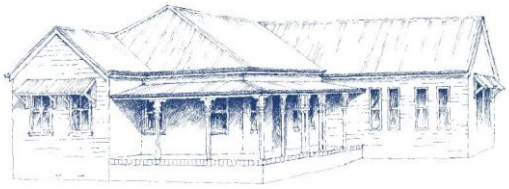
FAMILY LAW MATTERS

THE NEW CHILD SUPPORT FORMULA
DETAILED PAPER



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THE NEW CHILD SUPPORT FORMULA AND OTHER REFORMS

By Rebecca Pietsch

Preliminary

This paper was prepared by Rebecca Pietsch, a Senior Advisor in the Child Support Legal Services Section of the Child Support Agency. It was published in the Australian Family Lawyer in March 2008.

Introduction

During 2004-2005, the Australian Child Support Scheme was reviewed by a Ministerial Taskforce, appointed in response to a recommendation by the House of Representatives' Standing Committee on Family and Community Affairs in their report on "Child Custody Arrangements in the Event of Family Separation" (December 2003). The Taskforce was to:

- Provide advice on the short term recommendations of the Standing Committee about the cap on assessed income, the minimum payment, the link between care and child support, and income from overtime;

- Examine the working of the current child support formula with respect to data on the cost of children and re-establishment costs for both parents, and advise on the research necessary for ongoing monitoring;

- Consider how the Child Support Scheme can play a role in encouraging couples to reach agreement about parenting arrangements; and

- Consider how Family Relationship Centres may contribute to the understanding of and compliance with the Child Support Scheme.

After extensive work, including commissioned modelling and research on the costs of children and public expectations of child support, the Taskforce concluded that an entirely new formula was required to appropriately assess child support in Australia today. The changes since the introduction of the current formula to parenting arrangements, work patterns, and the costs of children meant that the new model needed to treat both parents' incomes and contribution through care in the same way, as well as recognising that government makes a significant contribution to the costs of children in many households through Family Tax Benefit.

To achieve this, the Taskforce recommended the introduction of an "income shares" approach to child support, as well as changes to child support agreements and provisions relating to the recognition of care. Various measures were also recommended to increase parental and public confidence in and acceptance of the Scheme, in the hope that this would ultimately lead to higher voluntary compliance, increased workforce participation, and better outcomes for children.

The Taskforce was very aware of the potential impact of child support requirements on parenting arrangements, particularly the scope for financial outcomes to increase conflict or influence decisions about care. However, a scheme that is to recognise the financial costs of care provided by both parents must in some way link child

support liabilities to care. The formula and related provisions about care to be introduced from July 2008 seek to balance these considerations.

Due to the long lead times necessary to implement some of the substantial changes to the Scheme, especially the new formula, a three-stage approach to introduction was adopted. This allowed some particular sources of high concern to be addressed early, while allowing sufficient time for drafting of legislation and the redevelopment of systems for more major changes and aligning certain changes to child support and Family Tax Benefit with the beginning of a financial year.

This article provides an overview of the changes that have been implemented so far, and those to be introduced from 1 July 2008. Background information on some of the hoped-for outcomes of the changes as may be relevant to family law practitioners is also included, particularly for the major changes to be introduced from July 2008.

Stage One: July 2006

Due to the long lead times necessary to implement the more substantial changes to the Scheme, several changes were introduced in July 2006 to address sources of high concern, some of which coincided with the short-term recommendations of the House of Representatives Committee.

Cap on assessed income for high-income payers

The relatively high child support contributions expected from paying parents with high incomes prior to July 2006 had been a source of considerable tension, and a reduction in the assessed income of such high-income parents had been recommended by previous inquiries into the child support scheme. This mechanism was adopted by Government as an interim measure, to relieve pressure ahead of the different way of calculating child support to be introduced from July 2008, reducing the "cap" on assessed income from 2.5 times Male Total Average Weekly Earnings ($139,137 in 2006) to 2.5 times Average Weekly Earnings for All Employees ($104,702). As an interim measure, it will cease to apply from July 2008 as the new formula, rather than the assessed income of parents, will cap the costs of children.

Minimum payment

The House of Representatives Committee recommended that the minimum payment of $260 a year be doubled to $520 a year, and the Taskforce also found support for an increased amount amongst members of their advisory stakeholder group. However, this was balanced with the need to keep the payment affordable for parents on low incomes. This will be particularly important once the minimum payment becomes due for each child support case, rather than divided between any multiple cases (see below).

From 1 July 2006, the minimum payment was indexed to take account of inflation since its introduction in 1999. It will continue to be indexed each year to changes in the Consumer Price Index (CPI) to maintain its value. While a small change in dollar terms, ensuring that the minimum contribution required from a parent kept pace with changes in the cost of living was seen as an important factor in maintaining the currency of the scheme in public perception.

Capacity to earn

Changes were also made to the provisions under which a parent may be found to have a higher capacity to earn income than they are exercising, and child support assessed using this capacity rather than their actual income. There were concerns that some parents were being assessed on the basis of prior earnings when they may have had good reason to reduce their hours or change occupation, such as wanting more family-friendly hours to accommodate their caring responsibilities after separation. At the same time, the principal object of the scheme is to ensure that parents contribute to the costs of their children according to their capacity to do so, as they did before separation.

The new provisions restrict the operation of "capacity to earn" decisions, but retain the possibility of assessing a parent on their capacity to earn in certain circumstances where the parent is likely to have made employment decisions with the aim of affecting their child support assessment (see sub-section 117(7B) of the *Assessment Act*).

Prescribed Non-Agency Payments

The limit on the crediting of prescribed non-agency payments (PNAPs) towards satisfaction of a parent's child support liability under section 71C of the Registration and Collection Act is intended to ensure that the receiving parent has sufficient cash flow to meet other costs. In light of the increased Family Tax Benefit available to most parents since PNAP provisions were introduced in 1999, this limit was increased from 25% to 30% of the liability.

Stage Two: January 2007

Neither of the major changes introduced in January 2007 affected child support liabilities, but were rather intended to increase parents' options when dealing with the scheme.

Social Security Appeals Tribunal

Prior to January 2007, parents who disagree with a CSA decision at objection needed to appeal, or apply to a court to have the matter reconsidered. This was a notable difference from provisions applying to Centrelink decisions, and proved a problem for parents who had limited income or did not wish to enter the court system. Since January 2007, parents have been able to apply to the Social Security Appeals Tribunal (SSAT) to have an objection decision reconsidered, rather than appealing or applying to a court.

This change aimed both to provide a simple and inexpensive administrative avenue for parents seeking external review of decisions, and to increase overall public confidence in the scheme by ensuring transparency in decision-making. Some 1100 appeals have been received by the SSAT to date.

Timeframe for applying for child support

In line with the principle that parents, rather than the state, should be the first source of financial support for children, parents who wish to claim more than the base rate of Family Tax Benefit Part A must take reasonable action to obtain child support. "Reasonable action" usually means applying to CSA for a child support assessment. Prior to 1 January 2007, parents had four weeks to take such action.

Establishing care arrangements for children after separation may take considerably longer than four weeks, especially if parents wish to take advantage of mediation or similar services. In some cases, a forced application for child support may also have reduced the possibility of a reconciliation between the parents.

Parents now have 13 weeks to establish parenting arrangements before needing to apply for child support. Parents may wish to avail themselves of the services offered by Family Relationship Centres or the Family Relationship Advice Line, and to consider other options relating to child support, such as child support agreements and agreed non-agency payments.

Stage 3: July 2008

The new formula

The centrepiece of the changes to be introduced in July 2008 is the new formula for the assessment of child support liabilities (Part 5, Divisions 2-6). The new formula treats each parent's income in the same way, subtracting a self-support allowance of around $18,000 (2/3 of Male Total Average Weekly Earnings) to find the resources that each parent has available to support the children. The combined available resources of the parents are used, with the Costs of Children Table, to find the costs of the child or children. These costs are then distributed between the parents according to their relative available resources. Either parent may meet some or all of their share of the costs through care. Generally, one parent will meet less than their share through care and will transfer child support to the other parent, who is meeting more than their share through care.

Step-by-step information on the new formula is available from *The Guide: CSA Law and Policy*, Chapter 2.4. (The Guide is available from www.csa.gov.au).

Of relevance to family law practitioners is the greater flexibility and transparency of the new formula, with several elements that can be independently adjusted through court orders, administrative departures (Change of Assessment), or child support agreements. The self-support amount or assessed income of either parent may be adjusted where they have high costs in supporting themselves or others, or where they have resources not recognised in their Adjusted Taxable Income. The costs of the children may be increased or decreased according to their needs, and the formula will automatically distribute the costs between the parents, according to their relative resources.

Other variations are also possible to recognise the particular circumstances of parents and their children. More information on departures from the child support formula via child support agreement or court order, including suggested draft clauses, is contained in the Legal Practitioner's Guide, also available from www.csa.gov.au.

Even where parents or practitioners do not wish to adopt or modify the new formula, they may find it useful to refer to the Costs of Children Table, and it was hoped by the Taskforce that the courts would also use this new Australian research on the costs of children, rather than, for example, the Lee and Lovering tables.

Changes to the assessment of care

As noted in the introduction, the link between care of children and child support is fraught. Indeed, the House of Representatives Committee which recommended the establishment of the Taskforce on Child Support also recommended that care not be taken into account in the child support formula until it was substantially equal (40-60%), and that an additional government parenting payment be introduced to recognise parents' costs at levels of care lower than this.

While the new formula continues to link child support with the amount of care that each parent has of the children, the provisions relating to care attempt to limit the scope for conflict and decisions based on financial considerations rather than the best interests of children.

The current formula can produce "cliff" effects, where the amount of child support payable changes dramatically even though care arrangements have only changed slightly. In the formula to be introduced from 1 July 2008, a single recognition of cost will apply to all care between 14 and 34%, with a sliding scale increasing this recognition between 35 and 50% (section 55C). While a new "cliff" will be created at 14% (which is one night per week), the majority of parents who have regular overnight care of their children are comfortably within the band. For example, the common arrangement of "every second weekend and half the holidays" equates to around 22% care.

In addition, entitlement to Family Tax Benefit (FTB) will no longer be shared between parents unless they each have at least 35% care. Currently, parents with at least 10% care can claim some of the FTB for a child, which can create significant conflict, particularly where one parent does not claim their share of the FTB until the end of the financial year. From July 2008, parents with more than 65% care will be able to claim the full FTB entitlement for a child, while the other parent may claim some ancillary benefits, such as rent assistance, without affecting the entitlements of the first parent, so long as they have at least 14% care.

Another change is that child support assessments will generally recognise changes to care only if they represent a change of at least 7.1% (one night a fortnight, section 48)). Care changes smaller than this are unlikely to significantly affect the costs that parents incur. The exception is where care changes to above or below the 14% threshold, due to the significant difference in costs incurred at this level. This means that the majority of debates about whether one parent can have a few extra days care over the course of the year will have no effect on child support liabilities.

Even where care has changed by 7.1% or more, the change may not be recognised if the parent claiming more care is doing so contrary to a court order or previous agreement about parenting arrangements, unless the other parent agrees to the change. This provision is similar in intent to current "lawful/actual" provisions, but works in a somewhat different fashion, so that there is no change to the child support assessment in such circumstances (section 49). The parent who wishes to claim the higher percentage of care must take action to seek a new order or agreement. In some circumstances, such as where the safety of the child would be at risk if the order or agreement were followed, or where the other parent fails to meet their caring responsibilities, CSA will make an interim determination about care (section 52). However, wherever possible, it is more appropriate for parents to come to an agreement about care rather than for CSA to make an administrative determination about their arrangements. Mediation services are available through the Family Relationship Centres and related providers to assist parents in this regard.

Although a child support scheme can have no business intervening in disputes about care, these measures are expected to reduce the financial motivation behind the actions of a minority of parents.

Child support agreements

In line with the premise that parents should be able to make their own arrangements about child support so long as certain safeguards for children and taxpayers are met, new and more flexible provisions for child support agreements will be introduced from July 2008.

Two types of agreements will be available to parents:

- Binding agreements, which can be for any amount, but must be made with independent legal advice for each parent (section 80C); and

- Limited agreements, which do not require legal advice but must be made for at least the amount payable according to the administrative assessment (section 80E).

The options for ending agreements also differ, with limited agreements significantly easier to end than binding agreements, especially where parents' circumstances change. Binding agreements may be ended only by a subsequent binding agreement requiring fresh legal advice (including an agreement to end: section 80D) or a court order, which will be available only in very restricted circumstances (sub-section 136(2)(d)). Limited agreements can be ended by either parent where:

- The amount of child support that would have been payable if the agreement had not been made changes by more than 15% in circumstances not contemplated by the agreement; or

- Three years have elapsed since the making of the agreement; or

- The parents agree to end the agreement, or make a new limited or binding agreement (section 80G); or

- A court order sets aside the agreement, (available in wider circumstances than those for binding agreement: section 136).

Binding agreements are intended to provide a much greater degree of certainty for parents, while limited agreements are intended to allow parents some flexibility about child support arrangements without needing to commit to a long-term agreement. As limited agreements can be made without legal advice, the provisions include a protection for children in the form of a requirement that the amount be for at least the formula amount, as well as greater options for ending the agreement than exist currently.

For all agreements, the Family Tax Benefit entitlement of the parent receiving child support will be assessed on the amount of child support that would have been payable if the agreement had not been made. This will be achieved via a "notional assessment" of child support, which will refreshed if the agreement amount changes by more than 15%, on the request of either parent for limited agreements, or if three years have elapsed since the previous notional assessment was made (Part 7A).

A new protections for children and taxpayers have been included in these provisions, the requirement for Centrelink approval of agreements will be removed from July 2008.

Minimum per case and "fixed rates"

As noted in the introduction, a minimum amount of child support will be assessed for each child support case from July 2008, rather than a single rate being split between cases. The minimum amount for child support periods starting in 2008 is $339. To avoid financial hardship for parents on low incomes, where a parent is assessed in more than three cases, three times the minimum amount will be apportioned equally between the cases. In addition, the minimum amount will not be payable where a parent has at least 14% care of a child in the case, as some costs will be incurred during this level of care.

A cause for concern to the Taskforce was the large proportion of parents paying the minimum amount of child support as a result of reporting a low income, but who were not claiming government income support. Such parents are likely to be arranging their financial affairs in such a way that, while potentially legitimate for tax purposes, does not accurately represent their capacity to contribute to the costs of their children. From July 2008, parents reporting very low incomes but not claiming income support will be required to pay an annual rate of around $1100 per child, unless they can show that their incomes are indeed genuinely low. This rate will not be payable where the parent has at least 35% care of the child, as this constitutes a substantial contribution to the child's costs. Like the minimum rate, this fixed rate will be indexed to changes in the Consumer Price Index each year.

Overtime and second jobs

A common complaint from parents paying child support is that, due to their child support liabilities, they cannot find the money to properly re-establish themselves after separation. In some cases, this may make it difficult to maintain a relationship with their children if it is difficult to afford a property with an additional bedroom or suitable family transport.

New provisions to be introduced from July 2008 will allow parents to exclude additional income earnt after separation from assessment for child support purposes for up to three years after separation, where this income would not have been earnt in the ordinary course of events (section 44, Assessment Act). For example, a parent may take on overtime or a second job. As both parents' incomes will be assessed in the same way, these provisions are available equally to parents who pay or receive child support. A maximum of 30% of the parent's Adjusted Taxable Income can be excluded from assessment in this way.

Exclusion of additional income is available via an administrative application, rather than a departure from the formula under section 117. This, amongst other factors, is expected to make this provision easier for parents to access than provisions currently available under sub-section 117(2)(c)(iii) and section 117A, which have been repealed from July 2008.

Step-children and children in de facto families

A long-standing complaint about the child support scheme is that a parent who is assessed for child support cannot generally have their financial responsibility for a

child living with them recognised, if that child is not theirs biologically or by adoption. This may seem particularly unfair where neither of the child's parents are in a position to earn income due to ill health, or where they may in fact be deceased. Some parents have sought orders under section 66M of the Family Law Act to have some responsibilities recognised, though this would seem to fall outside of the intended aim of such orders.

From July, parents in this position will be able to apply for an administrative or court-ordered departure from the formula under sub-sections 117(2)(a) and 117(3), if they can show that the child requires their financial assistance because neither biological parent can support the child due to death, ill health or caring responsibilities. The parent applying for the departure must show that they have lived with the parent of the child (in a marriage or de facto relationship) for at least two years, and that the child normally lives with them.

Conclusion

Increasingly, parent conflict is understood to be detrimental to children, particularly where it results in a child not being able to continue a meaningful relationship with both parents.

It is beyond the scope of child support legislation, or a child support scheme, to resolve parental conflict, particularly since this conflict is likely to arise from many issues much wider than child support. However, if a child support scheme can avoid unnecessarily exacerbating or creating opportunities for conflict, then a decrease in conflict is a more realistic goal.

Transparency and balanced outcomes are also important features of a scheme that is to engender parental and public confidence and acceptance, and lead to voluntary compliance with liabilities. As part of the reforms, many small changes were introduced to this end, even where actual changes to child support amounts or practices were small.

The legislative changes to be introduced from July 2008 aim to not only introduce a new formula that more appropriately calculates child support for children in Australia today, but also to make it easier for separated parents to make acceptable, if not amicable, arrangements for the care and financial support of their children.

NOTES

1. Child Support (Assessment) Act 1989 (Cth).

2. Child Support (Registration and Collection) Act 1988 (Cth).