

Senate Community Affairs Legislation Committee

ADDITIONAL ESTIMATES – 26 FEBRUARY 2015 ANSWER TO QUESTION ON NOTICE

Department of Human Services

Topic: Child Support matter - assessment

Question reference number: HS 19

Senator: Xenophon

Type of question: Written

Date set by the committee for the return of answer: 17 April 2015

Number of pages: 7

Question:

Referring to a Child Support Program matter that has involved proceedings in the Family Court anonymised as “*Pedrana and Pedrana and [Child Support Registrar]*”:

- a) What is the total amount that the Department has been invoiced (i.e. external costs) in relation to and flowing from this matter; including but not limited to:
- Change of Assessment
 - Review on Objection
 - Social Security Appeals Tribunal Review
 - Information Commissioner review
 - Ombudsman Review
 - Court Proceedings initiated by the Child Support Registrar or Department of Human Services
 - Court Proceedings initiated by either of the parents to which the Child Support Registrar was a party
 - Administrative Appeals Tribunal initiated by the Child Support Registrar or Department of Human Services

Noting the (probably) unusually complicated nature of this case, please provide an estimate of the total internal cost incurred by the Department in dealing with the following:

- Change of Assessment
- Review on Objection
- Social Security Appeals Tribunal Review
- Information Commissioner review
- Ombudsman Review
- Court Proceedings
- Administrative Appeals Tribunal?

- b) Does the Department concede that all four matters described by the Secretary in her Senate Estimates testimony to Senator Xenophon on 26 February 2015 stem from a single Child Support Assessment?
- c) Does the Department concede that the initial Child Support Assessment was set aside by an objection review decision and that this objection review decision reduced the Child Support Assessment amount by between \$5,000 and \$6,000?
- d) In relation to 'Matter One' of the proceedings (Declarations sought by the Child Support Registrar in the Family Court) described by the Secretary in her Senate Estimates testimony to Senator Xenophon on 26 February 2015:
 - 1) Can the Department confirm that the substantive issue raised in 'Matter One' centred about the use of Family Court Documents by the Child Support Agency?
 - 2) On what date was the Court application filed?
 - 3) On what date was the idea of the Department meeting all reasonable legal cost in the matter raised between the parties?
 - 4) Was this idea raised by the Department, the father or the mother?
 - 5) On what date did the Department advise the father and mother that it would meet all reasonable legal costs in the matter?
 - 6) How much was spent on these particular proceedings:
 - i) in total;
 - ii) for the Department's Costs;
 - iii) for the father's Cost; and
 - iv) for the mother's Costs?
 - 7) Noting the matter was funded as a test case, can the Department advise whether it sought, as an alternate to seeking judicial declarations to clarify the law, to resolve the matter non litigiously with the father and then seek a change in the legislation to clarify the law?
- e) In relation to 'Matter Two' of the proceedings (Appeal to the Full Court on Matter One) described by the Secretary in her Senate Estimates testimony to Senator Xenophon on 26 February 2015:
 - 1) On what date was the notice of appeal filed?
 - 2) Did the Department write to the father inviting him to discontinue the appeal within 21 days or that cost orders would be sought against him and advising that those costs may include indemnity costs?
 - 3) If so, on what date was that letter written?
 - 4) On what date did the father withdraw his appeal?
- f) In relation to 'Matter Three' of the proceedings (Appeal of the Social Security Appeal Tribunal decision and Application in Case) described by the Secretary in her Senate Estimates testimony to Senator Xenophon on 26 February 2015:
 - 1) With respect to the Appeal against the Social Security Appeal Tribunal decision:
 - i) Does one of the substantive matters before the court centre about the failure of the Child Support Agency to attend to a concern of the inclusion of false and/or misleading and/or reckless information in a completed Change of Assessment application form?
 - ii) It is understood from the Senate testimony that the Child Support Registrar and father had a different opinion as to whether concerns were raised during initial oral and written representations to the Agency about the inclusion of false and/or misleading and/or reckless information in a completed Change of Assessment

application form. It is understood that the Commonwealth Ombudsman has looked into this issue and agrees with the father's view. Is this correct, and if it is correct, what impact has the Ombudsman's finding had on the Agency's stance in relation to their original opinion?

iii) What are the nature of the costs being sought against the father in relation to the Appeal against the Social Security Appeal Tribunal decision?

2) With respect to the Application in a Case:

After the conclusion of 'Matter One', in which the Family Court declared that the Child Support Agency could use Family Court Documents in the exercise of its functions and powers, but added that "*the court has the ultimate supervisory control over an inappropriate use of the information by the Registrar*":

i) Did the father raise concerns over inappropriate use of Family Court documents by the Child Support Agency in his objection to the original decision?

ii) Did the father raise concerns over inappropriate use of Family Court documents by the Child Support Agency in his Social Security Appeals Tribunal Review of the objection?

iii) Is one of the substantive issues in this case centred about the inappropriate use by the Child Support Registrar of documents sourced from Family Court proceedings?

g) Does the Department concede that a nexus exists between 'Matter One' and 'Matter Three'?

1) Noting the Declaration made in favour of the Agency in the first matter, but that this matter on foot still centres about the use of Court documents, how is the Department dealing with Family Court documents that are being tendered as part of Change of Assessment applications.

2) Noting the father has sought alternate dispute resolution, but this has been declined outright by the Agency, is it safe to assume that the Department wants a judicial ruling on this "inappropriate use" aspect of the current proceedings?

3) What are the nature of the costs being sought against the father in relation to the Application in a Case?

4) With respect to both the Appeal against the Social Security Appeal Tribunal decision and the Application in a Case, did the Department receive written legal advice as to the likely success of prospects of success of the appeal, and if so, on what date?

5) With respect to both the Appeal against the Social Security Appeal Tribunal decision and the Application in a Case, can the Department confirm that it is not open to reaching some negotiated settlement?

h) In relation to Matter Four (Administrative Appeal of a Decision of the Information Commissioner) of the proceedings described by the Secretary in her Senate Estimates testimony to Senator Xenophon on 26 February 2013:

1) What is the cost estimate for the conduct of the proceedings?

2) Noting the application has been raised by the Department against a decision of the Information Commissioner on a "*very very important point of law*", has the Department given considered to treating the matter as a test case and funding the father such that a strong argument can be put to the other side of the question?

3) Is it normal for the Department to litigate against a self-represented litigant on "*very very important point of law*".

Answer:

- a) The total amount for external legal work arising from these matters (until the end of February 2015) is \$583,075.02. This amount includes an amount of \$84,478.42 paid by the department to cover the costs of both the parents' legal representation in Family Court proceedings which was brought by the department in order to clarify an important legal issue relevant to child support matters more generally. The department paid the legal costs for both parents.

Since commencement in 2011, many areas of the department have been involved in the work included in the scope of this question. The department's internal systems do not separately record information that would enable the department to estimate the internal costs (including legal and administrative costs) of all of these areas of the department dealing with the management of a particular case.

- b) No. Three of the matters arise out of the registered child support liability between the paying parent and the other parent. Matter Four arises out of a decision of the Office of the Australian Information Commissioner in relation to a decision under the *Freedom of Information Act 1982*.
- c) The Senior Case Officer (on 1 August 2011), the Objections Officer (on 5 December 2012) and the Social Security Appeals Tribunal (SSAT) (on 17 May 2013) all applied the child support assessment formula in the *Child Support (Assessment) Act 1989* to the evidence before them. All agreed that there should be a departure from the original administrative assessment (started on 27 January 2010) because of further evidence put before them that the paying parent's financial resources were greater than the adjusted taxable income that had been used to make the original assessment from 27 January 2010 (to assess the paying parent's initial child support liability from June 2011).

On 3 February 2010 there was an original administrative assessment by the department that the paying parent's liability was \$1,898 per annum. This original administrative assessment was based on information obtained from the Australian Taxation Office that the paying parent's adjusted taxable income for 2010 was \$30,603.

On 1 June 2011 an application was made by the other parent for a change of that assessment. In making that change of assessment application the other parent provided information including information that the paying parent's personal income was \$51,000 and business income was \$139,082. The department's Senior Case Officer considered that application by the other parent for a change of assessment and on 1 August 2011 made a decision that the paying parent's liability was \$13,212 per annum.

The paying parent requested a review of that assessment and provided further evidence, including evidence about the paying parent's financial resources. A review was conducted by a department Objections Officer and on 5 December 2012 the paying parent's liability was assessed as \$6,260 per annum.

The other parent sought review by the Social Security Appeals Tribunal (SSAT) of that decision. On 17 May 2013 the SSAT made a decision to set the paying parent's adjusted taxable income on the evidence before them, including new evidence as provided by the parents, for a period from 1 June 2011 to 1 January 2013. The SSAT decided that for the period from 1 June 2011 to 1 January 2013 the paying parent's adjusted taxable income should be set at \$67,449 from 1 June 2011, \$76,199 from 1 July 2011 and \$85,000 from 1 July 2013. This caused the annual liability of the paying parent to vary as follows:

- \$7,954 from 1 June 2011;
- \$7,542 from 7 June 2011;
- \$8,848 from 1 July 2011;
- \$8,806 from 1 February 2012;

- \$9,766 from 1 July 2012; and
 - \$9,754 from 1 January 2013 to 30 September 2013.
- d) 1) Yes.
- 2) 5 September 2011.
- 3) The matter was raised in a telephone conversation on 16 September 2011, followed by an email from the paying parent dated 23 September 2011.
- 4) The paying parent.
- 5) 1 November 2011.
- 6) i) \$453,716.59.
- ii) \$369,238.17.
- iii) \$71,459.92.
- iv) \$13,018.50.
- 7) The department received legal advice and pursued a course of action to resolve the issue and clarify the law. The Family Court declared on 15 May 2012 and 5 March 2015 that the department acted legally in its use of the documents provided. In order to alleviate the paying parent's concerns about the use of the documents, the department recommended to the paying parent that he should seek merits review of the Senior Case Officer's decision by lodging an objection. The paying parent lodged an objection on 9 September 2011. The objection decision allowed the new decision-maker to look at the case afresh and address any concerns the paying parent had with the evidence before it.
- e) 1) 12 June 2012.
- 2) Yes.
- 3) 28 August 2012.
- 4) 14 September 2012.
- f) 1) i) Yes, insofar as it was a matter argued by the paying parent in his submissions to the Family Court. On 5 March 2015 the Court rejected the paying parent's submission that there had been inappropriate use of documents by the department.
- ii) No comment was made in Senate Testimony as to whether or not "concerns were raised during initial oral and written representation to the Agency about the inclusion of false and/or misleading and/or reckless information in a Completed Change of Assessment application form".
- On 23 April 2013 in a response to the Ombudsman the department agreed that the paying parent had made allegations against the other parent on 9 June 2011 and 21 June 2011 regarding the documents submitted by her. The exchanges with the Ombudsman went to the fact of the making of the allegations, not to their substance or merit, and therefore had no impact on the Agency's original opinion.
- iii) The nature of costs being sought against the paying parent in relation to the Appeal against the Social Security Appeal Tribunal decision may include costs relating to dismissed applications, including the costs of the appeal of that decision, an application to re-open the case and an application to recuse the presiding judge.
- 2) i) Yes.
- ii) Yes.
- iii) Yes, insofar as it was an issue raised by the paying parent. The Family Court decided on 5 March 2015 that there was no improper use of any documents provided to the department for the purpose of determining the child support liability of the parents.

- g) The paying parent continued to raise issues before the Court in Matter One and in Matter Three.
- 1) On 15 May 2012 the Family Court made Orders (*Pedrana v Pedrana (No 2)* (2012) 48 Fam LR 89) declaring that the Child Support Registrar was permitted to use the court documents in making the Change of Assessment decision. The Court found that neither the Family Court Rules nor the Harman obligation prevented a party from providing such documents to the department in support of Change of Assessment applications.
 - 2) The department determined that the paying parent's appeal and his applications in a case were without merit and there was no basis for setting aside the SSAT decision. On 23 November 2013, in the light of the department's view that the paying parent's case was without merit, the department made an offer in writing to the paying parent inviting him to discontinue the proceedings without costs. The paying parent rejected that offer on 10 January 2014.
On 5 March 2015 the Family Court dismissed the paying parent's appeal against the SSAT decision finding that the paying parent's grounds of appeal were not made out. The Court reaffirmed that "[T]he case officer was entitled to use the documents provided by the wife in the way the case officer did. That use was not inappropriate."
 - 3) In Matter Three the paying parent filed four unsuccessful applications, as follows:
 - On 29 October 2013 the paying parent filed an application in a case to issue a subpoena and adduce fresh evidence at the hearing of the appeal. Part of the application was dismissed on 3 February 2014 with some questions reserved to the hearing on 14 February 2014. Ultimately the Court did not grant the application in a case and refused to make the orders sought.
 - The paying parent filed an application in a case on 15 November 2013 for a declaration that the Child Support Registrar had used financial documents inappropriately. The application was heard on 14 February 2014 and dismissed on 5 March 2015.
 - On 9 December 2013 the paying parent filed an application in a case seeking that Justice Watts disqualify himself from hearing the case on the grounds of apprehended bias. The application was heard on 14 February 2014 and dismissed on 5 March 2015.
 - On 4 February 2015 the paying parent filed an application in a case to seek to re-open the case. A directions hearing was held on 18 February 2015 and the application was dismissed on 5 March 2015.In April 2015 the department filed an application for costs in the Family Court.
 - 4) Yes, on 12 July 2013.
 - 5) The department is always open to alternative dispute resolution where appropriate and consistent with the powers in the relevant jurisdiction. The paying parent had made a proposal on 17 November 2013 to minimise litigation by seeking a 'concession' by the department about the use of documents. The proposal was not appropriate for the department to accept, given the department's view on the substantive appeal. Furthermore, the proposal was not one that would have ended the proceedings in that the Child Support Registrar was one of two Respondents in those proceedings and unable unilaterally to agree to a resolution of the issues. Ultimately the Family Court dismissed the paying parent's appeal on 5 March 2015.
- h) 1) The estimate is \$45,000 exclusive of GST.
- 2) The department considers that the Office of the Australian Information Commissioner's decision was wrong in relation to the application of Legal

Professional Privilege to three documents. While this appeal is important in order to ensure that a decision that is wrong is reviewed by the Administrative Appeals Tribunal (AAT) and the issues that are raised will broadly affect the department in regards to the correct application of Legal Professional Privilege, it is not a test case. A test case is one that involves a new, novel or as yet unconsidered interpretation of the law.

- 3) The AAT is a no cost jurisdiction and is commonly accessed by unrepresented litigants. Both the department and lawyers engaged by the department are accustomed to dealing with unrepresented litigants and ensuring that the proceedings allow for parties to properly put their case.