



24 June 2014

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

Dear Committee Secretary,

RE: Parliamentary Inquiry into the Child Support Program

About National Legal Aid

National Legal Aid (NLA) represents the Directors of the eight state and territory legal aid commissions (commissions) in Australia. The commissions are independent statutory authorities established under respective state or territory enabling legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

NLA appreciates the opportunity to provide comments to this Inquiry.

Background

Legal aid commissions have solicitors who specialise in child support as part of our family law practices. These practices have been operating for decades. Our staff have extensive experience assisting both payers and payees of child support and of interactions with the Department of Human Services Child Support, referred to herein as ("Child Support"), the Social Security Appeals Tribunal (SSAT), and the courts in child support matters.

The introduction of the child support scheme in 1988, and ensuing reforms to it including the current child support program, have resulted in an increase in the understanding and acceptance of the financial responsibilities associated with children, and the support

appropriately provided to those children. It is acknowledged that the program has some complexity. However, the circumstances of people are many and varied, and the program endeavours to take account of these. It is suggested that an administrative scheme capable of resolving everyone's issues simply, particularly given the significant contests between some of the parties involved, is likely to be impossible. The current program is therefore considered by us to be generally effective and our following comments are provided in this context.

Terms of reference

- **Methods used by Child Support to collect payments in arrears and manage overpayments**

It is appropriate that the collection of child support arrears, and the management of overpayments by Child Support, are underpinned by policies and guidelines which are applied in a non-discriminatory manner. It would be beneficial if some collection and management policies were more transparent.

It is suggested that a high level of skill is required to manage the tensions between collecting arrears and taking account of very varied individual personal circumstances. It is essential that Child Support staff are appropriately equipped to manage this tension, thereby ensuring that people are making appropriate payments sustainable over time which reflect individual circumstances and take account of the cost of self-support.

Efforts could also be made to ensure any debt or overpayment is correctly calculated before enforcement action is pursued. Child Support customers should be referred for legal advice where it is apprehended that there is an issue with the debt. It is a more efficient use of resources to ensure an accurate basis for the calculation prior to commencing enforcement action.

Particular issues include:

Investigative powers and matters selected for enforcement by Child Support

Child Support has broad powers under child support legislation to collect arrears. However, commissions are regularly approached for assistance by payees seeking legal advice about enforcing child support arrears where Child Support has not been successful collecting via administrative methods. This is often in circumstances where it is suggested that the payer has more income/assets than would appear on the face of things and/or has particularly complex financial affairs.

Commissions do what they can to help payees with enforcement by providing information, advice, assistance, and occasionally representation. Commissions do not have investigatory powers beyond searches that can be undertaken of public records such as land titles or company searches, and court orders will be required for discovery of relevant matters.

Legal aid funds are limited and are necessarily prioritised to those matters where people's safety is at risk, and there is merit in pursuing the matter. Taking enforcement proceedings in courts can be complex, expensive and time consuming. Consequently, where it appears that the payer's capacity to meet the debt may not be demonstrated, and/or that the amount which could be recovered would not justify the expenditure of public funding to initiate proceedings, the payee can find themselves without a remedy.

Our observation of matters selected by Child Support for court enforcement, is that these matters are more likely to be cases where the payer has real property, including where that property is his or her home (an evident asset), and not those matters where the payee alleges that the payer is hiding or alienating income and/or assets and/or other financial resources.

Commission experience suggests that there are payers who have used complex business structures or who have alienated income or assets to avoid payment of child support. Whilst potentially more challenging to pursue such matters, requiring active investigation of income or assets, it is suggested that these matters should be subject to thorough investigation and systematically prioritised for arrears action by Child Support. To the extent that it is not already happening, the system would also benefit from stronger links between the change of assessment decision making process and enforcement (i.e. where a payer's financial capacity has been investigated in the course of making a change of assessment decision, this matter could then be tracked, and if the decision is not complied with, the matter could be referred directly for enforcement action).

Enforcement time frames

The experience of commissions is that court action is usually commenced only once a debt reaches a significant level, and that sometimes the debt is enforced at a time when the children (who should benefit from collection) are close to 18 or over 18. See for example, the comments of Federal Magistrate Scarlett (as he then was) in *Child Support Registrar & Carpenter* [2012] FMCAfam 829 at paragraphs 92 and 109.

Arrears policy

We understand that there is also currently a policy of Child Support that payment arrangements should ensure that arrears are paid off within 2 years. As a matter of policy this is clearly a desirable outcome. Commission experience is that where payers have arrears and receive a Centrelink benefit, Child Support will deduct the statutory maximum (currently around \$45 per fortnight) from the benefit which, we expect, helps to meet the policy imperative. Child Support can be expected to inform people of actions to be taken and to provide processes to reduce the imposed statutory maximum where it would be appropriate to do so. However, for some people, understanding correspondence and initiating and negotiating reduction processes can nevertheless be onerous. Commissions assist people who are not capable of understanding communications received or of managing these types of negotiations on their own.

International collection

Case Study 1:

A client approached a commission seeking to enforce child support for her 15 year old daughter. She had separated from the father 10 years ago, and although she had always had a case registered with Child Support, she had received virtually no child support over the years. Child support arrears were around \$10,000.00. Approximately 3 years ago, the paying parent re-partnered and relocated to another country where he was gainfully employed. Child Support was in contact with him and regularly sent him debt notices, and made telephone calls requesting payment. These requests and notices were seemingly ignored by the payer. Child Support advised the client that although the place of relocation was a "reciprocating jurisdiction" for child support purposes, that there was no agreed system for transmission of the debt between that particular jurisdiction and Australia. Consequently, unless the paying parent returned to Australia there was no way the debt could be enforced.

The difficulties highlighted in case study 1 could potentially be addressed by taking steps to strengthen international relationships and cooperation. Australia was involved in negotiations for the 2007 Hague Conference Convention on the International recovery of child support and other forms of family maintenance. We understand that Australia has not yet ratified the convention.

Departure Prohibition Orders

Commissions are contacted from time to time for urgent advice by paying parents who have been prevented from returning to their country of residence. Conversely commissions have assisted and advised a significant number of payees who are receiving no financial support for their children because the other parent has relocated overseas. For these parents, a DPO (should the payer travel to Australia) may represent the only way of ever securing the child support which should appropriately be paid. Notwithstanding that this could be considered a drastic mechanism for collecting child support, it is nevertheless suggested that it may be a mechanism appropriately implemented in cases where a payer travelling to Australia is clearly aware of the child support liability and has consistently avoided or refused payment, and any family violence issues have been taken into account¹.

Overpayments

A significant number of overpayments to payees are caused by factors outside the control of the payee, for example, late lodgement of tax returns on the part of a payer. Where reduction of overpayments is implemented by Child Support, commission experience is that the overpayment can result in the immediate cessation of child support until the overpayment is absorbed (and Child Support may also take other action, for example

¹ See Family Violence and Commonwealth Laws - improving legal frameworks (ALRC Report 117) February 2012 P.321

intercepting payee's tax refunds). This can cause considerable and unexpected hardship for a payee with the care of children. Some parents may not be aware of alternative options (e.g. payment plan) or have limited capacity to negotiate a preferred overpayment option.

- **Whether the child support system is flexible enough to accommodate the changing circumstances of families**

NLA is of the view that the child support system has considerable flexibility built into it to reflect the changing circumstances of families.

Assessments for past child support periods

It is difficult, however, to change assessments for past child support periods. We recognise that there is sound policy behind this - retrospective changes can result in over payments or arrears. However, commissions regularly assist people who have fallen into child support arrears as a result of failing to engage effectively with Child Support about changes to their incomes. This can mean they are assessed on incomes that are inaccurate, for example 2/3 Male Total Average Weekly Earnings ("MTAWE"). In our experience, the rules against retrospective changes impact more heavily on clients who have low levels of literacy; who are from culturally and linguistically diverse (CALD) backgrounds; who have health problems including mental illness; or who are restricted from engaging with government agencies because of social disadvantage or incarceration. It can be extremely complex to assist these clients to correct a debt that may be several years old, and it can involve expensive remedies (for example an application to court is required for a departure from an assessment older than 18 months). It is suggested that consideration be given to allowing child support periods that are older than 18 months to be changed through Child Support's administrative change of assessment process without an application to court being required. Through the change of assessment process, the decision maker retains the discretion to make a decision that is fair to both parties (i.e. the decision maker can consider the impact of creating either arrears or overpayments which would cause hardship).

Child Support Agreements

Child support agreements can also be restrictive and inflexible unless parents and their legal advisers have adequately considered and addressed possible changes in circumstances. 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). These binding child support agreements can only be set aside by a court in "exceptional circumstances causing hardship". 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 (see the comments of Justice Watts in paragraphs

Keane & Keane [2013] FamCA 332, particularly at paragraphs 67 - 72). 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.

- **The alignment of the child support and family assistance frameworks**

There are strong public policy reasons for the links between child support and family assistance frameworks. The basic premise is that family assistance payments are reduced when payees receive child support. This reflects the principal object of the Child Support (Assessment) Act 1989: "to ensure that children receive a proper level of support from their parents" (section 4) reducing reliance on government payments.

It is suggested however that there is considerable confusion in the community about the extent to which Child Support and Centrelink interact and share information. Both Child Support and Centrelink are now part of the Department of Human Services, and this is reflected on correspondence to clients and by a shared website. This is likely to contribute to the misperception that information provided to or collected by one department will automatically be transmitted to and used by the other.

It is also not always easy for people to obtain accurate information about what the interaction of the two frameworks will be in various circumstances. This impacts on the ability of parties to come to agreements about child support, including agreeing to pay child support privately. Please also see our comments below in relation to the effectiveness of mediation.

Case study 2:

Child Support is deducting payments from a payer's disability pension. The payer assumes that as a result, Child Support is aware that he is on a benefit and that he is meeting his child support liability. He fails to understand that he is incurring a debt because Child Support has assessed him on a default income of \$45,000. Child Support tells him that he was on a default income because he did not lodge his tax return. When he said that he was not required to lodge as he was a disability pensioner, Child Support told him: "you still have to lodge if you are a Child Support client". As the time for lodging the relevant tax return had passed, it was not straightforward to correct the assessment and required legal intervention.

The relationship between private collection and entitlement to FTB(A) can also produce an unfair outcome when retrospective changes are made to an assessment. Examples can be found in cases where retrospective changes to the assessment increase the amount of child support payable. This can happen in a number of different circumstances; where a default income is used and the paying parent subsequently lodges a higher taxable income for the relevant period; where the paying parent estimates his or her income, and this estimate is later "reconciled" by Child Support at a higher rate; or when the level of care recorded in the assessment changes retrospectively.

In private collect cases, Centrelink calculates the entitlement to FTB(A) payments by assuming that the payee is receiving the amount of child support that is assessed to be paid. If retrospective changes are made to the assessment, the calculation of FTB(A) is also revised and clients can be told that they have been paid more FTB(A) than they should have. This is the case even though they have not actually received the newly calculated child support payments, and in many cases, have little or no chance of ever receiving them.

There appears to be a lack of consistency in the way these cases are dealt with by Centrelink, and in the information that is provided to clients. For example, we are aware of parents who have not been advised of the option to seek a review by an Authorised Review Officer, the option to be referred to a social worker or the availability of a FTB(A) debt exemption.

Child Support actively encourages parents to make their own private collection arrangements about child support. However, the risk of an adverse impact on Family Tax Benefit Part A payments makes it difficult for legal practitioners to recommend private arrangements to payees. It is suggested that consideration could be given to permitting a payee to register these retrospective arrears for collection with Child Support. The case study below illustrates the issue.

Case Study 3:

A client sought assistance from a commission. She had a private collect case and the father was originally assessed to pay the minimum rate for their three children. The client was not aware of the father's financial circumstances and did not question the assessments. Child Support retrospectively re-assessed several years of child support when the father lodged tax returns (late). This resulted in assessments that were much higher than the minimum rate. Because the case was private collect, Centrelink assumed that the client had received the (newly revised) assessed rate of child support. Shortly afterwards, the client was issued with a notice from the Family Assistance Office advising her that she had been overpaid almost \$8,000 in Family Tax Benefit A and that this would need to be repaid. Centrelink then took immediate steps to recover the overpayment by withholding the supplementary amount she was entitled to receive, as well as a portion of her Family Tax Benefit. When she contacted Child Support she was told that as the case was private collect they could not assist in collecting the shortfall from the payer.

Child Support Solicitor Hotline

Child Support operates the “child support solicitor’s hotline” (the “hotline”). This service is used by our solicitors and is considered invaluable by them. Our staff often use this service when they have clients with them who are not at all clear about what their child support situation is, or what the content or import of any communications they have received from Child Support is. The hotline generally enables a quick clarification between service providers of what the real issues are and the solicitor can take immediate instructions from the client, who may not otherwise be readily contactable for a range of

reasons such as homelessness, no phone, mental health issues, substance abuse issues etc. The solicitor is then in a position to inform Child Support of the client's situation and any proposals as appropriate. It is suggested that it would be an efficient use of resources for Centrelink to have a service which mirrors Child Support's hotline.

- **Linkages between Family Court decisions and Child Support's policies and processes**

Decisions of the family law courts inform Child Support about approaches taken in relation to enforcement etc, and legal practitioners rely on these decisions in advising clients and interacting with other practitioners and agencies.

Commission staff will often be required to look at past orders in relation to child support which are brought in by people seeking legal assistance. There is some experience of orders where it is unclear whether, for example, payments such as school fees are intended to be counted as payment of or additional to child support. There may be a need for increased education as to how orders could be best drafted so that they provide for maximum appropriate support of children, and do not lead to obligations that are weaker than the minimum requirement of the Child Support system.

See also our comments below in relation to the alignment of care under the following term of reference, i.e. "How the scheme could provide better outcomes for high conflict families".

- **How the scheme could provide better outcomes for high conflict families**

NLA notes the Inquiry of the Australian Law Reform Commission in relation to Commonwealth laws, including Child Support and Family Assistance, and family violence and in particular the 2012 report *Family Violence and Commonwealth Laws – improving legal frameworks*, and the related consultations and submissions made to the Inquiry.

NLA also notes the work of Child Support in identifying and addressing issues of family violence.

It is our experience that Child Support is increasingly capable of identifying family violence and responding appropriately to it. Ongoing appropriate referrals for legal advice and action as appropriate, including to address safety and other family law and related issues, will continue to be beneficial.

Child support is often part of, or the undercurrent to, a wider family law dispute between parents. NLA supports the "alignment of care" legislation introduced in 2010 as a positive step towards ensuring children involved in high-conflict family law situations are still adequately provided for financially. The alignment of care legislation ensures that the same principles are used for determining care percentages for child support purposes as for family assistance purposes, and also ensures that child support payments and family assistance payments are directed to the household in which the child is actually residing.

- **Assessing the methodology for calculating payments and the adequacy of current compliance and enforcement powers for the management of child support payments**

The child support formula that has been in place since 2008 is multi-faceted and complex, and assessing the methodology is therefore likely to be a wide ranging and sophisticated task. As suggested above, it is our view that the current formula is flexible and that a system which addresses everyone's needs immediately may be impossible. It is further suggested that if any change to the formula were being contemplated that great care should be exercised before any changes are made, as changes to suit particular individuals or groups may have unintended consequences.

With regard to the adequacy of compliance and enforcement powers for the management of child support payments please refer to our comments under terms of reference 1.

- **The effectiveness of mediation and counselling arrangements as part of family assistance frameworks**

Broadly, NLA welcomes greater discussion and education about the use of mediation and counselling in response to family law matters, including in relation to child support and family assistance issues.

Child support is a technical area of law. The child support system provides a formula, the adequacies of which have been tested. Decisions reached at mediation without legal advice on the specifics of child support obligations, and without knowledge of legislative requirements, may result in an unenforceable agreement and disadvantage, often to the payee. Child support disputes can also include family violence issues, and mediation of issues may not be appropriate.

Family dispute resolution (FDR) is currently provided by legal aid commissions, Family Relationships Centres (FRCs), and other frontline services.

Commissions provide a legally assisted model of FDR to those parties where at least one is eligible for a grant of legal assistance. All matters are screened for risk and a determination is made about whether the matter can be appropriately conferenced. Commission FDR conferences may occur face to face, by shuttle, or by video/phone, depending on what is appropriate in the particular case. The legally assisted model of FDR offers significant benefits, including that parties are informed of their legal rights and responsibilities at law, and of the interplay between child support and other aspects of family law and family assistance. The model also addresses the power imbalance which is commonly seen between parties. Commission FDR conferences have achieved high settlement rates. These are considered especially significant as they are achieved in family law matters which are priorities under the National Partnership Agreement on Legal Assistance Services involving complex issues and often highly conflicted parties in acute circumstances. Conference chair people are lawyers and/or social scientists who are accredited Family Dispute Resolution Practitioners (FDRPs) pursuant to the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008*. They bring a research based,

child focussed approach to resolving parenting matters between parties (i.e. where the child should live and when they should spend time with each parent).

Legal assistance is essential if a binding child support agreement is contemplated, and is important in other matters because of the complexities of the child support system, and its interaction with family law and family assistance. Some of these issues have been highlighted above. The problems that can arise where mediated agreements are made about child support without appropriate advice are highlighted in case studies 4 and 5 below. These problems arise where people involved in the process do not adequately understand the interactions of child support, family assistance and family law.

In our experience economic abuse is an aspect of family violence commonly found in child support matters. It may or may not be accompanied by other forms of family violence. Economic abuse in child support matters is often characterised by the payer hiding or alienating income or assets, lodging late returns and engaging in behaviour which compels the payee to initiate, or respond to, various applications for changes of assessment if they are to have any hope of receiving appropriate levels of child support. For these reasons, and to the extent that it is suggested that such matters should be mediated, NLA recommends thorough screening to ensure that the individual matter is appropriate for the mediation proposed and further that the parties have received legal advice in relation to all related matters.

We understand that parents who make change of assessment applications to Child Support can be offered a referral to a mediation service. There may be a reluctance to negotiate over money with the other party, particularly if there are power imbalance issues, and possibly a hesitance on the part of some FDRPs to engage with child support issues generally, and particularly where they are alert to the potential for underlying family violence which may render the matter unsuitable for mediation.

It would be a significant concern if mediations about child support were to re/open issues about where child/ren should live or spend time because a party inappropriately seeks to leverage a change in child support.

Case study 4:

When they first separated a payer and payee attended a mediation session at a service provider that was not a commission. They reached an agreement to share the care of their two primary school aged children equally. They also agreed that neither would seek child support from the other, but would each pay the bills and school costs, etc. for the children which came up when the children were in their care. The father worked full time and was able to arrange his hours flexibly. The mother worked part time and needed to apply for family assistance payments to supplement her income and help her provide for the children when they were in her care. When she applied for payments from Centrelink she was required to make an application to Child Support for an assessment. As this requirement had not been explained to the parties at mediation they were both frustrated and conflict increased.

Case Study 5:

A payer and payee agreed to mediation at a service provider that was not a commission to discuss the payer's debt with Child Support which was over \$10,000. The payee agreed that if the payer paid her a lump sum of \$5,000 she would forgive the rest of the debt. They did not receive advice about the implications of doing this. The payer obtained a personal loan and paid \$5,000 directly to the payee. As per their agreement the payee informed Child Support that she had received the money and that she wished to "discharge" the remainder of the arrears. Shortly afterwards she was advised of a Family Tax Benefit debt because she had not collected the full amount of the arrears.

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

Please see above comments above.

Conclusion

We thank you for the opportunity to make this submission. Please do not hesitate to contact us if you require any further information.

Yours sincerely,

George Turnbull
Chair