

The program

- 3.1 The Child Support Program (CSP) traces its origins back to the late 1980s, when the Australian Government introduced the first Child Support Scheme. That first scheme was the result of almost ten years of work and reports by many groups, including the Joint Select Committee on the Family Law Act (1980), the national maintenance inquiry (1984), the Family Law Council (1986), a Government discussion paper (1986), and the Child Support Consultative Group (1988), the last of which was chaired by Justice John Fogarty of the Family Court.¹
- 3.2 The culmination of this long sequence of work was a two-stage Child Support Scheme, which progressively came into operation in 1988 and 1989. The final legislation for the scheme was introduced into the House of Representatives on 1 June 1989, was passed on 7 September 1989 and entered into force on 1 October 1989. The two Acts that regulate the CSP today are those from 1988 and 1989 (as amended):
- *Child Support (Registration and Collection Act 1988* (the *Registration and Collection Act*), and
 - *Child Support (Assessment) Act 1989* (the *Assessment Act*).
- 3.3 The first stage of the scheme dealt with existing child support liabilities, namely 'maintenance orders and agreements made, registered or approved in the courts.'² Whilst these liabilities predated the scheme, they could be enforced by the Child Support Agency. The second stage introduced, for the first time, an administrative assessment process for new child support cases.

1 Dr Neal Blewett, Acting Minister for Social Security, *House of Representatives Hansard*, 1 June 1989, p. 3441.

2 Dr Neal Blewett, Acting Minister for Social Security, *House of Representatives Hansard*, 1 June 1989, p. 3442.

- 3.4 In the years since the first scheme commenced, there have been major reviews and reforms at reasonably regular intervals:
- the Joint Select Committee on Certain Family Law Issues (37th Parliament) was established in May 1993, and reported on the Child Support Scheme in November 1994 (the *Price report*), making 163 recommendations,
 - numerous *Child Support Legislation Amendment Acts* were passed in 1997, 1998 and 2000, making various reforms, some enacting recommendations in the Price report,
 - the House of Representatives Family and Community Affairs Committee (40th Parliament) conducted an inquiry into child custody arrangements in the event of family separation, and reported in December 2003 (*Every picture tells a story*), making five recommendations regarding the Child Support Scheme, including recommending the creation of a Ministerial Taskforce,
 - the resulting Ministerial Taskforce, chaired by Prof Patrick Parkinson, reported in June 2005 (the Parkinson Report), with recommendations for considerable changes to the Scheme, and
 - reforms stemming from the Parkinson Report were implemented in three stages, between 2006 and 2008, and other changes have been implemented in the years since these last major reforms.
- 3.5 Many smaller reviews have also been conducted since the scheme's creation, including by the Commonwealth Ombudsman and the Australian National Audit Office.
- 3.6 This chapter looks at the present CSP through its central tool: the assessment formula. It will first consider the design of the formula, it will second examine how the formula is used to make an assessment, and deal with two additional matters, as follows:
- formula design
 - ⇒ history of the formula
 - ⇒ the formula today
 - ⇒ income
 - ⇒ care
 - ⇒ cost of children
 - assessments
 - ⇒ income
 - ⇒ care
 - ⇒ changes of assessment

- payment
- child support agreements, and
- committee comment.

Formula design

3.7 The child support formula is at the centre of the CSP, and this has always been the case: the first generation of the child support system, introduced in 1988, included a formula, based on recommendations of the Consultative Group chaired by Justice Fogarty.³

Questionnaire box 3.1 The CSP formula

The formula is ridiculous. It is based on kids having to go without basic needs. Does anybody have any idea of the cost of raising children?

The formula used is based on my tax return. But as mentioned, the more I earn the more I pay. How do I regain some financial stability or rebuild after divorce?

The formula is too complex and too hard to understand, you need to be a mathematician to work it out.

We have had no problem negotiating child support as we are both reasonable people. My ex-husband agrees that the formula used to calculate the cost of raising children is absolutely flawed (the cost is much higher than the formula suggests!) so I'm thankful that he is willing to provide extra money when necessary for 'extras' like health, school uniforms, some sporting etc. Other majority care parents are not so lucky.

The formula needs to be updated to reflect the true costs of raising a child which includes before and after school care, vacation care, sick days, health insurance, medical/Dr visit costs, medicines, specialists etc.

The formula for assessing the amount to be paid is confusing so I just pass on my earnings for the year and hope it's all good.

The formula is ridiculous, overcomplicated, convoluted, and unfair. Children shouldn't be worth more because their parents make more money.

The system has become so complex that you need to be an accountant and solicitor just to understand it. It is not possible for the average person to make sense of it and you can't get the formulas that are used.

3.8 One of the most difficult tasks in designing or improving a child support system is to establish a formula according to which assessments are made. A simple formula is easy to understand and administer, but unresponsive to the nuances of human lives in contemporary economic conditions. A complex formula can better respond to a particular family's circumstances, but it is therefore more difficult to administer, less comprehensible, and potentially less predictable.

3 Patrick Parkinson, 'The Future of Child Support', *University of Western Australia Law Review*, (2007) 33:2, pp. 180-1.

3.9 Victorian Legal Aid (VLA) illustrates the dangers in complex systems with reference to its clients:

For VLA clients the complexity of the scheme is a particular challenge. Issues of illiteracy, low education levels, culturally and linguistically diverse backgrounds, disability, and mental illness can make it difficult for clients to understand the system and engage with the system to ensure it provides equitable outcomes that deliver for children. When providing legal advice, VLA lawyers are first spending time educating clients about the system and how it relates to their current circumstance in order to reduce confusion and frustration.

VLA is concerned that if parents are unable to navigate a system that they perceive as too complex this unnecessarily exacerbates financial hardship and negatively impacts on capacity to provide for the child.⁴

History of the formula

3.10 The current formula, in place since 2008, reflects the considerable work undertaken by the 2005 Ministerial Taskforce. The Chair of that Taskforce, Prof Patrick Parkinson, expressed the nature of such a task, and the results it brings:

any child support system anywhere in the world involves rough justice. It has to because one is dealing with so many different circumstances, so many different families. One has to then summate that in a formula or formulae. Our system is quite complex compared to those of other countries. I met with, I think, three different ministers for child support in the UK between 2005 and 2009, and each of them expressed amazement that we had developed such a complex scheme. Theirs was much cruder, much simpler, but in my view therefore more unjust. The nature of these things is that one has to deal with averages and can only produce a roughly fair system.⁵

3.11 The current formula is a significant departure from the previous formula. The previous formula was based on the 'percentage of obligor income' approach, where the child support liability was 'based upon a flat percentage of the liable parent's income.'⁶ This approach produced a

4 Victorian Legal Aid, *Submission 53*, p. 5.

5 Prof Patrick Parkinson, *Committee Hansard*, Sydney, 27 June 2014, p. 1.

6 Patrick Parkinson, 'The future of Child Support', *University of Western Australia Law Review*, (2007) 33:2, p. 181.

formula relying on 'fixed percentages of income across the income range, and taking account of the income mainly of just one parent.'⁷ This had been the case since the establishment of the scheme, in the late nineteen-eighties, and was common in many schemes around the world that had been in place since that time.

- 3.12 The current formula, by contrast, follows the 'income shares' approach, taking the income of both parents into account, and recognising the care provided by each parent. As explained by Prof Parkinson, under this approach:

The income shares approach begins with a dollar figure for the costs of the child based upon combined parental income, and then distributes that cost between the parents in accordance with their respective capacities to pay. The primary caregiver is assumed to meet his or her share of that cost in kind. The non-resident parent's share becomes the child support obligation.⁸

- 3.13 According to the Department of Social Services (DSS) and Department of Human Services (DHS), the formula 'is based on research into the cost of raising children in Australia', and takes into account 'both parents' incomes, the level of care they provide for their children, and the associated estimated costs of the children.'⁹

The formula today

- 3.14 As noted above, child support assessments are calculated according to the formula. In order to formally determine the child support liability that applies to a particular case, the Child Support Registrar (the Registrar) makes an administrative assessment of the child support under the *Assessment Act*.
- 3.15 When making an assessment, the Registrar must have the following information about each parent:
- their income, and
 - the amount of care they provide to the child.
- 3.16 In certain cases, further information that is particular to an individual might be relevant to an assessment, such as other dependent children, or the exclusion of some income in the first three years after separation.

7 Patrick Parkinson, 'The future of Child Support', *University of Western Australia Law Review*, (2007) 33:2, p. 181.

8 Patrick Parkinson, 'The future of Child Support', *University of Western Australia Law Review*, (2007) 33:2, p. 181.

9 Department of Social Services and Department of Human Services, *Submission 99*, p. 11.

- 3.17 There are also two ‘universal’ inputs to each assessment, which are both updated each year. They are set independently of any particular assessment, and are based on Male Total Average Weekly Earnings (MTAWE). MTAWE is calculated and published by the Australian Bureau of Statistics twice a year (for the June and December quarters):
- the ‘self-support amount’ is set at one-third of annual MTAWE, and is based on MTAWE for the June quarter.¹⁰ The self-support amount for 2014 is \$23,523.¹¹
 - the ‘costs of children’ table was created by the Taskforce in 2005, and is also based on MTAWE. Each year DHS publishes an updated version.¹²
- 3.18 There are eight steps in making a basic assessment:
1. calculate each parent’s **child support income**, which is their **adjusted taxable income** (ATI) minus the ‘self-support amount’,¹³
 2. combine both parents’ child support income, producing the **combined child support income**,
 3. calculate each parent’s **income percentage**, which is their share of the combined child support income,
 4. establish each parent’s **percentage of care** for the child,
 5. calculate each parent’s **cost percentage**, which assigns a percentage of the total costs of the child, according to the amount of care they provide to the child,
 6. calculate each parent’s **child support percentage**, which is their income percentage minus their cost percentage: any parent whose percentage is positive will have a child support liability,
 7. determine the **cost of the child**, according to the costs of children table, which takes account of the combined child support income, and the age and number of children for which the assessment is being made, and
 8. calculate the **annual rate of child support**, by applying the child support percentages to the cost of the child.¹⁴

10 Section 45, *Child Support (Assessment) Act 1989*.

11 Department of Social Services, *Child Support Guide*, section 2.4.2.

12 Section 155, *Child Support (Assessment) Act 1989*.

13 The self-support amount is a universal figure, set at one-third of annual Male Total Average Weekly Earnings (MTAWE), which is published by the Australian Bureau of Statistics twice a year (for the June and December quarters). Under section 45 of the *Child Support (Assessment) Act 1989*, the self-support amount is updated yearly, based on MTAWE for the June quarter.

14 Part 5, division 2, *Child Support (Assessment) Act 1989*.

- 3.19 The 'annual rate' of child support will be payable by one parent to the other parent, generally over the course of a year at regular intervals. Under the basic formula, there would be the possibility that no child support payments would be necessary, if both parents had the same income and provided the same amount of care. They would both have an income percentage of 50, and a cost percentage of 50, and therefore would both also have a child support percentage of 0.

Income

- 3.20 As noted above, the income of both parents must be included in a formula assessment. According to DSS/DHS, 'child support assessments are generally based on parents ATI [Adjusted Taxable Income]', which comprises an individual's taxable income, taxable pension and benefit payments, and also includes:
- reportable fringe benefits,
 - target foreign income,
 - total net investment losses,
 - certain tax-free pensions and benefits, and
 - reportable superannuation contributions.¹⁵
- 3.21 The ATI is generally assessed by the Australian Taxation Office (ATO), most commonly when the parent lodges a tax return following the end of a financial year.
- 3.22 According to DHS, the overall design of the formula takes account of the fact that an individual's ATI is their 'gross' rather than 'net' income, and many individuals' disposable income is less than their ATI. In an information booklet for parents, it states:
- While the formula uses taxable income, the impact of tax on your disposable income is taken into account when we work out the costs of raising your children.¹⁶
- 3.23 According to Prof Parkinson, the Taskforce considered using net, rather than gross, income. However, this was rejected, for the following reasons:
- taxable income is more readily identifiable and predictable; that using after-tax income could impact more heavily on low income earners; and that using taxable income allows for greater

15 Section 43, *Child Support (Assessment) Act 1989*.

16 Child Support Agency, *The Parent's Guide to Child Support*, 2009, p. 2.

simplicity and alignment with the income definitions used for other government purposes.¹⁷

3.24 However, there was considerable debate throughout this inquiry about the appropriateness of calculating child support based on taxable (gross) income, rather than on post-tax (net) income.

3.25 Many submissions, particularly from individuals, called for child support to be assessed on the basis of post-tax income:

Assessment should be based on net not gross income. When my child lived with me what was spent on her – as with what was [and] is spent on myself – came from what was left after income tax.¹⁸

3.26 Some submissions called for assessments to be made on the basis of post-tax-income, with the self-support amount also removed:

Payer's adjusted income in the formula (adjusted income → Gross income minus self-support amount) does not take in to account the Tax the payer pays every year. The formula should be based on the net Income (Net Income → Gross income minus Tax & Self Support amount).¹⁹

3.27 Submissions also questioned the tax treatment of child support payments, with some calling for payments to be tax-deductible for payees:

The receiving parent of Child Support receives this payment tax free so it only seems fair if the Child Support payments should be made taxable deduction so to provide a taxable break for those workers who are on a fixed salary and make payments.²⁰

3.28 The inquiry was the focus of considerable debate about the best way to take account of individuals' incomes for child support purposes. There were numerous calls for change, with attendant increases in complexity. Many suggestions for change did not appear to deliver any substantial greater fairness to the way the formula operates.

3.29 The interaction of child support and personal income taxation is very complex, and many clients of the CSP are not satisfied with the explanations offered by the CSP. Chapter 4 considers how the CSP communicates with its clients, and the reforms suggested there should go some way to improving general understanding of the CSP and taxation.

17 Patrick Parkinson, 'The future of Child Support', *University of Western Australia Law Review*, (2007) 33:2, p.191.

18 Name Withheld, *Submission 96*, p. 10.

19 Name Withheld, *Submission 89*, p. 2.

20 Name Withheld, *Submission 111*, p. 1.

Self-support amount

- 3.30 Considerable evidence to the inquiry questioned the appropriateness of the current 'self-support' amount, which was \$23 523 in 2014. Some submissions argued that the self-support amount was too low:

The self-support income needs to be increased to a realistic value, clearly a single person would be unable to sustain anything near a reasonable life on approximately \$20 000 per annum pre-tax. The current single newstart allowance is \$26 546 which one would assume the Government deems to be the minimum support needed for self-subsistence.²¹

- 3.31 Other submissions pointed out that the self-support amount was not set according to an individual's location, disregarding regional variations in living expenses:

The self-support does not even come close to addressing the minimum needs of someone to support themselves. I challenge anyone to find accommodation for the year for that amount in Darwin – it is not possible to do so, let alone feed yourself and put fuel in your car to get to work.²²

- 3.32 Other evidence questioned why the self-support amount was the same for all individuals regardless of their income, and did not rise with income as child support payments do:

However, the CSA self support amount remains static. It is illogical to apply the same 'self care amount' to all parents as with increase in income, comes additional responsibility and expenses.²³

- 3.33 Criticisms also focussed on the application of a single self-support amount to all parents, regardless of how much care they provide:

We are against the equalisation of the self-support for the primary carer.²⁴

The 2006 reforms to the child support program saw the equalisation of the self support amount. This move blatantly ignored the need for the residential parent to establish and maintain a family home suitable for raising children (via high rental or mortgage).

Accommodation costs, on average, consume one third to a half of the available income to the residential parent who then needs to

21 Name Withheld, *Submission 87*, p. 3.

22 Name Withheld, *Submission 33*, p. 4.

23 Name Withheld, *Submission 74*, p. 6.

24 National Council of Single Mothers and their Children, *Submission 40*, p. 5.

attempt to fund the ongoing day-to-day costs of the child. In contrast the non-custodial parent's living costs for one are substantially less as they can access shared accommodation or pay lower rental for substantially smaller accommodation.²⁵

- 3.34 A common suggestion was for the self-support amount to be made variable, at a set proportion of an individual's income, such as twenty-five percent.²⁶

Questionnaire box 3.2 Self-support amount

I think the formula does not take account on individual circumstances enough, or is flexible enough to do so. My opinion is that the amount of child support should be based on the estimate of the cost of the child, but not increased with the income parents. The self-support amount should take account of disparities between self-support living expenses in Sydney and Melbourne versus cheaper cities.

The financial costs of raising my son are 95% borne by me. It's not possible to raise a child on the amount that my child support assessment has 'left over' after the parent self-support amount and the allowance taken out for his older children.

The self-support amounts are not high enough for Payer and Payee. The cost of living is significant and the self-support amount does not reflect this.

The self-support amount is set HIGHER than any form of government social security amount. The self-support amount should be equal to a pension (or the pension the same as the self-support amount). It also only considers up to 3 children.

The self-support amount of \$26,000 is not realistic. As a one income family, this amount only covers my mortgage and nothing else. Realistically, no one can self-support themselves on \$26,000. This needs to be looked at in comparison to the average daily living expenses including average mortgage repayments.

- 3.35 The self-support amount has been the subject of debate during the whole life of the Program: the Price report recommended the 'non custodial parent's basic formula self support component be increased by 20 per cent';²⁷ and *Every picture tells a story* recommended that the then versions of the self support amount (at the time set at different levels) be brought 'closer together to reflect the changing work patterns in the community.'²⁸
- 3.36 As noted at the start of this Chapter, formula design involves a careful balancing of complexity and responsiveness. Some suggested reforms to the self-support amount advocate for responsiveness to an individual's circumstances – such as the region they live in, their postcode or their gross income. Such changes would erase the 'universality' of the self-support amount. They would also increase the complexity of the program

25 National Council of Single Mothers and their Children Hobart Branch, *Submission 32*, p. 8.

26 Name Withheld, *Submission 1*, p. 1.

27 Joint Select Committee on Certain Family Law Issues (37th Parliament), *The Operation and Effectiveness of the Child Support Scheme*, November 1994, recommendation 123.

28 House of Representatives Standing Committee on Family and Community Affairs (40th Parliament), *Every Picture Tells a Story*, December 2003, recommendation 26.

- making it more expensive to administer, and more difficult for clients to understand - and also reduce its predictability.
- 3.37 Other suggested reforms advocate the reintroduction of unequal self-support amounts - that is, allowing a higher amount for 'primary carers'. This would be a fundamental change to the formula, designed as it is to assess each parent's liability on the same criteria. It would clearly have ramifications for every other element of the formula, and it is not clear that these ramifications have been elucidated and taken account of. It also fails to take account of parents who have shared care of children (i.e. where there is no 'primary carer').
- 3.38 At a more general level, many suggestions have a similar underlying concern: that the self-support amount is not the true cost of a single adult's basic needs in today's economy. The current amount is set by reference to MTAW, based on recommendations of the Parkinson report. There have been considerable changes to the social security system in the years since the Parkinson report was implemented, and there is considerable popular belief that the cost of living in Australia is notably higher than in comparable countries.²⁹
- 3.39 The appropriateness of the self-support amount is difficult to assess in the absence of rigorous data, and most of the evidence advanced in support of change was anecdotal or vague at best. However, there is a strong argument for expert analysis and review of the current setting. This will be considered further in Committee Comment, below.

Care

- 3.40 As noted above, an assessment for child support will take account of the amount of care ('percentage of care') provided by each parent or non-parent carer. This ensures that the assessment recognises the contribution made by caring for a child, and that this is reflected in the child support liability produced by the assessment. The formula does this by assuming that the carer meets some of the costs of raising a child 'directly through the care they are providing.'³⁰
- 3.41 The 'percentage of care' amount is 'usually calculated based on the number of nights [the carer] is likely to provide care for the child in the relevant care period (usually 12 months).'³¹ However, care is not assessed

29 Daniel Hurst, 'Most Australians believe the cost of living has soared over the past year', *Guardian Australia*, 21 October 2014; Amy Bainbridge, 'Australians struggling to cope as cost-of-living pressures bite: Choice survey', *ABC online*, 8 August 2014.

30 Department of Social Services and Department of Human Services, *Submission 99*, p. 14.

31 Department of Social Services and Department of Human Services, *Submission 99*, p. 14.

on a full range from 0 to 365 nights of care. Rather, the percentage of care is grouped into five broad categories, or 'care types' (see table 3.1 below):

- below regular,
- regular,
- shared,
- primary, and
- above primary.

3.42 The amount of care provided by both parents (or a parent and non-parent carer) must amount to 100 percent. So, for example, if one parent has 15 per cent care (regular care), the other will have 85 per cent care (primary care).

3.43 From the care percentage, the formula assigns the corresponding 'cost percentage', within the broad 'care types'. Importantly, there is a threshold amount of care (regular) that must be met before any cost percentage is assigned. So, for example, providing 50 nights of care (below regular) will result in a cost percentage of zero, as the formula does not assume that any direct costs are met with this level of care.

Table 3.1 Care and cost percentages

Amount of care			Cost percentage
Care type	Number of nights	Percentage of care	
Below regular	0 to 51	0% to less than 14%	0%
Regular	52 to 127	14% to less than 35%	24%
Shared	128 to 237	35% to less than 48%	25% plus 2% for each percentage of care point over 35%
		48% to 52%	50%
		More than 52% to 65%	51% plus 2% for each percentage of care point over 53%
Primary	238 to 313	More than 65% to 86%	76%
Above primary	314 to 365	More than 86% to 100%	100%

Source DSS/DHS, Submission 99.

3.44 The formula is designed so that, within some 'care type' ranges, different amounts of care are assigned the same cost percentage. For example, a cost percentage of 24 per cent is assigned to a parent who provides 14 per cent of care as well as a parent who provides 34 per cent care.

- 3.45 Prof Patrick Parkinson explained the rationale behind the cost percentage scale, and its introduction at 24 per cent:

At the point at which the child is living across two households and there are two lots of bedrooms and so on, there needs to be some allowance for that. We placed that at one night per week through to almost five nights per fortnight as a band of situations in which, in all probability, costs other than food were being expended across two households to care for the child. The 24 per cent figure was a research based one based upon our analysis of how those costs are distributed across the two households. We used what is called a budget standards approach and another approach as well, and the experts on our committee came up with the 24 per cent figure as the best average for how to share those costs.³²

- 3.46 There were many concerns expressed about the link between care and the cost percentage. Some evidence disputed the fairness of the cost percentage for the low end of regular care, referring to the result as a 'discount'. The National Council of Single Mothers and their Children (Hobart branch) recommended the removal of:

the 24% discount for one overnight stay per week and introduce a sliding scale that accurately reflects the percentage care in the child support assessment. We remain completely unconvinced that 24% discount in child support payments in exchange for as little as 13% care is a fair or equitable outcome and consider that the significant and disproportional outcome is an economic driver which is contradictory to 'the best interest of the child'.³³

- 3.47 In addition to concerns about the equity of the cost percentage scales, some evidence pointed out the potential for the amounts of care to be a point of conflict. According to this suggestion, parents might seek to provide amounts of care that serve their financial interests, particularly given the considerably different assessment that would result from 13 per cent care as opposed to 15 per cent care.

- 3.48 Putting aside claims about the intentions of parents' care decisions, the inquiry heard many concerns about the appropriateness of the care and cost percentages, particularly in the ranges of regular and primary care. As with the self-support amount, there is merit in expert analysis and review of the current settings and whether the current limit of five care types is adequate. This will be considered further in Committee Comment, below.

32 Prof Patrick Parkinson, *Committee Hansard*, Sydney, 27 June 2014, p. 7.

33 National Council of Single Mothers and their Children Hobart Branch, *Submission 32*, p. 20.

Cost of children

3.49 Prof Parkinson has detailed the rationale and process for including the costs of children in the child support system. The Australian approach is generally referred to as the 'continuity of expenditure principle':

the [child support scheme] is based upon the notion that the non-resident parent should contribute a similar level of support to the children as he or she would have contributed if the parents were living together... the Fogarty Committee [which designed the first Australian scheme] therefore drew upon estimates of the percentage of gross income that is spent on children in an intact relationship.³⁴

3.50 Prof Parkinson noted that there are possible objections to this approach. In particular, after separation, standards of living often decline as the separated family will need two separate homes to live in, and will incur many other 'double' costs. According to such an argument, it is unreasonable to expect that it would be possible to continue providing the same standard of living after separation. However, Prof Parkinson notes that much can change over the eighteen years of a child's growth to adulthood:

However, while the standard of living of many resident parents falls after separation, this loss in living standards may be ameliorated if they re-partner. The child support formula needs to apply generally until the children are 18, and the circumstances of parents can change considerably over this time.³⁵

3.51 Prof Parkinson finally notes that the approach is 'widely accepted', and that:

The idea that a parent ought to contribute approximately what he or she would have been paying if the parents had not separated is a reasonable moral position to take. It justifies the requirement that liable parents on higher incomes pay more than those on lower incomes. It allows the children to continue to share to some extent in the living standard of the liable parent. It is a morally defensible basis for calculating child support even where for the liable parent

34 Patrick Parkinson, 'The Future of Child Support', *University of Western Australia Law Review*, (2007) 33:2, p. 183.

35 Patrick Parkinson, 'The Future of Child Support', *University of Western Australia Law Review*, (2007) 33:2, p. 184.

with new housing costs and other additional costs after separation, finances are much tighter than they were before.³⁶

3.52 The process for establishing the 'costs of children' has been subject of many recommendations over the life of the child support scheme. The Price report recommended in 1994 that:

the Minister for Social Security commissions an independent study into the costs of children to enable a critical evaluation of the current child support formula percentages.³⁷

3.53 In 2003, *Every picture tells a story* recommended the Ministerial taskforce review the costs of children, including:

- establishing the costs of raising children in separated households at different income levels that adequately reflect the costs for both parents having significant and meaningful contact with their children, [and]
- adequately reflecting the costs for both parents of re-establishing homes for their children and themselves after separation.³⁸

3.54 The work of the Taskforce, as recorded by Prof Parkinson, relied on three different sources information to inform the costs of children:

The Child Support Taskforce utilised three different methodologies to reach the best and most up-to-date estimates possible of the costs of children in Australian families. The Household Expenditure Survey was used to examine actual patterns of expenditure on children. The budget standards approach was utilised to assess how much parents would need to spend to give children a specific standard of living, taking account of differences in housing costs all over Australia. A review was also done of all previous Australian research, so that the outcomes of these two studies could be compared with previous research findings.³⁹

3.55 The current 'costs of children' table was introduced in 2008, as part of the final stage of implementing the Taskforce's recommendations. As noted

36 Patrick Parkinson, 'The Future of Child Support', *University of Western Australia Law Review*, (2007) 33:2, p. 184.

37 Joint Select Committee on Certain Family Law Issues (37th Parliament), *The Operation and Effectiveness of the Child Support Scheme*, November 1994, recommendation 116.

38 House of Representatives Standing Committee on Family and Community Affairs (40th Parliament), *Every Picture Tells a Story*, December 2003, recommendation 26.

39 Patrick Parkinson, 'The Future of Child Support', *University of Western Australia Law Review*, (2007) 33:2, p. 186.

above, the table relies on data from the Australian Bureau of Statistics, and is updated annually.

- 3.56 In the event that there are changes to parents' Family Tax Benefit (FTB) entitlements, the costs of children table may require revision. DSS/DHS pointed out that the current table relied on assumptions about the average level of family assistance through FTB payments:

Child support payments are calculated based on broad estimates of the average costs of children that are net of the estimated average levels of FTB that parents are assumed to receive.⁴⁰

- 3.57 However, there were many contributors to the inquiry who criticised the cost of children table (see Table 3.2).

- 3.58 Some evidence criticised the policy basis for the table, arguing that the cost of children should be fixed:

the cost of children should be fixed and should not be dependent on the level of income of the parents. The current formula assumes that it costs more for parents on higher incomes to raise their children. As [another speaker] mentioned, in reality it does not cost any more to buy a loaf of bread or a carton of milk depending on income. In fact, there are no general costs of living that are dependent on a person's level of income. It makes no sense that the cost of raising children is deemed to vary depending on the parents' income, yet the cost of supporting yourself – the self-support amount – does not.⁴¹

- 3.59 Some submitters suggested that the table could lead to 'exorbitant' assessments, when applied to individuals on high incomes, beyond the real cost of raising a child.⁴² One witness called for the table to be drastically reduced, with an income cap introduced at \$70 569 (2014 dollars), rather than at the current level of \$176 423. Under such a recommendation, the maximum yearly cost of a single child in 2014 would be \$11 291 (aged 0 – 12 years) or \$15 878 (13+ years).⁴³

40 Department of Social Services and Department of Human Services, *Submission 99*, p. 10.

41 Simon, Community Statement Session, *Committee Hansard*, Adelaide, 6 August 2014, p. 22.

42 Mr Trevor Koops, *Submission 12*, p. 2.

43 Mr John Flanagan, *Committee Hansard*, Sydney, 27 June 2014, p. 20.

Table 3.2 Cost of children (2014)

Number of Children	Parents' combined child support income (annual figure & fraction of MTAW)					
	\$0 – \$35,285	\$35,286 - \$70,569	\$70,570 - \$105,854	\$105,855 - \$141,138	\$141,139 - \$176,423	\$176,423 and above
	0 – ½ MTAW	½ - 1 MTAW	1 – 1 ½ MTAW	1 ½ - 2 MTAW	2 – 2 ½ MTAW	above 2 ½ MTAW
<i>Children aged 0 – 12 years</i>						
1	17c for each \$1	\$5,998 plus 15c for each \$1 over \$35,285	\$11,291 plus 12c for each \$1 over \$70,569	\$15,525 plus 10c for each \$1 over \$105,854	\$19,053 plus 7c for each \$1 over \$141,138	\$21,523
2	24c for each \$1	\$8,468 plus 23c for each \$1 over \$35,285	\$16,583 plus 20c for each \$1 over \$70,569	\$23,640 plus 18c for each \$1 over \$105,854	\$29,991 plus 10c for each \$1 over \$141,138	\$33,520
3+	27c for each \$1	\$9,527 plus 26c for each \$1 over \$35,285	\$18,701 plus 25c for each \$1 over \$70,569	\$27,522 plus 24c for each \$1 over \$105,854	\$35,990 plus 18c for each \$1 over \$141,138	\$42,341
<i>Children aged 13+ years</i>						
1	23c for each \$1	\$8,116 plus 22c for each \$1 over \$35,285	\$15,878 plus 12c for each \$1 over \$70,569	\$20,112 plus 10c for each \$1 over \$105,854	\$23,640 plus 9c for each \$1 over \$141,138	\$26,816
2	29c for each \$1	\$10,233 plus 28c for each \$1 over \$35,285	\$20,113 plus 25c for each \$1 over \$70,569	\$28,934 plus 20c for each \$1 over \$105,854	\$35,991 plus 13c for each \$1 over \$141,138	\$40,578
3+	32c for each \$1	\$11,291 plus 31c for each \$1 over \$35,285	\$22,229 plus 30c for each \$1 over \$70,569	\$32,815 plus 29c for each \$1 over \$105,854	\$43,047 plus 20c for each \$1 over \$141,138	\$50,104
<i>Children of mixed age</i>						
2	26.5c for each \$1	\$9,351 plus 25.5c for each \$1 over \$35,285	\$18,348 plus 22.5c for each \$1 over \$70,569	\$26,287 plus 19c for each \$1 over \$105,854	\$32,991 plus 11.5c for each \$1 over \$141,138	\$37,049
3+	29.5c for each \$1	\$10,409 plus 28.5c for each \$1 over \$35,285	\$20,465 plus 27.5c for each \$1 over \$70,569	\$30,168 plus 26.5c for each \$1 over \$105,854	\$39,518 plus 19c for each \$1 over \$141,138	\$46,222

Source Department of Human Services

3.60 Evidence also raised concerns about the presumption that there was no cost difference between raising three and four children:

Furthermore, we remain confused about the original assertion that there is no cost impact in raising the fourth or subsequent child and that the cost of tables cease at the third child. NCSMC [National Council of Single Mothers and their Children] has not

located one larger family who has found this finding to be accurate.⁴⁴

- 3.61 There were more general comments that the table did not reflect contemporary family finances, calling for the formula to be changed 'to more closely resemble parents' income and the costs of children'.⁴⁵ Evidence also suggested that the method of estimating the 'cost of children' needed to be reviewed and updated:

NCSMC calls for a review of the 'basket of goods' formula assessment, which is out of date. For example it excludes medical costs because it assumes that all medical costs for sole parents are covered by Medicare and bulk billing doctors. Not all sole parents are on an allowance and therefore are not eligible for bulk billing or a health care card. It was also developed at a time when government made a greater contribution to supporting low income sole parent families.⁴⁶

- 3.62 Dr Bruce Smyth and Dr Bryan Rodgers point out that the current system was designed and implemented at a time when government support for families was substantially different, and subject to ongoing change:

Disentangling the impacts of the child support reforms from the Welfare-to-Work changes and the Global Financial Crisis stimulus package is extremely difficult.⁴⁷

- 3.63 Prof Parkinson agreed to suggestions that the table would benefit from review:

I think it would be very wise to regularly review the basis of the research which led to our proposals. They were based upon 2004 data and we are now in 2014. In the United States, they review every four years. It is obviously sensible but it does need the kind of group like the ministerial task force that was set up back then for this extremely complicated work.

...

We did include certain automatic elements. For example, we based a number of parts of the formula on MTAW, which is male total average weekly earnings, so it was self-updating in accordance with changes in incomes in the Australian population, so in that sense we did build it in. But it was a recommendation that the research capacity be maintained in this area, which had been

44 National Council of Single Mothers and their Children, *Submission 40*, p. 14.

45 Ms Lynn Cresswell, *Committee Hansard*, Adelaide, 6 August 2014, p. 10.

46 National Council of Single Mothers and their Children, *Submission 40*, p. 5.

47 Dr Bruce Smyth and Dr Bryan Rodgers, *Submission 13*, p. 28.

allowed to lapse, and that the formula should certainly be considered if there were significant changes, particularly to the welfare system affecting a significant proportion of the child support population.⁴⁸

3.64 And, as confirmed by DSS/DHS:

[The costs of children] take into account a number of assumptions about the differences between couple families and separated parents, *FTB policy settings at a point in time*, administrative simplicity and the need for certainty for families.⁴⁹ [emphasis added].

3.65 As noted above, the cost of children has been criticised for its appropriateness, despite its indexing through the use of MTawe. Changes in the economy and the levels of Government income support since it was established have caused many to doubt its fairness. This is particularly problematic given the way that the cost of children is stated to account for the formula's use of gross incomes. As with the self-support amount and cost percentages, it is important to ensure that the cost of children provides the best setting for the overall fairness of the CSP. This will be considered further in Committee Comment, below.

Assessments

3.66 The central process of the CSP is the administrative assessment. Using the formula, the 'universal inputs', and information about each parent (including their incomes and how much each cares for the child), an assessment of the child support liability is made. The administrative assessment is performed by the Child Support Registrar, a senior official in DHS.⁵⁰ The Registrar generally delegates this function to more junior officers of the Department.

Table 3.3 Questionnaire respondents' views of the assessment process

Do you understand the basis on which the assessment was made?	Responses	Percentage
No	2273	26%
Yes	6371	74%
Total	8644	100%

48 Prof Patrick Parkinson, *Committee Hansard*, Sydney, 27 June 2014, p. 7.

49 Department of Social Services and Department of Human Services, *Submission 99*, p. 16.

50 Section 10, *Child Support (Registration and Collection) Act 1988*.

Figure 3.1 Questionnaire respondents' reasons for having a CSP assessment

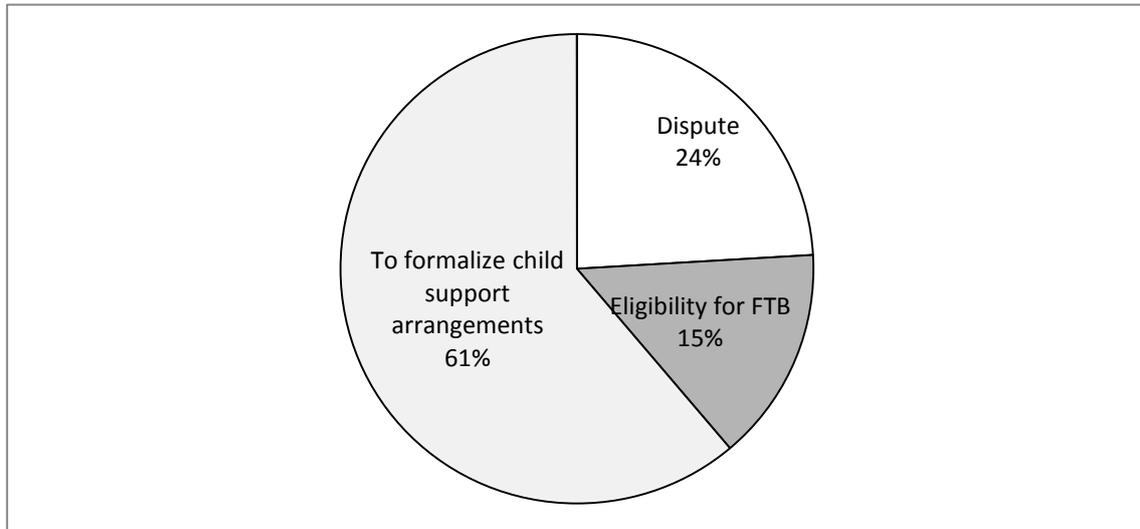
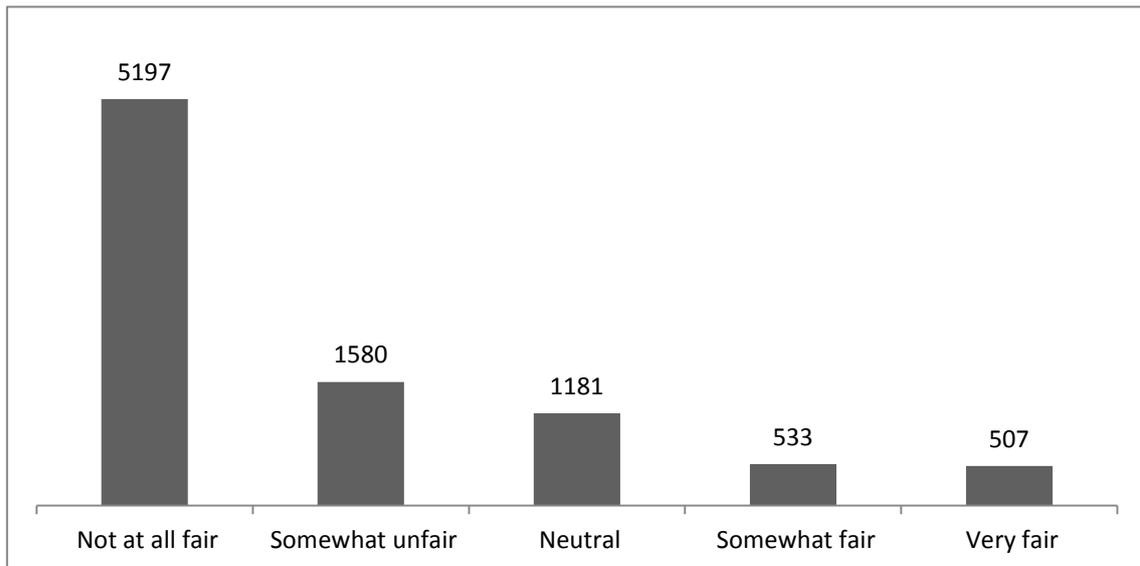


Figure 3.2 Questionnaire respondents' views on the fairness of assessments



Income

3.67 An assessment uses information that can come from a number of sources. In respect of information about income, such information might come from:

- parents themselves,
- DHS (for example, through Centrelink processes),
- the ATO,
- employers, and

- other sources.⁵¹
- 3.68 Under the *Assessment Act*, an administrative assessment will generally rely on a parent's taxable income, as assessed under either the *Income Tax Assessment Act 1936* or the *Income Tax Assessment Act 1997*. This should relate to the *last relevant year of income*, which is 'the last year of income that ended before the start of the [child support] period.'⁵² As discussed in relation to the formula, additional components of income may be included in the ATI, which is the starting point for making an assessment.
- 3.69 However:
- Where a parent has not lodged their tax return, or the ATO has deemed that a parent is not required to lodge a tax return, Child Support must make a determination of the parent's adjusted taxable income based on the income information available.⁵³
- 3.70 Other information that may enable such a determination is:
- information (either orally or in writing) or a document that specifies or allows the Registrar to work out the parent's adjusted taxable income...For example, the customer may have informed the Registrar of their income for the year, the ATO may have full year payment summary information recorded for a parent or the Registrar may have information about the Centrelink payments made to the parent for the year or the Registrar may have information from an overseas authority about the income earned by a parent who was resident in a reciprocating jurisdiction.
- The Registrar must be satisfied that the amount specified or worked out is a reasonable approximation of the parent's adjusted taxable income for the year. In making that decision the Registrar will have regard to ATO assessments for previous years or information available from the ATO or other sources about the year in question.⁵⁴
- 3.71 In addition, the Registrar may use an ATO assessment for the year before the 'last relevant year of income', and apply the 'ATI indexation factor'. Where the last two relevant years of income are not available, the Registrar may use an earlier ATO assessment multiplied by the ATI indexation factor, or 2/3 of current MTAW, whichever is greater.⁵⁵ In the

51 Department of Social Services and Department of Human Services, *Submission 99*, p. 13.

52 Section 5, *Child Support (Assessment) Act 1989*.

53 Department of Social Services, *Child Support Guide*, section 2.4.4.

54 Department of Social Services, *Child Support Guide*, section 2.4.4.

55 Department of Social Services, *Child Support Guide*, section 2.4.4.

absence of any information, the Registrar may determine that the ATI is at least 2/3 of MTAWAWE.

- 3.72 It is also possible for a parent to make an estimate of their income. Whilst there are some circumstances where this cannot be done, in general an individual can elect to estimate their income, in order to take account of a change in their circumstances not reflected in the ATO assessment for the last relevant year of income. The estimate must be no more than 85 per cent of the ATI for the last relevant year of income, and must be advised to the Registrar.⁵⁶
- 3.73 There were two principal areas of complaint regarding how incomes are used to make administrative assessments, which will be discussed below:
- the inflexibility of a yearly income estimate (and regular uniform payments), particularly for self-employed individuals whose incomes fluctuate greatly over the course of a year, and
 - the capacity for individuals to artificially lower their CSP liability by failing to lodge a tax return, or by hiding income from the assessment process.

Questionnaire box 3.3 CSP assessments

The assessment has never been fair as the father is self-employed. I always have to apply for change of assessment, and sadly it is I that has to provide ALL the evidence. Child support should have more investigative powers.

The support decreases each year as he finds more ways to minimise his income. Nobody at the Child Support Agency insists he provides evidence so he gets away with it, year in, year out. I am too worn out to go through any more Child Support processes.

Mostly everything seems quite fair and reasonable. But I was a bit puzzled why payments went down when he has another child with someone else. The daily costs of looking after our daughter did not change.

I don't see that its fair when the assessment is [calculated] on my gross income and then paid out of my net wage.

The senior case officer did not involve me in any of the decision making process and tried to force through an assessment that did not take into account all the facts.

It was made on assumptions, and when my partner and I questioned it we were told too late, the decision was made and we would have to apply through a review process if we wanted it changed (which we did not and were told the decision was upheld and final only thing left was a SSAT review.)

Current assessment is based on my "potential to earn" and is further adding to my stress because I am being charged money that I am not earning.

Yearly estimate

- 3.74 Many clients of the CSP have argued that the current assessment and payment system is too inflexible, as it does not take account of their regular fluctuations in income. This can cause significant problems, including accruing debts under the CSP as well as debts to Centrelink through social security payments:

I acknowledge that overpayments often come about through no one's fault, my husband is a shift worker so it is incredibly difficult to estimate his income, and it often fluctuates from year to year.⁵⁷

- 3.75 Economic Security 4 Women pointed out the difficulty payees experience when relying on fluctuating child support payments:

they are really very reliant on those child-support payments being regular and understanding what they are going to be – they cannot fluctuate too much; there is enough fluctuation in their income earning as it is.⁵⁸

For example:

It is my experience that this information can be vague, inconsistent and, often at times, not even available. Indeed, this month my payment was less than expected and I had no notification or explanation supplied. Whilst I would like to be in a financial situation where I did not require every dollar possible, my family lives on a tight budget where we responsibly manage every cent of our income so that I can provide my children with every possible educational and sporting opportunity available.⁵⁹

- 3.76 This is particularly common with self-employed individuals, and small business owners:

incomes can vary from between 200 and 300 per cent from the taxable income amounts determined through the taxation department.

...

For example, an individual owning a small business may have a taxable income of approximately \$30,000. Child support could then counter-determine that same person's income as \$70,000 per annum based on a lot of unsubstantiated assumptions. An insurance company assessing the same individual's income for an

57 Name Withheld, *Submission 33*, p. 4.

58 Ms Sally Jope, *Economic Security 4 Women, Committee Hansard*, Canberra, 29 August 2014, p. 25.

59 Sharon, *Community Statement Session, Committee Hansard*, Brisbane, 22 July 2014, p. 37.

income protection claim may then come up with an annual income of \$35,000.

Incomes from small businesses are dynamic – constantly changing with time – and it is essential that they are treated in such a way during the assessment process. There needs to be a constant income review in place for these types of incomes – maybe a periodic assessment every three months. I firmly believe that small business owners will give up trying to maintain their businesses if they are going to be treated unfairly and thus causing unwanted stress and anxiety in an already difficult situation.⁶⁰

and

Income estimates for the self-employed. I am self-employed. I run a business. As you are aware, businesses experience peaks and troughs, especially in the current economic conditions – try explaining that to a child support team. If you are over then you pay more; there is no refund. But, if you are under, the fines and the harassment can drive you insane. I think the system would work best with the GST system, because you have to report anyway; so have the ATO linked to this.⁶¹

- 3.77 The CSP has its roots in the 1980s, when the economy and workforce were in a vastly different structure from today. According to the Australian Bureau of Statistics, casual employment has risen to more than 20 per cent of the workforce since the CSP began in the late 1980s, part-time employment has risen to more than 30 per cent, and the self-employed make up 15 per cent of the workforce.⁶²
- 3.78 Despite the clear changes in Australia's economy and workforce structure since the 1980s, the CSP is designed around assessments that provide certainty to parents for a year or more. However, the broader problem remains: many parents do not have incomes that are stable across the year, and many find it difficult to make accurate estimates of future earnings. At the same time, this is not a problem that is restricted to CSP clients: many families with un-separated parents have to deal with similar uncertainties in their incomes, while managing fixed liabilities such as rent, loan repayments, insurance etcetera.
- 3.79 Chapter 2 considered how the Government might improve the budgeting and financial knowledge of CSP clients. This should increase the financial planning skills and resilience of families with uneven incomes, and

60 Andrew, Community Statement Session, *Committee Hansard*, Brisbane, 22 July 2014, pp. 34-35.

61 Vicki, Community Statement Session, *Committee Hansard*, Brisbane, 22 July 2014, pp. 35-36.

62 Australian Bureau of Statistics, *Australian Labour Market Statistics July 2014*, 8 July 2014.

improve their capacity to deal with financial uncertainty throughout the year.

Minimising income

- 3.80 Other evidence argued that some ATIs, whilst apparently based on the last relevant year of income, do not reflect the actual financial means of a parent. This was commonly associated with claims about an individual's business structures, earning untaxed (cash) income, capital assets, or the amount of support provided by a new spouse.
- 3.81 One of the most common criticisms of the CSP is the capacity for individuals to lower their ATI below their real income, thereby fraudulently minimising their child support liability. This is particularly problematic where individuals fail to lodge a tax return in circumstances where their income is increasing.
- 3.82 The NCSMC noted that '[t]he perennial issue of not having an accurate and timely assessment of income corrodes the overall effectiveness of the [CSP].'⁶³ Echoing this sentiment, Mr Barry Williams gave evidence that:

What we are saying is that we believe when you are paying child support both payers and payees should be made to do a tax return every 12 months. There can be no hassle there then.

...

I am horrified that there are some cases where they can go seven years and there have been no tax returns and they have to try and calculate it. They calculate by asking the employers what their average weekly wages are. But on the payee side there are a lot of payees who are working in family businesses and getting cash in the hand that they do not declare. So it is not an all-round fair system. We believe that a time should be put on it if you are paying child support and if you are receiving child support. A lot of the payees are also working but not putting in tax returns. It is very hard then for the CSA to calculate a fair and equitable figure for both. So what I am saying is that it is the government of the day's job to decide whether we are going to make these people put in a tax return every year, like normal people mostly have to do.⁶⁴

63 National Council of Single Mothers and their Children, *Submission 40*, p. 12.

64 Mr Barry Williams, Lone Fathers Association (Australia), *Committee Hansard*, Canberra, 17 July 2014, p. 13.

3.83 Numerous submissions from individuals emphatically reiterated the necessity of ensuring both parents comply with the law and lodge tax returns every year:

Increase powers of the CSA to enforce tax return lodgements where these are outstanding 3 or more years, particularly where there are arrears.⁶⁵

it appears to me that current methods for collection and enforcement are very difficult to apply in circumstances where payers are not working as employees, not lodging tax returns, when payers can not be located and/or are residing overseas.⁶⁶

The recipient [payee] parent reduces hours of work and also works cash in hand several years post separation. These factors result in a reduction of the income declared by the recipient to the ATO. When CSA calculates the combined income, it is not a true reflection of earning ... In my experience it is not always the paying parent who tries to avoid the responsibility of child support; the recipient parent can make decisions to manipulate the system to their own financial advantage.⁶⁷

3.84 Evidence from the ATO suggests that there may be scope for additional cooperation between it and DHS, in order to provide as much information as possible where a tax return has not been lodged.⁶⁸

3.85 In addition to information sharing, the ATO and DHS have a memorandum of understanding (MOU) under which the ATO pursues the outstanding tax-returns of thousands of CSP clients each year. According to the ATO:

the ATO has agreed to pursue 105,000 lodgments [sic] annually drawn from a prioritised referral list provided by the Child Support Agency.⁶⁹

3.86 However, DHS has stated to the Committee that it provides details of all CSP clients with at least one outstanding tax-return to the ATO, each year. According to DHS, it referred the following numbers of such clients to the ATO in the past three financial years:

- 2011-12: 488,208
- 2012-13: 447,999

65 Name Withheld, *Submission 10*, p. 1.

66 Ms Giovanna Arrarte, *Submission 46*, p. 3.

67 Name Withheld, *Submission 74*, p. 4.

68 Mr Chris Jordan, Australian Taxation Office, *Committee Hansard*, House of Representatives Standing Committee on Tax and Revenue, Canberra, 27 August 2014, p. 15.

69 Australian Taxation Office, *Submission 128*, p. 1.

- 2013-14: 435,425
- 3.87 There is clearly a large gap between the number of clients who have an outstanding tax-return and the number pursued by the ATO each year. It would appear that the ATO is pursuing barely one-quarter of individuals who have failed to lodge their tax-return.
- 3.88 The MOU between the ATO and DHS has been in place since November 2012. It is due to expire in on 30 June 2015, and a replacement MOU will need to be negotiated and agreed⁷⁰. This provides a good opportunity for a comprehensive review of the way the ATO and DHS cooperate in this area, to inform the next MOU. This will be considered further in Committee Comment, below.
- 3.89 The ATO also has the capacity to enforce penalties against individuals who lodge their tax-return late. According to the ATO's guidance to individuals:
- We may apply a failure to lodge on time penalty if you lodge your tax return late. However, it's our policy not to apply a penalty if your tax return:
- is lodged voluntarily, and
 - does not result in any tax payable.
- We are likely to apply a penalty if:
- you have more than one tax return outstanding
 - you have a poor lodgment history, or
 - you have not complied with a request to lodge your tax return.⁷¹
- 3.90 Under current practice, the ATO does not take into account an individual's child support liability – whether fully paid or in debt – when considering whether to apply a penalty:
- [the penalty regime] operates purely on the act of lodgement. So if there is a failure to lodge there is a penalty that is applied when you do not lodge a tax return. There is nothing in the criteria that says that it applies if you are a child support client.⁷²
- 3.91 DHS has advised that it:
- ...does not have any information sharing or coordination arrangements in places with the ATO regarding tax-penalty

70 Department of Human Services, *Submission 99.5*, p. 12.

71 Australian Taxation Office, *What if you don't lodge?*, <https://www.ato.gov.au/Individuals/Lodging-your-tax-return/Do-you-need-to-lodge-a-tax-return--/What-if-you-don-t-lodge-/>, viewed 21 January 2015.

72 Mr David Diment, Deputy Commissioner, Australian Taxation Office, *Committee Hansard*, Canberra, 2 October 2014, p. 5.

remission. The remission of tax penalties falls under taxation law and the department has no authority in this regard.⁷³

3.92 Ms Erin Holland, Deputy Commissioner of the ATO, advised that any change to the penalty regime, to apply penalties to child support clients with a child support liability, would have resource implications for its operations:

Yes, there would be resourcing issues both from a technology perspective but also from an administrative perspective because penalty regimes result in increased contact from the community. So you would have people calling, and obviously there would be requests for remission of penalties.⁷⁴

3.93 The question of penalty regimes for the non-lodgement of tax-returns by CSP clients will be considered further in Committee Comment, below.

3.94 Some individuals, however, frustrate the assessment process by ensuring that their ATI does not reflect their real income. In this context, the inquiry considered the possibility of introducing an anti-avoidance mechanism to prevent individuals from artificially lowering their income through the structuring of their financial affairs, where this is done primarily to reduce their CSP liability. This would be relevant only where a client used legitimate financial and business arrangements with the primary intention of lowering child support payments through the regular assessment process.

3.95 The most apt model for such a mechanism is found in Australian taxation law. Part IVA of the *Income Tax Assessment Act* is designed 'to counter schemes that comply with the technical requirements of tax law but have a dominant purpose of avoiding tax.'⁷⁵

3.96 Under the general anti-avoidance law, there are three requirements for Part IVA to apply:

- there must be a 'scheme',
- the taxpayer must have received a 'tax benefit', and

73 Department of Human Services, *Submission 99.1*, p. 14.

74 Ms Erin Holland, Deputy Commissioner, Australian Taxation Office, *Committee Hansard*, Canberra, 2 October 2014, p. 5.

75 Australian Taxation Office, *Clarifying the operation of the income tax general anti-avoidance rule (Part IVA)*, [https://www.ato.gov.au/General/New-legislation/In-detail/Direct-taxes/Income-tax-for-businesses/Clarifying-the-operation-of-the-income-tax-general-anti-avoidance-rule-\(Part-IVA\)/](https://www.ato.gov.au/General/New-legislation/In-detail/Direct-taxes/Income-tax-for-businesses/Clarifying-the-operation-of-the-income-tax-general-anti-avoidance-rule-(Part-IVA)/), viewed 19 January 2015.

- having regard to eight listed factors, the ‘scheme’ was entered into with the purpose of obtaining the benefit.⁷⁶
- 3.97 An analogous method of dealing with individuals who have structured their financial affairs to reduce their income for child support purposes would follow largely similar lines. In particular, it would need to operate where:
- an individual has structured their financial affairs so that their ATI is lowered, and
 - that structure was used for the primary purpose of lowering their income for Child Support purposes.
- 3.98 In these cases, such a mechanism would allow the Registrar to make an income determination that was based on an individual’s actual financial means, not their lowered income. This will be considered further in Committee Comment, below.
- 3.99 Finally, on a technical matter, the Ombudsman raised concern about the rigidity of rules around the Registrar’s ability to amend an assessment when a tax assessment turns out to be incorrect. As described in the Ombudsman’s case study:

Mr D’s accountant made an error when completing Mr D’s income tax return for 2010-11. As a result, the ATO assessed that Mr D’s taxable income for 2010-11 was \$292,000 instead of \$92,000. The ATO notified Child Support of this assessment and Child Support amended Mr D’s child support assessment accordingly, increasing it dramatically [compared to the previous assessment].

Mr D notified the ATO of the error and the ATO amended his taxable income to \$92,000.

Mr D asked Child Support to correct his child assessment. Child Support told him that it was obliged to continue using the information in the ATO’s first assessment, and that his only option was to apply for a “Change of Assessment in special circumstances”. Mr D did not want to do this, because he believed Child Support should have been able to correct his assessment once it was aware that the ATO’s first assessment was wrong... Mr D has the option of applying for a change of assessment; however this is a complex, intrusive and time consuming process to rectify a simple error.⁷⁷

76 Michael Kobetsky, *Income Tax: Text and Essential Cases*, (7th Edition) Federation Press, 2008, p.638.

77 Commonwealth Ombudsman, *Submission 55*, p. 19.

3.100 Under the *Assessment Act*, the Registrar must not amend the assessment in the kind of circumstance described above, unless one of four criteria are met.⁷⁸ As clearly shown by the case study above, such criteria clearly lead to unfair outcomes for CSP clients. This will be considered further in Committee Comment, below.

Care

3.101 As discussed above, the formula also relies on a determination about the amount of care provided by each parent. Under the *Assessment Act*, there are three kinds of determinations that the Registrar may make:

- actual care: a ‘determination of the percentage of the actual care that each parent provides’, which is based on a pattern of care⁷⁹,
- care arrangement: an interim determination (in certain circumstances), based on ‘a written agreement, parenting plan, or court order rather than on the actual care’⁸⁰, and
- below regular care: where ‘a parent’s care falls below 14 per cent despite the child being made available to the person’.

3.102 Care determinations are not permanent, and the Registrar will revoke and remake determinations if the care of a child has changed. DHS shares information with Centrelink so that, if either CSP or Centrelink makes a care determination, the other will use the same determination.⁸¹

3.103 As discussed above, the amount of care provided by a parent will likely have an impact on the amount of child support they pay or receive. Some parents complained that the actual care determination – based on actual care – did not reflect the agreed care arrangements. This was a particularly common complaint of parents who stated that they were being denied from providing the agreed (higher) level of care by the other parent.

3.104 Parents in this situation had two sources of distress: they were denied the ability to provide the agreed amount care for their children, and were also paying increased child support payments as a result of their diminished actual care. These parents typically called for both better action to enforce care agreements, and for child support assessments to be based on care agreements – the amount of care they expected to provide – rather than on actual care.

78 Section 56(2), *Child Support (Assessment) Act 1989*.

79 Sections 49-50, *Child Support (Assessment) Act 1989*.

80 Sections 51, 52 & 54C, *Child Support (Assessment) Act 1989*.

81 Department of Social Services, *Child Support Guide*, section 2.2.2.

- 3.105 Disputes about care arrangements are generally resolved by the Family Law courts. There is no capacity for the CSP to directly enforce care arrangements, and the inquiry heard very little evidence in support of such a capacity. However, there were many suggestions for the CSP to better take account of agreed care arrangements, in situations where the actual care did not reflect the agreement.
- 3.106 Under current legislation, an interim care determination can be made, so that the assessment will reflect the agreed care rather than the actual care. The logic behind this is that it gives both parents time to resolve the disputed care agreement before the assessment changes. However, this will generally only apply for up to 14 weeks (around 3.2 months), which in many cases is not long enough for a care agreement to be enforced in court or for mediation to commence.⁸²
- 3.107 As noted by the Attorney-General's Department:
- it may be difficult for parents to seek a resolution through the family law system within [the interim care determination] timeframe. ... the average time between contacting a Family Relationship Centre and the first FDR session is approximately 12 weeks. The Federal Circuit Court sets a target of finalising 90% of cases within 12 months and the Family Court of Australia sets a target of finalising 75% of cases within 12 months.⁸³
- 3.108 The Lone Fathers Association (Australia) highlights the impact that this change of assessment can have, noting that the 14 week period where access has not been granted places 'heavy pressure on the parent who is paying child support and also has commitments to pay for legal assistance to enforce the access order'.⁸⁴ The Association suggests that an independent mechanism for the enforcement of court orders should be established.
- 3.109 This will be considered further in Committee Comment, below.

Changes of assessment

- 3.110 The Change of Assessment (COA) process is used to remedy administrative assessments that do not 'provide a fair level of child support' in situations where 'parents or children have special circumstances.'⁸⁵ According to the Child Support Guide:

82 Attorney-General's Department, *Submission 95*, p. 4.

83 Attorney-General's Department, *Submission 95*, p. 4.

84 Lone Fathers Association, *Submission 42*, pp. 5 – 6.

85 Department of Social Services, *Child Support Guide*, section 2.6.1.

The Registrar can only change an assessment if one or more of 10 listed reasons ... is established in the special circumstances of the case ... If one of the reasons for a change of assessment is established, the Registrar must also consider whether changing the assessment would be 'just and equitable' and 'otherwise proper'.⁸⁶

- 3.111 The listed reasons for a change of assessment are, in summary:
1. the high cost of spending time with or communicating with the child,
 2. the high cost associated with the child's special needs,
 3. high costs of caring for, educating or training the child in the way both parents intended,
 4. the child's income, earning capacity, property or financial resources,
 5. the payer has paid or transferred money, goods or property to the child, the payee, or a third party for the benefit of the child,
 6. the high child care costs for the child (if under 12 years of age),
 7. the parent's necessary expenses significantly affect their capacity to support the child,
 8. the income, earning capacity, property or financial resources of one or both parents,
 9. the parent's duty to maintain another child or person, their necessary expenses in supporting another child or person they have a duty to maintain, or their high costs of enabling them to spend time with or communicate with, another child or person they have a duty to maintain, and
 10. the parent's responsibility to maintain a resident child.⁸⁷
- 3.112 There are two major areas of concern relating to the COA, which will be discussed below:
- the COA reasons, especially reason eight, and
 - the COA process, especially for those with persistent special circumstances.

Reason eight

- 3.113 The most controversial reason for a change of assessment is number eight – *the income, earning capacity, property or financial resources of one or both parents*. Professor Parkinson pointed out that the COA process 'balances the need for certainty and simplicity with the need to take account of individual financial circumstances', but that reason eight is 'particularly

86 Department of Social Services, *Child Support Guide*, section 2.6.1.

87 Sections 98C & 117, *Child Support (Assessment) Act 1989*.

broad and vague', and there are 'numerous problems' with its practical application.⁸⁸

3.114 Many submissions criticised reason eight for its wide operation:

In particular [r]eason 8, of the 10 reasons listed for applying for a change of assessment due to special circumstances is regarded as overly broad and non-specific leaving it open to exploitation.⁸⁹

3.115 Professor Parkinson added:

I am concerned about some aspects of it, particularly what we call reason 8, which is the income, property and financial resources of the parties. It is very vague language. I do not think the courts do terribly well in understanding it, with great respect. I have seen some fairly dodgy decisions over the last few years. I think it needs a lot more clarification.⁹⁰

And:

One of the difficulties with reason 8, which is on financial resources, is that it covers a whole variety of different situations. Let me respond first in relation to deemed income where it is alleged somebody is in the cash economy. I do not know there is much more we can do on that than we do, because it is inherently subjective. The agency does have powers to look at bank accounts and so on. The key issue, I think, is that, before deeming somebody to have an income which according to their tax records they do not have, there should be an opportunity given to them to explain what is in their bank accounts. A number of cases I have come across where assumptions have been made about money travelling in and out of a bank account which has a perfectly innocent explanation where the child support review officer has not confronted the payer with that issue and sought their response. So some basic issues of natural justice and procedural fairness would definitely help.

The other big issue in terms of deemed income is capacity to earn. We made recommendations in 2005 for changes to the law which were partially accepted. It seems to me there ought to be a very high bar before we say that somebody has an income they do not in fact have because they have the capacity to earn in a job they do not have. Only yesterday I was dealing with that very issue with a client where nobody is saying he is hiding money or acting in the

88 Prof Patrick Parkinson, *Submission 2*, p. 6.

89 WIRE Women's Information, *Submission 35*, p. 8.

90 Prof Patrick Parkinson, *Committee Hansard*, Sydney, 27 June 2014, p. 2.

cash economy; it is simply that he left a job. He had good reason to leave that job. He was concerned the department did not think he had good reasons, and then he was deemed to have an income he did not in fact have. So I think we do need to look at the law again and to set a very high bar in those situations.⁹¹

3.116 Other evidence supported greater clarity about how reason eight is to be applied:

Ms Lynch: I think that could assist with consistency. We would imagine that there probably is inconsistency. We would probably say that there is inconsistency in decision making even at a court level between judges, so we would imagine that even at an administrative level there is probably inconsistency. It is a real issue of balance between having discretion and having absolutely no discretion. I think we would support some sort of practice directions to assist.

Ms Coulston: We would. I think part of the issue with inconsistency would arise in situations where they have to look at what is just and equitable in the circumstances of changing an assessment. I do not know how you provide a practice direction around that because that is within the legislation and it is one of the requirements of the decision maker. I know that the agency has guidelines already in place and I think having firm guidelines and revisiting those would be very welcome, but I do not know essentially how you would get rid of that issue, although I do have some faith in the fact that there are next steps available to try and address the issue if inconsistency has arisen in a particular matter.⁹²

3.117 Without being prescriptive about its form, evidence to the inquiry overwhelmingly supported greater clarity about how reason eight should be applied. This will be considered further in Committee Comment, below.

Persistent special circumstances

3.118 Families with persistent special circumstances must apply for yearly assessments that are inappropriate, and then submit themselves to immediate COA in order to remedy the unfair assessment:

91 Prof Patrick Parkinson, *Committee Hansard*, Sydney, 27 June 2014, p. 3.

92 Ms Angela Lynch & Ms Erica Coulston, Women's Legal Services Australia, *Committee Hansard*, Brisbane, 22 July 2014, pp. 43-4.

I have endured several COAs, due to the fact that my child suffers a chronic illness... Because of the chronic illness, I have to apply each year to have the same costs considered. Because the father works for cash running his own business, I have to apply each year for CSA to consider his real income. This is traumatic, arduous and something I have to do along side providing 100% care for my child, managing her chronic and life threatening illness, working a professional job and managing a household alone. COA is not straightforward; it requires providing substantial evidence, incurring significant out of pocket costs for appointments and it takes months to complete.⁹³

- 3.119 Whilst the basic path of assessment and COA is appropriate in most cases, there are clearly some instances where circumstances are so similar that going through both stages each year is administratively wasteful and distressing to families. Streamlined 'special assessments' that incorporate both stages for a limited group of CSP cases would address this problem. This will be considered further in Committee Comment, below.

Payment

- 3.120 An assessment will result in a child support liability – the amount for one parent to pay to the other parent at (usually) fortnightly intervals over the course of the coming year or child support period. There are two ways for the liability to be paid – it may either be transferred directly between clients (private collect) or be paid by one parent to the CSP, which then pays it on to the other parent (child support collect or 'child support collect'). By the end of the 2013-14 financial year, 53.3 per cent of cases were 'private collect',⁹⁴ accounting for \$2 billion of assessments. The remaining cases were 'child support collect', with \$1.5 billion transferred.
- 3.121 It should be noted that the CSP assumes all 'private collect' liabilities are transferred, when in reality this is not true. According to evidence from DSS:

Data from internal DSS research prior to 2008 suggested that 21 to 38 per cent of payees in private collect cases report not receiving their payment in full or on time.⁹⁵

93 Name Withheld, *Submission 56*, p. 3.

94 Department of Human Services, *Annual Report 2013-2014*, September 2014, p. 71.

95 Ms Cath Halbert, Group Manager, Department of Human Services, *Committee Hansard*, Canberra, 28 August 2014, p. 1.

- 3.122 Equally important, the \$1.5 billion transferred in 'child support collect' is less than the full amount assessed, given that almost a quarter of parents with an 'active case' have a child support debt. The Committee sought further information from DHS about the assessment and collection rates in child support collect in the 2013-14 financial year, to understand the recent collection performance in the CSP. The evidence provided by DHS shows that the 2013-14 collection rate for child support collect was about 95 per cent – that is, about 5 per cent of liabilities in 2013-14 were not paid.⁹⁶
- 3.123 A child support collect liability may also be paid for indirectly, rather than by the transferring money to the CSP. Such 'Non-Agency Payments' (NAPs) are subject to limitation. As explained by the Child Support Guide:
- In some circumstances the Registrar may credit payments made directly to a payee or to a third party against a child support liability that is registered for collection. The Registrar may also credit the value of non-cash payments or the provision of services in the same way.⁹⁷
- 3.124 NAPs can be:
- a payment made directly to a payee,
 - a payment to a third party in discharge of a debt owed by the payee, payer or both, or
 - a non-cash transaction such as property transfer, or the provision of services.⁹⁸
- 3.125 In general, for the Registrar to credit such payment, both parents must have intended for the payment to be a credit towards the child support liability.
- 3.126 However, some payments may still be accepted by the Registrar as NAPs even if both parents did not share the intention that it would be credited against the liability. To qualify, the payment must be found in a list prescribed in regulation, hence the name 'prescribed payments'. The current list, in general, comprises payments for:
- child care,
 - school or preschool fees,
 - uniforms and books for school or preschool,
 - essential medical and dental services,
 - payees' housing costs, and

96 Department of Human Services, *Submission 99.5*, p. 1.

97 Department of Social Services, *Child Support Guide*, section 5.3.1, viewed 23 December 2014.

98 Sections 71, 71A & 71B, *Child Support (Registration and Collection Act) 1988*.

- payees' motor vehicle costs.

3.127 'Prescribed payments' are also subject to conditions about the amount of care provided by the payer parent, the requirement that the child support liability not relate to an international case, and the NAP cap of 30 per cent of the total liability.

3.128 School fees are an issue that links both assessments and payments. As noted above, a COA may be sought on the basis of school fees, and school fees are also a 'prescribed payment'. The treatment of school fees under the CSP is problematic when there is no agreement by the parents about schooling, or where the agreement about schooling existed in different financial circumstances.

3.129 Prof Parkinson noted the 'arbitrariness' of decisions relating to school fees under the CSP. He suggested that reform might improve the status quo, under which:

the formula will be varied to take account of school fees if the parents had planned on a private school education while they were together and it remains reasonable for the liable parent to contribute to these costs now. I would prefer to see a test along the lines of whether it is reasonable in all the circumstances that a child should have an education at a particular private school taking into account a) the income of the parties b) the previous educational plans of the parties c) the circumstances in which the child has been educated to date and d) the current needs of the child. There are circumstances where due to the particular needs of a child, he or she may best be educated at a private school which can cater to those needs. If the father has sufficient income, it may well be reasonable to ask him to contribute notwithstanding that this had not been planned by the parents at a time before those needs emerged.⁹⁹

3.130 These concerns were echoed by other evidence to the inquiry, including from the Queensland Law Society. The Society said that the when some clients are discouraged from seeking the review of assessments on the basis of school fees, due to the apparent inconsistency in decisions:

School fees are a very good example and one of the most common scenarios where an application for review is lodged. Our members report that clients often receive advice from child support officers that they should not consider a review because they may be worse off.... there appears to be no uniform approach adopted by child support with respect to the payment of [school fees]

99 Prof Patrick Parkinson, *Submission 2*, p. 6.

...

Given that school fees are an increasingly common issue for separated parents, it is our recommendation that child support consider the implementation of guidelines to assist parents and lawyers in dealing with this area.¹⁰⁰

- 3.131 The Social Security Appeals Tribunal (SSAT) also noted the prevalence of applications for review on the basis of school fees:

In the context of applications for review of decisions made under Part 6A of the Assessment Act, costs of education of a child in a private school are a common source of dispute.¹⁰¹

The SSAT also noted that, whilst one of its decisions relating to school fees was challenged in court:

The case does not establish a clear principle as to the point in time when mutual expectation must exist and whether a change of expectation after separation must be mutual.¹⁰²

- 3.132 A number of individuals who spoke during a Community Statement Session raised concerns about the treatment of school fees, both payers and payees. There is considerable support for a specific rule applying to school fees, and this will be considered further in Committee Comment, below.

Child Support Agreements

- 3.133 Parents can also choose to make an agreement about child support, which can then be implemented with the assistance of the CSP. These agreements may be 'limited' (without needing legal advice), or 'binding' (with legal advice). Evidence to the inquiry supported the use of such agreements, but many contributors noted that lawyers could be reticent to assist clients to make binding agreements, because of the complexity and consequences of such agreements:

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.¹⁰³

100 Ms Alison Ross, Law Society of Queensland, *Committee Hansard*, Brisbane 22 July 2014, p. 20.

101 Social Security Appeals Tribunal, *Submission 94*, p. 3.

102 Social Security Appeals Tribunal, *Submission 94*, p. 3.

103 Queensland Law Society, *Submission 100*, p. 5.

- 3.134 Additionally, some evidence questioned the ‘high bar’ that has been set for their review by courts:

where the parties have entered into a Binding Child Support Agreement, it is much more difficult to set aside the Agreement...All of the reported decisions of the Family Courts (that is, the Family Court of Australia and the Federal Circuit Court of Australia) illustrate that setting aside such Agreements requires an applicant to jump a very high hurdle. There is a need to establish “exceptional circumstances” and consequential “hardship” if the Agreement is not set aside.¹⁰⁴

- 3.135 Evidence also pointed to problems with the treatment of binding agreements made before the current legislation came into force:

The law relating to child support agreements was changed from 1 July 2008 to recognise that it should be open to parents to make binding child support agreements provided they receive appropriate legal advice (which must be certified)...However, there is a category of clients who entered the agreements prior to 1 July 2008, when legal advice was not a requirement. Most of these agreements were transitioned by Child Support as "deemed binding agreements". However, the transitional arrangements made no provision for these agreements to be treated differently by the court, and so these agreements are also subject to the "exceptional circumstances" provisions...This would appear to be a legislative oversight given that agreements made before 1 July 2008 were often made without legal advice, and were also made under entirely different legislation.¹⁰⁵

- 3.136 Whilst the use of child support agreements is not widespread, expert evidence to the inquiry clearly believes that their treatment under legislation merits reconsideration. This will be considered further in Committee Comment, below.

Committee Comment

- 3.137 As discussed throughout this chapter, any administrative child support scheme must find a balance between simplicity and complexity. In the Australian scheme, the formula is designed to achieve this balance. However, public confidence in any scheme depends on a shared belief

104 Law Council of Australia, *Submission 59*, p. 3.

105 National Legal Aid, *Submission 57*, pp. 5-6.

about its innate fairness. The basic principles of the current formula are sound: parents should contribute to the raising of their children, both through direct care and financial support, regardless of separation; contributions should reflect both the costs of raising children as well as parents' capacity to pay; the scheme should vigorously pursue those who misuse the system; and Government should not attempt to prescribe the way that parents make legitimate decisions about caring for their children.

- 3.138 Despite this background of principle, there are nonetheless elements of the current formula that clearly need expert attention. The Committee believes that the current system has a number of shortcomings and elements of the formula may not reflect current costs and practices.

The formula

- 3.139 The formula's use of pre-tax income has been criticised during the inquiry. The Committee notes the potential inequity in the way tax relating to child support is calculated, since child support funds are taxed at the payer's tax rate, but actually received by the receiving parent, who will frequently be in a lower tax bracket. This can generate more tax for the Government, but may not be the most equitable outcome. However, care must be taken to ensure that proposed solutions do not result in greater complexity, without delivering any greater fairness. It is also important to ensure that estimation of costs in the child support formula to calculate payment amounts are current and reflect actual costs. The Committee considers that a number of elements used in the child support formula require reconsideration.
- 3.140 In addition, the Committee considers that, in order to ensure the best outcomes for children, Government has a role in assisting families to transition to new financial arrangements, understand and plan for their liabilities. As recommended in Chapter 2, the provision of financial counselling should be an integral party of family support services.

Self-support amount

- 3.141 There have been three major themes in calls to change the self-support amount:
- making it responsive to an individual's circumstances,
 - reverting to differentiated amounts for parents depending on how much care they provide, and
 - reviewing the appropriateness of its alignment with Male MTAW.
- 3.142 While the use of a 'universal' self-support amount has some drawbacks, there is no compelling argument for introducing an individualised self-

support amount. Most of Australia's taxation and social security system applies identically across all of its regions and postcodes. Individuals make decisions about where they live based on the balance of employment, travel, housing and living costs and proximity to friends and family. Further, while individuals on higher incomes might spend more money on food, rent and transport, the price of covering the basic necessities of life do not increase merely because someone earns more money.

- 3.143 The argument for reintroducing unequal self-support amounts would appear to address the poverty of some parents who provide primary care. However, it is fundamentally at odds with the equality at the centre of the formula. It also presupposes that children have a primary carer. While this may be true in many cases, the Committee strongly supports shared care parenting arrangements, and believes that policy should not be changed in such a way that discourages shared parenting arrangements.
- 3.144 The self-support amount was fixed to one-third of MTAWWE almost a decade ago. While using this reference point means that the amount grows in line with wages growth, it does not respond to an increase in the cost of living such as through growth in the consumer price index (CPI). If basic living costs are rising more quickly than wage growth, the ability of parents to survive on the self-support amount will be eroded over time.
- 3.145 Given this, the self-support amount should be reconsidered and amended as necessary, to ensure that it is set at an appropriate level, and that it has a method of indexation to ensure that it is appropriate in future.

Administering the cost and care of children

- 3.146 The formula's treatment of care – through the 'care and cost percentages' – was raised throughout the inquiry. This was particularly controversial in relation to regular and primary care. The Committee believes that this should also be reconsidered, to ensure that it reflects contemporary costs of living, and the costs incurred by parents providing care for their children. It should be reconsidered to ensure that the five broad 'care types' remain appropriate and adequate to reflect current arrangements and costs. The examination should include consideration of the best way to encourage shared care arrangements.
- 3.147 Evidence to the inquiry has reflected a broad range of views about the appropriateness of the current costs of children table, which can be grouped as follows:
- there should be a fixed cost assigned to a child, rather than a cost which reflects the combined income of the child's parents,
 - the costs of children are generally too high, and

- the costs of children are generally too low.
- 3.148 The Committee strongly supports the current underlying principle of the costs of children table: that is, both parents should be expected to contribute approximately the same amount of money as if they had not separated. This is an important principle, because it ensures that parents equally bear responsibility for their own children.
- 3.149 The principle has important implications for families more broadly, and for society. Children should be able to expect that they will be supported as much as their step-siblings, ensuring that there is equity between all children of a parent.
- 3.150 There are, however, criticisms of the costs of children table that bear consideration. Given the near-decade since its creation, given the significant changes in the levels of social security payments in that time, and given the expert advice that a review would be beneficial, the Committee believes that the cost of children table should be reconsidered.

Recommendation 5

In conducting a review of the child support formula, the Committee believes that the Australian Government should have regard to a range of guiding principles including the best interests of the child/ren involved, whether fair and amenable private shared parenting arrangements have been successfully entered into, and whether any family violence is present in the family dynamic.

Taking into account the framing principles of the Child Support Program which aim to ensure that the system operates in the best interests of the child, the Committee recommends that the Australian Government review the Child Support Program to ensure the adequacy of calculated amounts and equity of the program for both payers and payees with respect to:

- the current self-support amount and indexation mechanisms;
- the cost of children table and indexation mechanisms;
- the use of gross income levels for child support payment calculations; and
- consideration of child support income management where there are substantiated allegations of child support payments not being adequately spent on the needs of the child.

Assessments

Income

- 3.151 As noted in this chapter, one of the most frequent complaints about the Child Support Program – from all parents who contributed to the inquiry – is the inaccuracy of income information. The Program relies on individuals providing correct information. When one client intentionally provides incorrect information, or refuses to provide information, the Program’s inability to make fair assessments then erodes the faith of other clients. The long-term success of the Program depends on the perceived fairness of its assessments.
- 3.152 There is evidence that some clients continually frustrate the assessment process by avoiding their tax responsibilities. Whilst DHS and the ATO clearly work together to reduce the impact of this, it is unfortunate that some clients do not to act responsibly and lodge accurate tax returns on time.
- 3.153 It is difficult to assess the effectiveness of current arrangements, particularly given that they rely on cooperation between different agencies. Nonetheless, the disparity between the number of CSP clients who fail to lodge tax returns and the number of such clients pursued by the ATO is alarming. The Committee believes that the cooperation between the ATO and DHS to address the non-lodgement of tax returns by CSP clients needs to be closely audited by the Australian National Audit Office. Further, negotiations of the subsequent MOU between the ATO and DHS should not commence until the audit has been presented in Parliament, and the implementation of the recommendations of that audit may be incorporated into the MOU.
- 3.154 In making this recommendation, the Committee recognises the statutory independence of the ANAO, and the discretion of the Auditor-General in relation to whether or not a particular audit is to be conducted.

Recommendation 6

The Committee recommends the Australian National Audit Office conduct a performance audit of the cooperation between the Australian Taxation Office and the Department of Human Services to address the non-lodgement of tax returns by clients of the Child Support Program. The recommendations of the audit should be incorporated into the next memorandum of understanding between the Australian Taxation Office and the Department of Human Services relating to this area of cooperation, negotiations of which should not commence until the audit has been presented in Parliament.

- 3.155 The Committee also believes that a specific penalty should be introduced to discourage individuals from avoiding their obligation to lodge a tax return each year. Although there is an existing penalty regime for non-lodgement, penalties are applied at the discretion of the ATO.
- 3.156 Having a distinct and non-discretionary penalty applied to all CSP clients who fail to lodge their tax return on time will serve as a deterrent to non-lodgement, and signal the Government's intention to stop individuals abusing the taxation process to avoid their child support responsibilities. The provision should allow for defences where the CSP client has a reasonable excuse for non-lodgement, such as circumstances outside their control. An ATO/DSS/DHS working group should be established to recommend the size of the civil penalty.

Recommendation 7

The Committee recommends the Australian Government amend current policy to ensure that the penalties applicable to the non-lodgement or late-lodgement of tax returns are enforced for all clients of the Child Support Program. The penalty should allow for defences where the individual has a reasonable excuse for non-lodgement, such as circumstances outside their control. Consideration should also be given to the annual indexation of the penalty. A working group comprising representatives of the Australian Taxation Office, the Department of Social Services and Department of Human Services should be established to recommend the size of the penalty.

Care

- 3.157 While many contributors to the inquiry criticised the inability of the CSP to enforce care arrangements, no expert evidence supported any changes in such a direction. Enforcing care agreements should remain a matter for Family Law, and the Committee supports the proper resourcing of Federal Courts to ensure that such enforcement is timely.
- 3.158 However, current arrangements for the assessment of care can fail to take account of the agreed care, and cause a parent to be assessed at a higher payment level despite a care agreement (and their desire to provide the agreed care). An interim determination may put a pause on any assessment changes whilst the care arrangements are resolved, enforced or modified in court. However, the fourteen week limit on interim determinations is not long enough in many cases, which may cause a parent's child support liability to increase just as they attempt to enforce parenting orders through the courts. As a result, this time period should be abolished.

Recommendation 8

The Committee recommends that the Australian Government amend legislation to enable a greater period of time before determining when to adjust the amount of child support payable in interim care determinations. The Committee considers that the current fourteen week period, after which Department of Human Services changes the child support payable to reflect the care taking place at that time, does not provide sufficient time for relevant legal proceedings to be completed or for prior agreed arrangements to be enforced by a court or for revised arrangements to be agreed upon. The best interests of the child must be paramount in any amendment made.

- 3.159 There are a number of international models that link the enforcement of contact orders with the child support payment system. In particular, Denmark provides a model which may have some application to Australia. The 2003 report of the House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story: Inquiry into child custody arrangements in the event of family separation*, stated that:

The committee has noted an administrative approach to contact disputes which is operating in Denmark [footnote removed].
Contact disputes are dealt with separately from other parenting

issues but within the context of a 'normal package' of contact arrangements which is promoted by the Danish government. Courts resolve the major issue of custodial responsibility.

An aggrieved parent can initiate a complaint with the County Governor's office in writing. A lawyer in that office will contact the other parent for a response. A meeting will be held and the parties can be referred to mediation. If it cannot be resolved the lawyer will determine the issue by an order that is enforceable in court. There is a right of appeal to the Ministry of Justice. Enforcement is a very simple, non-adversarial but still court based process, with a meeting with a judge often resolving the matter. Penalties are available.

"The system has many advantages over the current court-based approach in Australia. ... there are no procedural hurdles ... [it] is not adversarial ... The role of the lawyer ... and ... of the judge in an enforcement process, is to work out what the dispute is all about and to reach a decision, if the parties cannot reach their own agreement after counselling. The environment of an office is much more conducive to non-adversarial processes than a courtroom" [footnote removed].

Other advantages appear to be that it is a quick and cheap process ... These models provide some valuable insight into how family dispute determination processes can be non-adversarial, and relatively simple, but still apply the requirements of procedural fairness.¹⁰⁶

Recommendation 9

The Committee recommends that the Australian Government consider international models for enforcing contact/parenting orders through the child support program and how these models may be applied to the Australian context. The Committee notes that where family violence is present, these models may not be appropriate.

106 House of Representatives Standing Committee on Family and Community Affairs (2003) Every picture tells a story: Inquiry into child custody arrangements in the event of family separation, 4.78 – 4.80.

Changes of Assessment

- 3.160 The COA reasons and process received considerable attention throughout the inquiry. However, as pointed out at the start of this report, the scheme produces satisfactory results for most parents most of the time. COAs have limited applicability, and are not a central experience for most CSP clients.
- 3.161 Nonetheless, there is considerable concern about reason eight, and the Committee believes that greater clarity around its use should be provided.

Recommendation 10

The Committee notes that the intent of the “capacity to earn” criteria is to prevent payers deliberately avoiding their financial responsibilities in respect to shared parenting. However there are also genuine instances where a person’s earning capacity may decrease due to decreased market demand for certain skills, the need to retrain, health issues or other life changes. A greater degree of flexibility is required. The Committee therefore recommends the Australian Government review “capacity to earn” as a rationale for initiating Changes of Assessment under Reason 8.

Payments

- 3.162 As noted above, school fees can be a common source of disagreement between separated parents. The Committee sought the advice of numerous contributors to the inquiry relating to school fees, and many contributors supported more clarity around their treatment. The Committee believes that school fees should be explicitly dealt with under the CSP, so that there is greater certainty around how school fees are treated.

Recommendation 11

The Committee recommends that the Australian Government seek to develop a clearer system for resolving disputes about the payment of school fees as Non-Agency Payments.

Technical amendments

- 3.163 Child Support Agreements provide a valuable element of flexibility for parents under the CSP. Given the Committee's earlier recommendation for an expansion of mediation services, it is to be hoped that more parents will be able to enter long-standing agreements about child support, both in limited and binding form.
- 3.164 However, contributors raised serious concern about the treatment of binding agreements entered into before 1 July 2008, and the very high bar for courts to set aside binding agreements.
- 3.165 The Committee is also concerned about the impact of the legislative rules around the Registrar's ability under section 56(2) of the Assessment Act to amend a child support assessment when there is an error in the tax assessment made by the ATO.
- 3.166 There was no clear agreement from the evidence about how these problems should be resolved, and so the Committee is not in a position to recommend specific legislative changes. Rather, the Committee believes that these issues should also be reconsidered by the Australian Government.

Recommendation 12

The Committee recommends that the Australian Government consider matters pertaining to:

- **the hurdle for courts to set aside Child Support Agreements made before 1 July 2008, and to set aside all Binding Child Support Agreements, and**
- **the amendment of section 56(2) of the *Child Support (Assessment) Act 1989* to allow the Registrar to take into account amended tax assessments.**