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Child Support Legislation Amendment Bill 2004

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

Bills Digest
No. 123 2003–04

Child Support Legislation Amendment Bill 2004

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Law and Bills Digest Section
22 April 2004

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Child Support Legislation Amendment Bill 2004

Date Introduced: 31 March 2004

House: House of Representatives

Portfolio: Family and Community Services

Commencement: Schedule 1 commences 28 days after the proposed Act receives Royal Assent. Schedule 2 commences on the day when the proposed Act receives Royal Assent. Schedule 3 commences on various dates (mainly on Royal Assent or 28 days thereafter), except for item 10 which is taken to have commenced on 30 June 2001.¹

Purpose

The Bill amends the *Child Support (Assessment) Act 1989* ('the Assessment Act'), the *Child Support (Registration and Collection) Act 1988* ('the Registration Act') and the *Family Law Act 1975* for four main purposes.

First, the Bill incorporates certain matters relating to the assessment and collection of child support presently contained in regulations into the parent Acts. Second, the Bill refines some provisions to clarify, among other things, that Australian child support legislation does not apply if both parents reside outside Australia.

Third, the Bill is designed to improve access to courts for review of child support decisions. Fourth, the Bill seeks to 'address anomalies in the current system or improve aspects of child support administration', such as giving a Minister a right to access personal information about a constituent (where the constituent has expressly or impliedly consented to the Minister having access to that information for the purpose of responding to a request for assistance from another member of parliament on behalf of the constituent).

The Bill also amends section 33 of *A New Tax System (Family Assistance) (Administration) Act 1999* to provide that the Secretary can take account of a child support debt in determining that an individual is entitled to be paid a family tax benefit advance for a standard advance period.

The Bill does not give effect to the recent recommendations for the revision of the child support scheme contained in the 2003 report by the House of Representatives Standing Committee on Family and Community Affairs, *Every picture tells a story: report on the*

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inquiry into child custody arrangements in the event of family separation).² The Child Support Agency confirms this view.³

Background

Primarily, child support in Australia is dealt with by three Acts (and regulations made to give effect to those Acts): the Assessment Act, the Registration Act and the Family Law Act. Whether one or more of these Acts applies is determined by the circumstances of the case. For example, the Family Law Act will not apply to most cases (see below).

In short, the Assessment Act applies if the child for whom child support is payable was born on or after 1 October 1989; if the parents separated after that date; or if a sibling was born after that date. Among other circumstances, the Assessment Act does not apply if the child is over 18 years of age; married or living in a de facto relationship; or is not present in Australia, ordinarily resident in Australia or in a ‘reciprocating jurisdiction’. The Assessment Act contains a formula by which the Registrar of Child Support—in reality an administrative officer of the Child Support Agency—assesses child support. It provides mechanisms for seeking internal review of administrative assessments and for seeking judicial review (including the power of the court, among other things, to order a departure from the administrative assessment if ‘in the special circumstances of the case’, the assessment is ‘unjust and inequitable’; see section 117).

The Registration Act provides for the registration and collection of child support liabilities. Such liabilities may arise from administrative assessment of child support, the registration of a child support agreement (including an agreement entered into overseas), or a court order. The Child Support Agency usually collects child support through deductions from the liable parent’s salary or wages. It can also collect arrears this way. Once a liability is registered, the debt becomes a debt owed to the Commonwealth. As such, only the Commonwealth (and not the payee) can commence legal proceedings for the recovery of the debt. It is important to note that not all child support payments or arrears are collected under the Registration Act. For example, a payee who is not in receipt of an income-tested pension or benefit may elect not to have child support payments collected under the Act (in which case, the payer makes payments directly to the payee or to a third party on behalf of the payee).

Division 7 of Part VII of the Family Law Act deals with child maintenance orders. Importantly, section 66E provides that a court must not make or vary a child maintenance order if an application for administrative assessment of child support could be made under the Assessment Act. The court may, however, make or vary a child maintenance order in relation to those children to whom the Assessment Act does not apply because they were born before 1 October 1989 (—as a matter of mathematics, such children would already be 14.5 years old and over). Further, section 66L of the Family Law Act provides that the

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court can make a maintenance order in relation to a child who is over 18 years of age if the court considers that the maintenance is necessary:

- (a) to enable the child to complete his or her education; or
- (b) because of a mental or physical disability of the child.

None of the political parties has expressed a view about the Bill. Further, there has been no press report about the Bill to date. This is not surprising, given that the proposed amendments seem to be largely uncontroversial.

Main provisions

Schedule 1

Schedule 1 commences 28 days after the proposed Act receives Royal Assent.

Schedule 1 incorporates into the Assessment Act, the Registration Act and the Family Law Act certain matters relating to overseas maintenance arrangements currently contained in regulations made under those Acts. The relevant regulations are the *Child Support (Assessment) (Overseas-related Maintenance Obligations) Regulations 2000* and the *Child Support (Registration and Collection) (Overseas-related Maintenance Obligations) Regulations 2000* ('the regulations').⁴ The regulations deal with Australia's obligations under various international agreements.

The power to make the regulations was conferred by the *Child Support Legislation Amendment Act 2000*. That Act amended the Assessment Act, the Registration Act and the Family Law Act. Some amendments contained in the *Child Support Legislation Amendment Act 2000* are referred to as 'Henry VIII clauses', because they provided for the making of regulations which are inconsistent with the parent Act and provided that the regulations will prevail to the extent of any inconsistency with the parent Act.

In parliamentary debate on 10 April 2000 concerning the Child Support Legislation Amendment Bill 2000, Senator Newman, the then Minister for Family and Community Services, explained that the Bill was intended to give effect to an international agreement between Australia and New Zealand about child support. That agreement was to take effect from 1 July 2000, but due to pressures on the Office of Parliamentary Counsel, it was apparently not possible for a Bill to be drafted incorporating the terms of the agreement. Instead, the plan was to introduce the Bill enabling the terms of the agreement to be dealt with by regulations, with another Bill implementing the agreement to follow 'later on this year'. Senator Newman said:

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This bill we are debating tonight was intended to include the measures that are now going to be tabled as regulations. But, as most senators would recognise, there has been huge demands on the Office of Parliamentary Counsel over the last few months with the pressure of legislation, and they were unable to complete the work in time for a 1 July start-up for these measures. The problem was caused by an agreement between our Prime Minister and the New Zealand Prime Minister. They had agreed that the new arrangements would start up on 1 July.

In order to honour that commitment, Australia is bringing forward some of the details by way of regulation. However, we have made it clear that these measures will be tabled ... But they will also be brought into the legislation later in the year. ...I think that is not an unreasonable way of proceeding in what is a very tight timeframe not for the government but for the legislative draftsmen and also for Australia's reputation in making agreements with heads of other governments. I think it is a practical solution. ... These are special circumstances, it will be for a very short period, until the legislative draftsmen can get what will come forward as regulations into an amending bill later on this year.⁵

Many of the proposed amendments contained in the current Bill refer to an overseas 'reciprocating jurisdiction'. The term 'reciprocating jurisdiction' means those jurisdictions specified in Schedule 2 to *Child Support (Registration and Collection) (Overseas-related Maintenance Obligations) Regulations 2000*. The list includes many countries, including African nations such as Kenya and Tanzania; Asian nations such as Malaysia, Singapore and the Philippines; European nations such as France, Germany, Spain, Italy and Greece; the United Kingdom; Canada (except Labrador and Quebec province); New Zealand; the United States of America; and South American nations such as Chile and Brazil. Notably, the list does not include the People's Republic of China, Indonesia, Vietnam, Saudi Arabia, Lebanon, Iran or Iraq.⁶

Where one parent resides in a reciprocating jurisdiction, but the other parent resides in Australia, the Australian child support scheme may still apply. Among other things, this means that child support may be assessed administratively under the Assessment Act and/or that child support may be collected under the provisions of the Registration Act.

Rather than simply relocating whole provisions intact from the regulations into the child support scheme, the Bill seeks to amend the existing legislation to extend the operation of certain provisions to cover overseas child support and/or maintenance situations. For example, the Bill amends the Assessment Act to provide that the liability of a parent (the payer) who resides in a reciprocating jurisdiction does not arise 'until all prior requirements (if any) under the applicable international maintenance arrangement, and under the laws of the reciprocating jurisdiction, have been complied with' (see **item 16**, which inserts regulation 15 of the *Child Support (Assessment) (Overseas-related Maintenance Obligations) Regulations 2000* into section 31 of the Assessment Act). The Bill also seeks to insert whole provisions dealing exclusively with overseas child maintenance where the terms of the regulations do not fit conveniently into the existing scheme. For example, the Bill seeks to amend the Family Law Act to include new

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sections dealing with parentage testing for the purposes of an international agreement or arrangement (**item 111**); Australia's obligations under the Agreement between the Government of Australia and the Government of New Zealand on Child and Spousal Maintenance signed at Canberra on 12 April 2000 (**item 114**), and Australia's obligations under the Agreement between the Government of the United States of America and the Government of Australia for the enforcement of Maintenance (Support) Obligations concluded and entered into force on 12 December 2002 (also **item 114**).

The Bill also seeks to refine various provisions by clarifying the effect of those provisions or by deleting unnecessary words or concepts. For example, the Bill makes it clear that at least one parent must reside in Australia for the Australian child support scheme to apply. It clarifies the role of overseas authorities where one parent resides in a reciprocating jurisdiction. It also clarifies how to calculate overseas income where a payer resides overseas.

While the amendments themselves are technically complicated (as is the child support scheme generally), they do not seem to be controversial, and it is thus unnecessary to discuss them in detail.

Importantly, by **items 47 and 116**, the Bill repeals subsection 163B(3) of the Assessment Act and subsection 124A(3) of the Registration Act. The effect of the repeal is to remove the possibility of making regulations which are inconsistent with the parent Act and which prevail over the parent Act to the extent of any inconsistency.

Schedule 2

Schedule 2 commences on the day when the proposed Act receives Royal Assent.

Schedule 2 amends the Assessment Act and the Registration Act to provide fairer access to courts and the review process under those Acts.

The Bill amends the Assessment Act to provide that where the Registrar refuses to accept an application for administrative assessment of child support and the applicant objects, either party may apply to a court of competent jurisdiction if he or she is aggrieved by the decision on the objection (**item 1**). Likewise, the Bill provides that where the Registrar accepts an application for administrative assessment, and a party objects, either party may apply to a court of competent jurisdiction if he or she is aggrieved by the decision on the objection (**items 2–4**). The effect of these amendments is to provide that only one party need object to the Registrar's decision but that both parties are then entitled to commence legal proceedings. In other words, it streamlines the review process and minimises the risk of multiple objections and applications in the same case.

The Bill is also designed to limit a person's redress to the Child Support Agency where the Assessment Act provides that person with a right to recourse to litigation (such as sections 106, 106A and 107). For example, currently subsection 98X(1) sets out the

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decisions against which an objection may be lodged with the Child Support Agency and subsection 98X(2) provides an exception. **Items 5 and 6** expand the exceptions, thereby reducing redress to the Child Support Agency in certain circumstances.

Under section 98X (as amended by the Bill), the exceptions to the provision are that (a) a person may not lodge an objection to a decision to accept an application for administrative assessment of child support if the ground of the person's objection is that the person is not the parent of the child, and (b) that a person may not object to a decision to refuse to accept an application for administrative assessment of child support if the ground of the objection is either that the person from whom child support is sought is the parent of the child or that the person who wishes to object is the parent of the child. If a person is prevented from lodging an objection by section 98X, then the person may be able to apply to a court for a declaration under section 106, 106A or 107 or **proposed section 107A (item 17 of Schedule 2)**.⁷

The amendments also provide (**items 14–17**) that unless one of the exceptions to section 98X applies, a person may not apply to a court unless the person has first objected under section 98X of the Act.

Item 11 inserts **proposed section 98ZCA** to provide that where a person applies to a court for a departure order under section 116 and has also lodged an objection under section 98X, the Registrar of Child Support is not obliged to consider the objection unless a court so orders.

Items 22 and 23 make consequential amendments to the Registration Act to include reference to **proposed section 107A of the Assessment Act** in section 79A of the Registration Act.

Schedule 3

Items 1–4, 6–8, and 12–33 of Schedule 3 commence on Royal Assent. **Items 5, 9 and 11** commence 28 days after the proposed Act receives Royal Assent. **Item 10** is taken to have commenced on 30 June 2001.

Schedule 3 makes miscellaneous amendments to the *A New Tax System (Family Assistance) (Administration) Act 1999*, the Assessment Act and the Registration Act.

The Bill amends the *A New Tax System (Family Assistance) (Administration) Act* to provide for the recovery of a child support debt owed to the Commonwealth from the debtor's family tax benefit advance. In reality, it is rare for a person to apply for an advance of family tax benefit (although it may depend on the amount of family tax benefit to which the person is entitled)—it is more likely that a person would apply for an advance of their own entitlement to a pension or benefit (because their own pension or benefit is more likely to be a higher amount of money). It is also unlikely that a person with a child support debt would be entitled to family tax benefit advance.

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However, in the rare case where a person has a child support debt and applies for a family tax benefit advance, the proposed amendments to **section 33** (contained in **items 1–3**) provide that the debt may be deducted from the advance. These proposed amendments bring the provision in line with amendments made to other family tax benefit provisions in 2001. Those amendments only permitted the Commonwealth to recover a child support debt from a person's periodic family tax benefit payments (not from an advance).

The Bill makes very minor technical amendments to the Assessment Act. For example, it inserts a definition of 'yearly equivalent of the EAWWE amount' in section 5 (**item 4**). The term 'EAWWE amount' is already defined in section 5 as the estimate of the all employees average weekly total earnings for persons in Australia [as calculated by the Australian Statistician]. It would not be difficult to extrapolate from that definition the meaning of the term 'yearly equivalent of the EAWWE amount', but presumably it is useful to have the definition contained in the Act.

The Bill also provides for the backdating of the assessment of child support where it comes to the attention of the Registrar that a payer (or liable parent) has another 'relevant dependent child' who was not taken into account when the assessment was made. The amendment to paragraph 39(3)(d) in **items 6 and 7** provides that if the Registrar becomes aware of the existence of the other child within 28 days of the notice of the assessment, then the liable parent is taken to have had the child when the application for administrative assessment was made (assuming paragraph 39(3)(c) does not apply). Presently paragraph 39(3)(d) provides that the liable parent (the payer) is taken to have the child from the day the notice was given. The amendment is fairer to the liable parent than the present provision, because the notice of the assessment may be the first time the liable parent learns of the child support liability. Consequently the notice of assessment may provide the first opportunity for the person to present information to the Child Support Agency (and to correct information on which the Registrar based the assessment).

Item 8 corrects a reference to 'liable parent' in subsection 45A(2). The provision currently refers to the total amount of losses and outgoings 'incurred by the liable parent', but the provision should refer to the total amount of losses and outgoings 'incurred by the entitled carer', given that section 45A deals with the calculation of the entitled carer's supplementary amount of income.

Items 13–18 amend section 76 by limiting the information which the Registrar must provide to the parties to an administrative assessment (for example, limited details about the children of a new relationship who are not the subject of the assessment). The effect of the amendments is to protect privacy, but they would also simplify the Registrar's workload.

Item 21 is one of the more interesting amendments in the Bill. It replaces section 143 with a more precisely worded provision to give effect to the decision of the Full Court of the Family Court of Australia in *Child Support Registrar and Z & T* [2002] FamCA 182.⁸ Section 143 deals with amounts paid by way of child support where no liability to pay

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exists. At first instance, the trial Judge found that under section 143 (as it currently stands) a person could seek to recover child support overpayments from the Registrar, rather than the person on whose behalf the Registrar collected child support (that is, the payee). The Full Court allowed an appeal by the Registrar. While the purpose of the amendment is to clarify, by express words, that the amount may be recovered from the payee (and not the Registrar), the language used in the amendment does not make the situation entirely clear—it refers to recovery of the amount from the ‘recipient’ and not from the ‘payee’ (or some other term in the Act used to refer to the eligible carer).

Items 22 and 23 are also interesting amendments. They amend section 150 of the Assessment Act, which deals with secrecy. **Item 22** amends subsection 150(3) to provide that the Secretary may disclose protected information to a law enforcement officer ‘if the information concerns a threat by a person to harm himself or herself seriously’. The adverb ‘seriously’ is not defined. The Explanatory Memorandum is not entirely clear as to the impetus for the amendment; self-harm is not an offence, and so it is not clear why there is a need to report the threat to law enforcement officers. The second reading speech states that the amendment is to facilitate police intervention to protect the client.⁹ It may be more appropriate if the amendment were to provide that the Secretary may disclose the threat to welfare agencies. Nonetheless, the amendment would seem to be in the public good.

Item 23 amends section 150 to provide that a person does not commit an offence of communicating protected information under subsection 150(4) ‘if the communication of the protected information to the Minister is expressly or impliedly authorised by the person to whom the information relates’. Again, this seems to be a well-intentioned provision open to issues of interpretation. The Explanatory Memorandum to the Bill states that the purpose of the amendment is ‘to allow the disclosure to portfolio ministers of protected information about child support clients that is necessary to finalise correspondence and similar tasks for those clients’.¹⁰

While express authorisation raises little concern, implied consent is another matter. It may have been less contentious for the amendment to have referred only to express consent, because then the consent (and any qualifications on the consent) could be documented. Questions may be raised about whether the Minister could receive information which the person himself or herself was not entitled to receive because of the secrecy provisions. Further, the Act and the proposed amendment seem to be silent as to whether the Minister could then communicate the information to the person or if, for example, authorised by the Commissioner under subsection 150(7), the Minister could only communicate the information to a court. Questions may also be raised as to whether the Minister can receive all information about the person held by the Child Support Agency or only that information pertinent to the current request for assistance.

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Concluding comments

In very large measure, the Bill is uncontroversial and uncontentious. It incorporates matters contained in the regulations into the three main child support Acts. It also clarifies existing provisions and amends other provisions which experience has proved to be inoperative or wrong.

There are a few provisions, particularly those contained in Schedule 3, which are more interesting and may be more contentious. They may, for example, raise issues of interpretation. They may also, for example, raise privacy considerations.

Endnotes

- 1 This provision is not, however, particularly significant—it amends an earlier revision of the Assessment Act.
- 2 The report is available electronically at:
<http://www.aph.gov.au/house/committee/fca/childcustody/report/fullreport.pdf>.
- 3 See ‘Child Support Amendment Bill introduced into Parliament’ at:
<http://www.csa.gov.au/legal/bill.htm>.
- 4 The regulations are available electronically at:
<http://scaleplus.law.gov.au/cgi-bin/download.pl?scale/data/pastereg/3/1589>, and
<http://scaleplus.law.gov.au/cgi-bin/download.pl?scale/data/pastereg/3/1590>.
- 5 Senator Newman, Minister for Family and Community Services and Minister Assisting the Prime Minister for the Status Women, ‘Second reading speech: Child Support Legislation Amendment Bill 2000’, Senate, *Debates*, 10 April 2000, pp.13 708–13, 709. Available electronically at: <http://www.aph.gov.au/hansard/senate/dailys/ds100400.pdf>.
- 6 Schedule 2 (being the list of ‘reciprocating jurisdictions’) is available electronically at: <http://scaleplus.law.gov.au/html/pastereg/3/1590/0/PR000480.htm>.
- 7 **Section 106** provides that an unsuccessful care applicant for administrative assessment may apply to a court for a declaration; **section 106A** provides that an unsuccessful liable parent for administrative assessment may apply to a court for a declaration; and **section 107** provides that a person from whom payment is sought under administrative assessment of child support may apply to a court for a declaration. **Proposed section 107A (item 17 of Schedule 2)** provides for a successful liable parent applicant for administrative assessment to apply to a court for a declaration.
- 8 The judgment is available electronically at:
<http://www.familycourt.gov.au/judge/2002/pdf/zt.pdf>.

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- 9 Larry Anthony, Minister for Children and Youth Affairs, 'Second reading speech: Child Support Legislation Amendment Bill 2004', House of Representatives, *Debates*, 31 March 2004, p. 26 479.
- 10 Explanatory Memorandum to the Child Support Legislation Amendment Bill 2004, p. 27.

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