ca25670f00207819/6a730298bd143d854a2566a2001e3838?OpenDocument (current at 25 October 2000)

6 A more detailed treatment of each of these changes can be found in the FACS *Budget 2000-2001: What's New, What's Different* publication available at: http://www.facs.gov.au/Internet/FaCSInternet.nsf/aboutfacs/budget/budget2000-wnwd_e.htm (current at 25 October 2000)

7 *Child Support: Formula for Australia*, Report from the Child Support Consultative Group, Canberra: AGPS, 1988. pp.132–4.

8 For further information on shared care see J Dickenson. et al *Sharing the Care of Children Post-separation*, paper presented at Family Strengths Conference, Uni of Newcastle, Nov. 1999. Available from: http://www.facs.gov.au/internet/facsinternet.nsf/98DAF4ABB8D56103CA2568910004F7AF/ACCFF41F57DA34AFCA2568920076C5A4 (current at 25 October 2000)

9 See Child Support Consultative Group, op.cit, pp.83–4 and the Price Report, op.cit, pp.336–9 for discussion of these issues.

10 See Price Report, op.cit, pp.355–7.

11 ibid, pp.426–7.

12 An original member of the Child Support Task Force.

13 'Rich angry dads win big child support cuts', *Sydney Morning Herald,* 11 May 2000.

14 'Child support package splits parents groups', *The Australian*, 11 May 2000.

15 *Federal Budget: Briefing Kit 2000-01*. ACOSS May 2000. pp.28–30.

16 Page 5.

17 Subsection 98S(1).

18 Subsections 98C(2), 98C(3) & 117(2).

19 Page 8.

20 See, for example, *Poletti v. Deputy Commissioner of Taxation* (1994) 94 ATC 4639 and the *Explanatory Memorandum* for the Taxation Laws Amendment Bill 1984 which inserted a similar provision into the *Taxation Administration Act 1953*.

21 However, section 9 also enables a State Supreme Court to exercise jurisdiction under section 32A of the *Federal Court of Australia Act 1976* [paragraph 9(4)(b)]—thereby enabling a State Supreme Court to hear and determine any matter that can be heard by a Federal Court judge sitting in chambers.

22 The *Explanatory Memorandum* for the Taxation Laws Amendment Bill 1984 which inserted the provision into the *Taxation Administration Act 1953* says that the purpose of the section is to establish the jurisdiction of State Supreme Courts notwithstanding anything in section 9 of the AD(JR) Act which could otherwise oust their jurisdiction.

23 The application will be made to the Administrative Review Tribunal if that Tribunal replaces the AAT—see Schedule 6, Part 2.

24 Page 18.

25 Section 5.

26 'Dads score as deserted wives take a pay cut', *The Advertiser*, 16 October 2000; 'Backlash of angry white males', *Canberra Times*, 13 October 2000; 'Battle brews on support changes', *The Age*, 12 October 2000; 'Travel ban threat in new support plan', *The Age*, 11 October 2000; 'Child support relief for dads', *The Advertiser*, 10 October 2000; 'Dads in distress on Nats' agenda', *The Australian*, 9 October 2000; 'Anthony seeking big changes to child support', *Canberra Times*, 7 October 2000; 'Minister plans to tackle "sacred cow"', *Canberra Times*, 7 October 2000.

27 *Report. Child Support Legislation Amendment Bill (No.2) 2000*, October 2000.

28 *Parliamentary Debates (Hansard)*, House of Representatives, 30 August 2000, pp. 19614–5.

29 Law Council of Australia. Family Law Section, *Submission on the Child Support Legislation Amendment Bill (No.2) 2000*, 27 September 2000. Women's Electoral Lobby Australia, *Submission to the Senate Community Affairs Legislation Committee*, 27 September 2000.

30 WEL, op.cit.

31 Subsection 8A(5).

32 Subsection 8A(6).

33 CSA Australia, 'Proposed legislative reforms', http://www.csa.gov.au/scheme/bud.htm (current at 20 October 2000).

34 Page 6.

35 See Senate Community Affairs Committee, op.cit.

36 Law Council of Australia, op.cit; WEL, op.cit.

37 See Senate Community Affairs Committee, op.cit.

38 *Parliamentary Debates (Hansard)*, House of Representatives, 30 August 2000, p.19614.

39 WEL, op.cit.

40 For example, Partners of Paying Parents (PoPPs), *Child Support Legislation Amendment Bill (No.2) 2000—Public Submission*, 27 September 2000.

41 *Explanatory Memorandum*, p. 13.

42 Section 14S.

43 Law Council of Australia, op.cit, p. 8.

44 *Explanatory Memorandum*, p. 19.

45 Page 20.