DOES THE CHILD SUPPORT SACRED COW MILK PARENTS OF ADMINISTRATIVE JUSTICE?

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Ask any gathering of Australian adults about child support and you are almost certain to spark a lively and colourful debate about the hidden mass of greedy and unworthy parents in Australia and their protector, the Child Support Agency (CSA). Most Australians know someone affected by the child support scheme, which commenced operation in 1988, some sixteen years ago. The scheme has enormous reach, covering over 1.3 million parents and 1.1 million children.[1] It is highly controversial, but has proved enduring. Even a Minister responsible for child support, Larry Anthony, has described the scheme as a 'sacred cow'.[2]

This paper considers the efficiency and effectiveness of the legislative provisions which entitle parents to apply to vary child support payments that would otherwise be calculated according to a statutory formula. The main question canvassed is whether the existing decision-making framework delivers 'administrative justice'. This is measured by the extent to which the framework incorporates commonly accepted administrative law values of accountability, transparency, fairness, accessibility and effectiveness.[3]

Within government, there is a quest for administrative justice in decision-making models, particularly those characterised by administrative discretion. Discretion allows for tailoring of individual circumstances, but is also criticised for its potential for caprice.[4] To protect against abuse of discretion by officials, the Commonwealth administrative law system contains a network of appeal rights including merit tribunal review, judicial review, ombudsman oversight and freedom of information rights. The first two are restricted under the child support scheme.

The paper will review some of the difficulties that can arise from these restrictions, by looking at the standards of internal review, the opportunity for judicial review and the implications for particular client groups. In reviewing these, the paper examines data from the CSA, the Commonwealth Ombudsman, Commonwealth tribunals, the Family Court of Australia and the Federal Magistrates Court. In addition, it overviews data extracted from a relational database of reported child support decisions as at July 2003 that was created specifically for this project.

It would be neglectful to continue without discussing developments in the child support arena. The scheme was most recently reviewed by the House of Representatives Family and Community Affairs Committee which reported to the Australian Government in December 2003.[5] The report was finalised some nine years after the previous review undertaken by the Joint Select Committee on Certain Family Law Issues.[6] Both parliamentary committees recommended the introduction of merit tribunal review into the child support system. On each occasion, the Government of the day rejected the proposal. Apart from the reports by these committees, there has been little academic comment on the

* *BA, LLB (Hons). This paper is a revised version of an honours thesis submitted at the Australian National University in 2003.* *The author would like to thank Professors Robin Creyke and John McMillan both of whom generously provided their time and scholarly assistance in the preparation of this paper.*

appropriateness of the decision-making framework within the scheme. Under the present government, the scheme has attracted much adverse public comment particularly through the newspaper media and mostly at the instance of the single fathers' movement. Much of the discussion is emotive and based on economic issues, not the legal merits of the decision-making framework.

While the child support scheme has developed an enclave of critics over the years, the Australian Government has assured its continuation through the promise of reform. The government's recent announcement of a new Taskforce with terms of reference to review the child support scheme has signalled significant change to the calculation of child support payments.[7] The structure of appeal rights will remain intact, however. Prime Minister Howard has implicitly rejected the establishment of a special Families Tribunal,[8] and the Taskforce's terms of reference do not trespass onto the administrative law framework that underpins the scheme.[9]

The political unpalatability of reform to some stakeholders may heighten the debate about the accessibility of appeal rights within the scheme, but this would be a distraction only. Regardless of whether the Federal Parliament alters the basis for calculating child support payments, appeal rights will have little bearing on the appropriateness of the amount of child support paid. From an administrative law viewpoint, the question remains: does the system meet accepted administrative law values?

It is disappointing that the Government has excluded government and administrative law aspects of the scheme from the purview of the Taskforce, as some anomalies persist. In particular, there is a lack of clarity about the operation of judicial review within the scheme, which could be of growing importance in the context of the Federal Magistrates Court being given both family and administrative law jurisdiction. Internal review practices are deficient in some respects. It also seems that there may be some inadequacies in the corporate governance arrangements that apply to the CSA. At the end of the day, however, the scheme is mostly well suited to its purpose. It requires only minor modification notwithstanding its limited reliance on administrative tribunals and judicial supervision.[10]

From humble beginnings: the child support scheme

The child support scheme has a fascinating history. The first child maintenance law was passed in 1840 by the New South Wales legislature, and was followed by similar laws in other Australian colonies.[11] Child maintenance was brought under Commonwealth regulation in the 1960s following difficulties experienced by sole parents in obtaining relief across state boundaries.[12] The *Matrimonial Causes Act 1959* (Cth), which commenced operation in 1961, provided relief with respect to children of divorced and deserted wives, while the maintenance of children born outside marriage continued to be subject to State and Territory laws. This reflected a lack of constitutional power at the Commonwealth level, which was mostly overcome in the 1980s when the states, apart from Western Australia, ceded power with regard to ex-nuptial children.[13]

The *Family Law Act 1975* (Cth), which repealed the Matrimonial Causes Act, is much celebrated for its profound effect on families undergoing breakdown, but is little recognised for its role in the development of the Australian child support scheme. In 1980, the Joint Select Committee on the Family Law Act, chaired by the now Attorney-General, the Hon Philip Ruddock MP, recommended the establishment of a national maintenance enforcement agency.[14] While this recommendation was not immediately embraced, a newly elected Labor government moved quickly in March 1983 to set up a national child maintenance inquiry,[15] and commenced Cabinet discussions about possible responses to the fiscal burden of the growing base of sole parents.[16] Eventually, the scheme formed one of the major planks of then Prime Minister Bob Hawke's 1987 election pledge to eliminate

child poverty by 1990.[17] Prior to the current system, only 30 per cent of non-custodial parents paid child maintenance, and court orders were generally regarded as low.[18]

The child support scheme began on 1 June 1988 with the commencement of what is now known as the *Child Support (Registration and Collection) Act 1988* (Cth). Called Stage 1, this part of the scheme allowed for the registration, collection and enforcement of child support orders made by the Family Court of Australia. Stage 2 began on 1 October 1989 with the commencement of the *Child Support (Assessment) Act 1989* (Cth) (the Act). Under this Stage, the vast majority of parents registered with the scheme have their child support payments assessed according to the statutory formula.

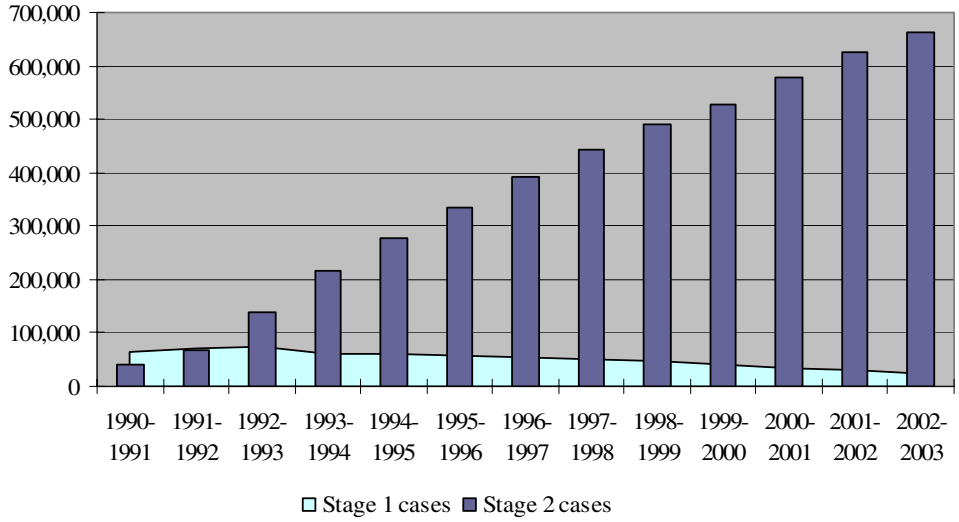
Supplementing these Commonwealth Acts are six sets of Regulations. Altogether, the laws amount to over 500 pages in the official Commonwealth legislation series. The legislation is noted for its complexity.[19] Wade observes that it is 'incomprehensible to all but an elite of child support officers and specialist family lawyers'.[20]

The legislative objects provide the best guidance as to the purpose of the scheme. The principal objects are to ensure that children receive a proper level of financial support from their parents[21] and that payments are made on a regular and timely basis.[22] Other objects are directed at ensuring that child support is determined in accordance with legislatively fixed standards, that parents be allowed to reach private agreements and that interferences with privacy be limited.[23]

From 30 June 1989, when the CSA processed only 22,610 cases,[24] the scheme now directly affects the financial position of over 2.4 million Australians. Stage 1 cases (that is, those determined in accordance with the Family Law Act) are not uncommon, but many have worked their way through the system, accounting for only 3.2 per cent of all registered child support cases by 30 June 2003 (Figure 1).

Child support liability is determined by the statutory formula in about 93 per cent of cases. Parents can depart from the formula by concluding an agreement registered with the CSA (accounting for 4.3 per cent of cases), applying to the CSA for a departure from the formula (2.4 per cent) or seeking a court order which departs from the CSA's departure decision and/or awards a lump sum payment (0.3 per cent).[25] The low proportion of non-formula cases invites a number of hypotheses about the success or otherwise of the existing formula and the arrangements that allow parents to depart from it. It may suggest that the framework has been successful in meeting its objectives of minimising the incidence of protracted and difficult legal proceedings and providing parents with certainty about their child support obligations. In turn, this may imply that there is no need to introduce a merit tribunal into the scheme, no matter how heavily criticised.

Figure 1: Active Child Support Cases, 1990-91 to 2002-03[26]



Change of assessment and court appeal framework

As noted above, the Act sets out a formula-based approach for the determination of child support which is applied in the normal run of cases. Factors that affect the rate of payment include payer and payee incomes, income amounts not assessed to enable parents to care for themselves, the number of children, the amount of care provided by each partner and the existence of other dependents. Contrary to popular myth, child support is largely determined according to the circumstances of the household. It is not, and was never intended to be, determined according to actual expenditure on the children.[27] Rather, the basis of the formula is to ensure that 'wherever possible children … enjoy the benefit of a similar proportion of parental income to that which they would have enjoyed if the parents had lived together'.[28] The Act also contains an opt-out provision by which parties may reach their own arrangements and register these with the Child Support Registrar under Part 6 of the Act.

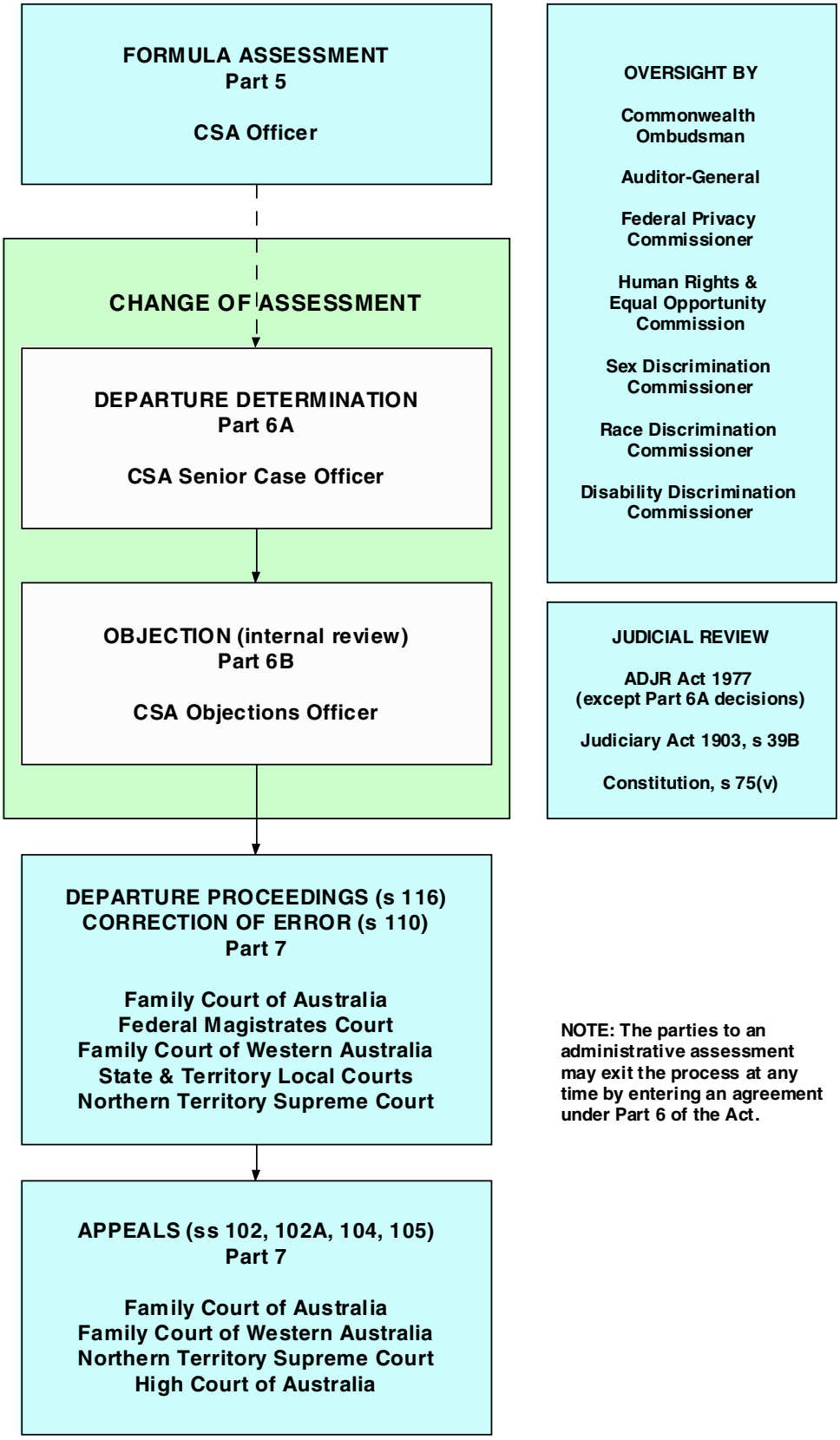
If the parties are dissatisfied with the formula and are unable to reach agreement as to what child support arrangements ought to apply, one or both may apply to the Child Support Registrar for a departure determination under Part 6A of the Act. In this process, the special circumstances of the case may be taken into account where a legislative reason exists. Once the Registrar or her delegate decides the application, an aggrieved parent may apply for internal review under Part 6B of the Act. This process is called an 'objection' and is mandatory before the parties can seek further review through the courts.

Combined, the agency level decisions under Parts 6A and 6B of the Act make up what is known as the Change of Assessment (COA) process. It is unsettling that the language of 'change of assessment', which finds expression in a range of public documents including those produced by the CSA, the Attorney-General, the Auditor-General and the Commonwealth Ombudsman, is not used in the child support legislation nor properly defined in any official publication; it is equally disquieting that a major parliamentary report recommending change to the scheme – the *Every Picture Tells a Story* report – defines the process as simply the original decision-making stage[29] and then incorrectly describes it as 'an internal review process'.[30]

Figure 2 sets out the framework of appeal rights within the scheme and, at a glance, demonstrates that the process is rational and streamlined. Some features of the scheme warrant brief comment.

In the large majority of cases, a Part 6A departure determination is triggered by a written application of one or either of the parents, and undertaken with the benefit of hearing both parties. Internal review, by way of a Part 6B objection, is only available upon written application by a child support parent. Objections are chiefly conducted 'on the papers' and are obligatory if one or both of the parties wish to progress to a court review. The COA process is accessible in that both levels of review are without charge and interpreter services are provided where required. Against this, the parties cannot be represented by another person before the Registrar.[31] The process is transparent in so far that original decision-makers must provide a written statement of reasons for their decisions[32] and objections officers may be required to provide written statements of reasons pursuant to s 28 of the *Administrative Appeals Tribunal Act 1975* (Cth).[33]

Figure 2: Decision-making and appeal framework for departures from the formula



The next level of review is undertaken by the courts under Part 7 of the Act. This may take the form of a review for correction of error under s 110 of the Act,[34] or a *de novo* review under s 116 of the Act.[35] *De novo* review means that 'the matter is heard afresh and a decision is given on the evidence presented at that hearing'.[36] Arguably, this can embrace consideration of the legality of the original and objection decision.[37] Appeals lie to higher courts, while an appeal to the High Court can only take place by special leave or on a certificate from the Full Family Court that an important question of law or public interest is involved.[38] Scheme accessibility may be at risk of being undermined by the high cost and degree of formality involved in court proceedings.

Judicial review is largely an incident to the scheme but is technically available. Part 6A departure determinations are excluded from review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act), but the Part 6B internal reconsiderations are not. By all accounts, courts are reluctant to exercise jurisdiction under the ADJR Act or the *Judiciary Act 1903* (Cth), on the basis that ss 110 and 116 appeals are intended to supply the core court-based review mechanisms. This approach is implicit in the explanatory memorandum to the Child Support Legislation Amendment Bill (No 2) 1992 which introduced Part 6A into the Act, and reflects the Federal Court's statutory discretion to not act where suitable alternative review processes are available.[39] This means that patent errors of law by agency decision-makers are not easily rectified given that the parent may have to undergo full *de novo* review. This has not escaped the notice of some Family Court judges. In *Abela & Abela*, Nicholson CJ said that he had 'some concerns … that a Review officer can make an assessment which widely differs from that provided under the Act itself and anyone who seeks to challenge the assessment is forced to do so within the confines of the somewhat restrictive provisions in section 117 of the Act'.[40]

Scheme performance

This section discusses the available data concerning the extent to which customers engage in COA and appeal processes so as to gauge the effectiveness of the decision-making framework. Some caution is warranted when interpreting the data. Low application rates at the various levels may indicate any one of a number of things – satisfaction with the underlying policy rationale of the scheme; good decision-making; that the decision-making criteria are constrained; or that the system of appeal rights is flawed. On the other hand, high application rates may indicate dissatisfaction with the policy rationale; poor decision-making; loosely defined decision-making criteria; or that the system of appeal rights is flawed. In either case, the possibility of inadequate information about appeal rights must also be borne in mind.

Departure determinations

In 2002-03, the CSA finalised 32,976 'applications' for 'change of assessment' (presumably departure determinations and associated objections), including 229 Registrar-initiated cases.[41] This equates to around 5 per cent of the Stage 2 caseload. The CSA accepted 80 per cent of these applications and departed from the formula in around 69 per cent of these.[42] Table 1 provides a summary of these outcomes for 2002-03. The data show that payers were more likely to seek departure from the formula than payees; however, variations initiated by payees were granted in greater numbers and proportions than those initiated by payers.

Table 1: Change of assessment outcomes – Stage 2, 2002-03[43]

	Payer Initiated	Payee Initiated	Registrar Initiated	Total
Applications Accepted				
Variation	8,216	9,641	207	18,064
No Variation	3,998	2,321	12	6,331
No Decision	1,571	303	0	1,874
Client Agreement	23	25	3	51
TOTAL	16,861	12,290	222	26,320
Applications Not Accepted				
Withdrawn	1,133	882	1	2,016
Incomplete	2,471	1,355	4	3,830
Ineligible	493	315	2	810
TOTAL	4,097	2,552	7	6,656
FINALISED	**17,905**	**14,842**	**229**	**32,976**

Objections

The CSA publishes limited information on the outcomes of objections, which are conducted in respect of a range of CSA decisions, not just departure determinations. In 2002-03, the CSA received a total of 14,630 objections.[44] Some 14,057 applications were finalised, of which 56.7 per cent were disallowed, 15 per cent were upheld or partially upheld, and 28.3 per cent were withdrawn or invalid.[45] In 2001-2002, only 11.1 per cent of objections were upheld or partially upheld.[46]

The CSA's objection overturn rates are suspiciously low. Other schemes report much higher overturn rates. In social security, for example, Centrelink, reports that in 2002-03 around 28.7 per cent of challenged decisions were overturned at internal review, another 33.2 per cent of decisions that went on to the Social Security Appeals Tribunal (SSAT) were overturned, and another 24.7 per cent of customer appeals to the Administrative Appeals Tribunal (AAT) succeeded.[47]

In 2002, the Auditor-General reported a COA objection uphold rate of six per cent in 2000-01 or 'around one per cent of [Senior Case Officer] decisions being changed by the objections process'.[48] The CSA claimed this was due to 'the high quality of original decisions',[49] which is incongruous with its own quality audit team's findings that decision-makers departed from policy and legislation in about 45 per cent of audited cases.[50]

Section 116 appeals

In terms of child support applications, in 2002-03 the Family Court received 372 *Form 63* applications for review of departures from the COA assessment, lump sum payments and discharge from, or variation to, child support agreements.[51] Between 1 July 2003 and 14 October 2003, 49 *Form 63* applications were filed.[52] These numbers are higher than expected in the light of the *Case Management Direction* that gives the Federal Magistrates Court a primary role in child support. It may be that the Family Court is hearing child support applications with property distribution proceedings. Presumably, too, a number of these matters were remitted to the Federal Magistrates Court.

In 2002-03, the Federal Magistrates Court reported a 26.5 per cent increase in its child support caseload.[53] Table 2 shows that 1,758 *Form 63* applications were filed with the court between 1 July 2000 and 10 October 2003. A breakdown between payers and payees was not available, but the table shows that women (mostly payees) filed more child support applications than men (mostly payers).

The Child Support Decisions Database (CSDD), a database of child support judgments created for this project, provides some useful information. Over the nearly 15 years to 1 July 2003, there were only 70 reported departure decisions, 37 of which were decided by the Family Court and 33 by the Federal Magistrates Court. In 2002-03, the Federal Magistrates Court stated that it reported just over half of its family law and child support judgments.[54] Around 27 per cent of child support litigants were unrepresented in that court that year.[55] Since 1 January 2000, the Family Court has reported only one departure judgment.

Table 2: Form 63 Applications received and finalised by the Federal Magistrates Court, by year and gender, 1 July 2000 to 10 October 2003[56]

	Female Applications		***Male Applications***		
Year	**Number**	**%**	**Number**	**%**	***Total***
Application Received					
2000	44	47	50	53	94
2001	195	64	112	36	307
2002	434	56	345	44	779
2003	291	50	287	50	578
TOTAL	**964**	**55**	**794**	**45**	**1,758**
Applications Finalised					
2000	43	46	50	54	93
2001	194	64	107	36	301
2002	383	57	285	43	668
2003	118	49	124	51	242
TOTAL	**738**	**57**	**566**	**43**	**1,304**

Appeals to higher courts

In 2001-02, the Federal Magistrates Court reported 18 child support appeals from local courts (compared to seven in the previous year).[57] There are no recent published data on child support appeals to the Family Court. The CSDD shows that since the commencement of the scheme to the end of July 2003 there were 23 reported appeal judgments by the Family Court.

Judicial review applications

Judicial review proceedings in the child support area have for the most part been spectacularly unsuccessful. This seems to be due to the Federal Court's reluctance to hear ADJR matters given that there are more suitable alternative appeal rights, as well as confusion among aggrieved parents about the source of rights for judicial review. In the few reported cases, judicial review applications concerning child support matters have been dismissed.[58] The Federal Court case of *Garnaut v Child Support Registrar*[59] demonstrates that judicial review has not been completely exiled from the child support scheme. The judgment recounts that Mrs Garnaut had earlier succeeded in obtaining relief with regard to an incorrect standard of review applied by the objections officer. On that occasion, Mrs Garnaut's case was remitted to the CSA.

Which model best suits the purpose?

When designing or reviewing a framework of appeal rights, three factors invariably arise for consideration: the characteristics of the people who might seek review; the type of decision to be reviewed; and the issues at stake. The Administrative Review Council (ARC), the Australian Government's administrative law think tank, suggests that these matters should guide the degree of formality adopted in tribunal proceedings.[60] However, they are also

useful in designing decision-making structures, including whether appeal mechanisms are best placed in an administrative or judicial context.

Customer profile

The CSA customer base is dominated by parents with one or two children eligible for child support (56.9 and 31.1 per cent of cases respectively).[61] Sole care arrangements are the norm. Ninety-three per cent of children spend 256 nights or more per year with one parent, mostly their mother.[62]

Generally speaking, CSA customers are low-income earners. With median taxable incomes of $31,688 in 2002-03, payers earned around 59 per cent more than payees, who had median incomes of $19,885.[63] This difference is a telltale sign of the long-term impact that separation has on women's financial and labour market position. For the purpose of the paper, the more important point is that both amounts equate to less than average weekly earnings.[64] The scheme also assists well-paid customers. In 2002-03, the highest recorded payer taxable income was around $8.3 million, and the highest payee taxable income was just under $2.1 million.[65]

The most common source of income for CSA payers is salary and wages (almost 87 per cent of all payers), while around 18 per cent of payers received some or all of their income from government benefits and allowances.[66] However, payers also received income from business allowances or director's fees (24.6 per cent of cases), partnerships and trusts (6.5 per cent) and business profits or loss (9.7 per cent).

The CSA does not report levels of educational achievement among its customers, but Doyle notes that when the COA process was first introduced in 1992, decision-makers were advised that the average reading age of customers was around 13 years.[67] There is no published information on the language skills or cultural heritage of customers.

The above data suggests that the child support scheme is largely comprised of low-income, poorly educated parents. Women tend to assume the role of sole carer while men, for a range of reasons, are predominantly absent fathers. The customer profile points glaringly to a need for a low-cost and informal mechanism for review. Nonetheless, segments of the child support community do not fit the mould. They are high-income earners with diverse and complex financial arrangements and whose circumstances are not always appropriately assessed on basic taxation data. The appeal framework needed for one category of cases will not necessarily be suitable for a different category. On this consideration alone, merit review by an administrative tribunal able to adjust its approach or formality according to the nature of the case before it would be an attractive option. The nature of the proceedings could be modified according to the socioeconomic features of the core customer base and the gravity of the issues to be explored.

Type of decision

COA decisions are highly discretionary and fall easily within the ARC's criteria as being suitable for merit review. These are principally that the decisions are made by administrative process and will or are likely to affect the interests of a person.[68] Moreover, the decisions in question are not legislation-like decisions of broad application, and nor do they automatically flow from the happening of a set of circumstances.[69]

A COA decision can only be granted where each of the three legislative criteria contained in s 117 of the Act are made out.[70] That is, where:

- the special circumstances of the case warrant a departure from the formula in that they fall within one or more of legislatively specified reasons (Step 1); and

- it would be 'just and equitable as regards the child, the liable parent, and the carer entitled to support' to grant a departure (Step 2); and

- the departure would be 'otherwise proper' (Step 3).

The establishment of a reason for departure (at Step 1) should be a relatively straightforward process provided the decision-making criteria are suitably cast. The CSA has decoded the legislation as providing ten reasons for a departure. Briefly, these include the income, earning capacity, property and financial resources of the parties or the children; requirements for self-support or support of other legal dependents; the high cost of contact with the children; the special needs of the children; and additional income earned for the benefit of resident children. An application for a departure determination might rely on a number of these reasons.

Similarly, in the ordinary run of cases, it should be a relatively undemanding procedure to establish the approximate effect of a COA decision on consolidated revenue (Step 3).

There is, however, a substantial degree of discretionary judgment in determining whether it is 'just and equitable' to grant a departure and the quantum that satisfies this indeterminate standard. At Step 2 parents are most exposed to human error in the decision-making process. This vulnerability may well be exacerbated by the CSA's decision to employ large numbers of contracted lawyers, most of whom are outside its normal employment, training and corporate governance arrangements, to make original decisions on the Registrar's behalf. Theoretically, any difficulties with this arrangement should, for the most part, be redressed in internal review. The CSA has acted to minimise the scope for error through the development of a policy manual called *The Guide*. The purpose of the manual is to assist parents and decision-makers on the legislation and Family Court decisions. Somewhat remarkably, the manual has not so far incorporated any of the decisions of the Federal Magistrates Court which now deals with the majority of child support departure cases.

The issues at stake

Child support is a highly emotive issue, and from time-to-time the scheme has been pilloried by the media as being a trigger for familial violence and suicide. It is inappropriate to lay blame on the scheme in this way, but few would doubt that a desirable feature of the scheme is to limit conflict and bring disputes to a speedy resolution particularly when small amounts of money are involved. The layers and accessibility of appeal rights necessarily have a substantial impact on the duration of a dispute. Arguably, family and child support law are exceptional areas where less may be more.

The determination of the appropriate amount of child support is a highly sensitive area of decision-making. It traverses difficult emotional and financial issues particularly as they affect the parents, children and subsequent family members. The legislation acknowledges this difficulty by importing the objective that the level of financial support provided by parents is to be determined according to 'capacity', and that parents with like capacity should provide like support (s 4(2)(a)).

In the context of evaluating the appropriateness of particular appeal rights, questions of quantum have significant consequence. In 2002-03, child support liabilities amounted to $260 or less per annum in almost 40 per cent of cases.[71] Parents in this child support bracket might be unwise to pursue court review given the high financial and emotional costs associated with legal action. Administrative review might also prove impractical where an

application fee is imposed, such as the AAT where there is an application fee of around $600,[72] and representation may be necessary. In 2000, the Australian Law Reform Commission stated that the median legal costs in the Family Court were $2,209 for applicants and $2,090 for respondents, while the equivalent figures for the AAT were $2,585 and $4,006 respectively.[73] These data suggest that both varieties of external review entail substantial costs.

Excluding the low-liability cases above, the median child support liability in 2002-03 was around $5,081.[74] Child support payments exceeding $10,000 per annum were paid in about seven per cent of cases.[75] While these cases involve substantial amounts of money, it is not clear that the amounts disputed in the departure process are anywhere near these levels. Again, in the normal run of cases, court review is likely to be cautiously pursued.

There are, on the other hand, some cases that can be resolved more suitably by a court process. The Commonwealth Ombudsman reports that the most common reason for a change of assessment is that the income, earning capacity, property or financial resources of one or both of the parents is not properly reflected in the formula assessment.[76] The CSDD confirms that this reason is a persistent area of dispute. Around 45 per cent of reported court cases relate to difficulties in ascertaining the financial resources of the parent in circumstances involving self-employment, partnerships, companies and/or trusts. This is a complex area of the law with regard to which the Parliament has given inadequate guidance to child support decision-makers. Given the intricacy of the legal devices involved, many of these cases may be better suited to court review rather than administrative review, particularly in the light of the courts' expertise and powers of discovery.

Other issues

From a government perspective, fiscal considerations dominate given that the CSA's role is to arbitrate what is essentially a dispute between parents. There are substantial budgetary costs associated with administrative tribunals, with the SSAT running on an annual budget of around $13m[77] and the AAT $28m.[78] The SSAT has an average cost per finalised application of around $1,300 while the AAT has an average cost of $7,100 per application completed with a hearing. With 40 per cent of child support cases involving amounts of $260 or less per annum, and another 46 per cent of cases assessed at amounts of less than the average cost of an AAT hearing, there must be a real question as to whether it is appropriate for government to commit resources to initiatives that may only serve to encourage and prolong disputes of this kind.

At this point, it is useful to address briefly the proposal that the child support scheme adopt the SSAT for the purposes of reviewing COA decisions. This approach could be seen to avoid tribunal set-up costs, provide economies of scale and capitalise on the SSAT's developing body of expertise with regard to social security and associated areas of law. These are worthy considerations, but contextual matters tilt the value of this proposal the other way. In this regard, it is significant that social security customers are entitled to appeal SSAT decisions to the AAT for further merit review. If child support cases were limited to the SSAT layer of appeal only, this would be likely to evoke a degree of confusion and anger among child support customers. Similarly, it is possible that faced with workload and time pressures, SSAT members may accord similar timeframes to decisions under both systems (child support and social security), when the former class of decisions might sometimes require greater resources given the absence of further appeal rights. In addition, the SSAT framework was created on the basis that the government is always a party to the dispute, and that some grievances may be readily resolved by giving the legislation a beneficial construction. Child support disputes are a very different beast, and it is not immediately apparent that the SSAT could easily switch its focus in this respect.

A countervailing consideration is that the absence of an independent administrative tribunal can potentially involve a degree of rough justice for child support parents. Officials are empowered to make decisions about matters that have no bearing on the Budget and in respect of which there is a shortage of low-cost appeal rights that citizens have come to expect in government schemes. Against this can be said that the system of administratively determining child support is infinitely preferable to only court action (or no practical redress) as was the case prior to the scheme. Furthermore, there are mechanisms to alleviate the cost of court action for those inclined to bring worthy claims to court. First, there are no application fees for matters commenced under Part 7 of the Act. Secondly, low-income parents may apply for Legal Aid or seek the assistance of a community legal centre where available. Table 3 shows the extent of this assistance under the scheme generally. Finally, parties to court proceedings are entitled to apply for a costs certificate pursuant to the *Federal Proceedings (Costs) Act 1981*, under which the court may order the Attorney-General to pay costs on a party and party basis. Decisions in the CSDD suggest that aggrieved child support parents have so far not sought this relief in the Federal Magistrates Court even though it is available.[79]

Table 3: Legal Aid and Community Legal Centre (CLC) assistance, 1996-97 to 2001-02[80]

Year	Legal Aid			*CLC Assistance*	
	CSA Client Applications	Legal Aid Granted	Legal Aid Refused	Advice	Cases Opened
1996-1997	2,288	2,217	38	3,590	1,505
1997-1998	3,423	3,418	40	3,662	1,446
1998-1999	3,281	3,265	94	4,609	1,268
1999-2000*	3,086	3,040	41	4,432	1,325
2000-2001*	3,276	3,247	33	3,759	1,221
2001-2002	2,697	2,574	114	3,639	967

*Legal Aid data exclude NSW.

Possible improvements to the scheme

The foregoing analysis shows that the child support scheme is characterised by competing considerations. The discussion points to a need for external review of child support decisions, but in a form that takes account of the diverse customer base. Given the prevalence of low-income earners within the scheme and the educational disadvantage of some CSA customers, an administrative tribunal seems instinctively preferable to a court process. Factors that incline instead towards a judicial process are the desirability of finality with regard to family disputes; the cost-effectiveness of the present appeal process; the characteristics of the segments of the diverse customer group which suggest that only a limited number of people will be likely to engage the appeal process; and the nature of the issues likely to be subject to challenge in a dispute between two private parties. It also disregards other safeguards within the existing system that are designed to minimise the cost of appeal, yet also minimise recourse to the appeal process.

Primary decision-making and internal review could certainly be improved, but there are less costly ways of achieving this, including through improved quality assurance procedures. The cost of court action can be alleviated by legal aid, community legal services and the availability of cost certificates under which the Attorney-General may pay a substantial amount of the appeal costs. The potential for adverse cost awards acts as a filter against the pursuit of unworthy cases. One further benefit of the existing system is that aggrieved parents who have private collection arrangements in place can obtain enforcement of child support arrears through the courts concurrently with a review of their COA outcomes.[81]

Administrative tribunals, by contrast, cannot enforce their own determinations as this would involve an exercise of judicial power.[82]

Under the scheme as it now exists, the absence of an administrative tribunal is softened by the involvement of the Office of the Commonwealth Ombudsman which has taken an active role in child support administration. This is borne out by the continuing large number of complaints to the Ombudsman which has exceeded 2000 per annum over the eleven years to 30 June 2003.[83] Moreover, this oversight role extends beyond the individual complaint level to agency-wide practices that can be reviewed under the Ombudsman's own motion powers.[84] The Ombudsman has issued two own-motion reports concerning aspects of the scheme in recent years.[85] However, just as it is important to assume that internal decision-making is not indefensible, it is equally important to anticipate that the Ombudsman is not placed to sleuth out all substandard administration. For that reason, it is important to look at some other changes to the child support scheme – of both a legislative and an administrative kind – that provide a better framework for administrative justice in the child support scheme.

Decision-making criteria

The current parliamentary processes have failed to address an emergent but rudimentary aspect of the scheme, notably the determination of the income, earning capacity and property and financial resources of the parties. The impact of changes in the labour market and corporate law and taxation systems on child support payments demand closer scrutiny. The fact that the Ombudsman specifically targeted this aspect of the scheme is indicative that developments in these areas have outstripped the existing legislative provisions. These developments include the incidence of commission payments and salary sacrificing, the use of partnerships and company structures to retain profits or split income between a parent and a new spouse or other family members, the divesting of assets and the use of trusts to avoid child support obligations.

The scheme also invites the need for greater administrative and judicial activity in the area of determining the 'earning capacity' of parents and their children. These aspects of the legislation demand meaningful guidance at more than a politically perfunctory level. They are beyond the Ombudsman's legal authority to review, and are infinitely more suitable for targeted consideration, perhaps by the new Taskforce.

Standard of review

On another front, there are indications that the CSA may have misdirected itself in the approach that should be adopted in the internal reconsideration process instituted in 1998. There are some public statements about the objection process which suggest that the CSA may have applied a flawed standard of review for some time.[86] As recently as 2003, the Federal Court found that the CSA misapplied the Part 6B provisions.[87] Even now, there are indications that that the internal review process is still affected by agency misperceptions as to its proper role.[88] The upshot is that the scheme is not delivering adequate feedback to its decision-makers. This may be partly due to a failure by the Federal Magistrates Court to forward child support decisions to the CSA as a matter of course. However, the CSA must also take responsibility for failing to monitor the evolution of the law and not incorporating decisions into the policy manual and decision-making processes. Strengthening the CSA's governance arrangements – such as improved cooperative processes between the CSA and courts – could readily cure some of these weaknesses.

Structure of review

From an administrative justice perspective, it is important that departure matters not be delayed by dogged adherence to process. This is evidenced by the Registrar's power to refuse to make Part 6A determinations because the issues are too complex.[89] In such cases, the applicant may sidestep a Part 6B internal review and proceed to court for a determination order under Part 7 of the Act.

A similarly reasoned and worthwhile change flagged in the last Parliament and reintroduced in the current Parliament in December 2004 is the proposal in the Child Support Legislation Amendment Bill 2004 'to make optional the requirement for an objection to have been lodged before a person has access to the court'.[90] If enacted, the change will allow a parent to seek court review of an original decision where, for example, he or she considers that the court process would be more effective even though an appeal stage would be foregone. Under this arrangement, one parent could conceivably lodge an objection while the other may seek court review. The Bill provided that, in such cases, the court will decide whether the Registrar should consider the objection or whether it should proceed to hear the primary application. This reform will enhance scheme effectiveness as it will enable parties to limit delay and short-circuit administrative processes that may be of limited value in difficult or novel cases.

Corporate governance and reporting arrangements

In the area of corporate governance, a noticeable failing is the absence of a separate annual report to Parliament some 16 years after the commencement of the scheme. Currently, the CSA provides a confined range of data in the Annual Report of the Commonwealth Department of Family and Community Services. This arrangement is unsatisfactory given that the CSA is responsible for the transfer of child support liabilities of around $2.2 billion per annum.[91] Child support is no small endeavour. The CSA's limited reporting practices make it difficult for observers to make reliable assessments about the success or otherwise of the scheme's decision-making processes. Improvements in this area can only contribute to the level of informed public debate and overall agency performance. The reach of the scheme heightens the need for enhanced public accountability measures, and the Act already has a mechanism for separate reporting.[92]

A recent report by the Commonwealth Ombudsman underscores the greater emphasis governance arrangements ought to be accorded by the CSA. Earlier this year, the Ombudsman found that there were substantial regional differences in the nature and style of COA processes within the agency, including in the overall standard of decision-making, the level of investigation undertaken by the decision-maker, and the reasoning underlying the decisions.[93] Nearly one quarter of COA decisions were rated as being not reasonably open to the decision-maker, not the best possible decision or not possible to categorise.[94] The CSA has agreed to implement appropriate training arrangements to correct these problems,[95] but it is likely that they are deeply embedded in the decision-making culture and will take sustained effort and time to overcome.

Conclusion

To return to the question first asked in this paper – does the child support sacred cow milk parents of administrative justice? – the answer is addressed in two ways. First, the paper has analysed the customer base and context for decision-making; and secondly it has examined the appeal framework, including criteria applied in the review of decisions. The conclusion reached is that the government has adopted the correct legal structure, but that some fine-tuning is required. The other standout point is that child support is a field of law and administration that is loaded with emotion and disputation. As a result, it is inevitable

that some parents will feel they have been deprived of administrative justice. Individual grievances are real and provide pertinent material upon which to consider and propose change. Ongoing discussions in other quarters are similarly constructive. If the scheme is to remain largely in its present form, it should be regularly reviewed to take account of public discussion and private complaint. The issues raised in this paper demonstrate that child support law has been a neglected area of study and analysis for too long.

Endnotes

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18 Cabinet Sub-Committee on Maintenance, above n 15, pp 11-13.
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43 Ibid.
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50 Ibid, p 83, paragraph 7.38.
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87 See discussion in *Garnaut v Child Support Registrar* [2004] FCA 1100.
88 For example, the explanatory memorandum to the Child Support Legislation Amendment Bill 2004 and the CSA's policy manual, *The Guide,* at Chapter 4.1, contain some inaccurate statements about the nature and content of internal review.
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90 Explanatory Memorandum to the Child Support Legislation Amendment Bill 2004, p 19.
91 Anthony, above n 1.
92 Child Support (Assessment) Act, s 148.
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94 Ibid.
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