

Background

The child support scheme: implications for social security

The Child Support Scheme, which came into effect in June 1988, is designed to shift responsibility for the support of children in one-parent families away from the public purse towards the non-custodial parent.

It has three elements:

- Changes to the *Family Law Act*, to ensure that court orders for maintenance of children are not discounted to take advantage of social security income tests; and to ensure higher maintenance orders.

- A new *Child Support Act*, providing for the collection of maintenance through the Tax Office, and payment out to custodial parents.

- Changes to the *Social Security Act*, to ensure that receipts of maintenance by custodial parents will reduce the level of the parents' social security entitlements.

We reviewed some of the features of the last of these elements in the April 1988 Reporter (see pp.539-40). In this more extended article, Regina Graycar looks at the detail of the changes to the *Social Security Act*.

The *Social Security and Veterans' Entitlements (Maintenance Income Test) Amendment Act 1988* has two main effects: it establishes a separate maintenance income test, separate from the income test which applies in respect of income other than maintenance, and it strengthens the statutory requirement to seek maintenance.

The maintenance income test

Three different kinds of maintenance are dealt with by the income test: direct periodic cash payments; maintenance in-kind; and any maintenance which takes the form of a lump sum payment (including a transfer of property) over \$1500 will be imputed to income and treated as special maintenance income over a period of time.

The maintenance income test, which began operation on 17 June 1988, reduces pension or benefit by one dollar for every two dollars of maintenance income, after a threshold of \$15 for the spouse and the first child, and an additional threshold of \$5 for each additional child. In contrast, the general income test (e.g. earned income) for supporting parent's benefit and widow's pension provides a threshold of \$40 plus \$12 for each child. The differential treatment of maintenance and other income began with the 'poverty traps' legislation on 1 July 1987, when the free area for maintenance income was reduced to \$40 and \$6 (rather than the \$12 used for other income) for each child. But the differential treatment is now considerably more acute.

Examples: A widow's pensioner with two children under 16 has part time earnings of \$150 per week. Her pension will be affected as follows:

$$\$150 - \$64 = \$86/2 = \$43$$

Her pension will be reduced by \$43 per week.

A widow's pensioner with two children under 16 has maintenance income of \$150 per week. Her pension will be affected under the new income test as follows:

$$\$150 - \$20 = \$130/2 = \$65$$

Her pension will be reduced by \$65 per week.

Maintenance in-kind is not defined in the Act, other than to say that 'in-kind maintenance income... means maintenance income of the person other than a payment received by the person or a dependent child of the person'. Most common will be payments for housing (rent or mortgage) paid directly to a third party, or payments for school fees, child care, health insurance, etc.

Section 4A deals with capitalised maintenance income, which is defined to mean maintenance income not provided on a periodic basis and the value of which exceeds \$1500. There is a formula for computing such sums to income (imputation). The relevant factors are the amount, the capitalisation period and the relevant period (that is, the period for which one needs to calculate the rate of 'imputed income'). The capitalisation period can be specified by the Family Court (refer to Family Law Act, s.66L, s.77A, s.87A), and where that has not been done, the period may be deemed to be from the day of the order until the youngest child turns 18, if it is child maintenance. Where it is for a spouse, the period will be until she turns 65. There is, however, a broad discretion in the Secretary, under s.4A(5), to set a different capitalisation period ('such period as the Secretary considers appropriate in the circumstances of the case').

Example: A woman receives a lump sum transfer of \$100 000, expressed to be in respect of maintenance for her two children, aged 4 and 2.

$$\text{The Formula is } \frac{A \times R}{C}$$

A is the amount transferred; R is the relevant period and C is the capitalisation period.

A is \$100 000. R is 1 week. C is 16 years, or 52 x 16 weeks = 832 weeks. $\$100\,000/832 = \120 per week which will be deemed maintenance income. Her pension will be reduced by \$50 per week. (\$20 free area; $\$100/2 = \50).

Suppose the woman's children are 14 and 16. Applying the formula, A is \$100 000 R is 1 week; C is 52 x 4 = 208. The result is \$480 per week deemed maintenance income. At this level, her pension would be cancelled.

However there is a new provision (s.33(12A)) designed to ensure that the pension will not reduce below 75% of maximum rate. This limitation on reduction applies in three situations: where the maintenance takes the form of a transfer of property or other housing maintenance; where in-kind maintenance (or imputed capital maintenance) is being paid in the first six months after separation, and where maintenance income (cash or in-kind) is provided in relation to expenses arising directly from a disability of a child. This result (of protecting 75% of the maximum rate) is achieved through the following complex process.

Where the special maintenance income exceeds the aggregate of 50% of the maximum rate, including amounts payable for children, and the maintenance free area, the excess is to be disregarded. This will provide a threshold so that payment will not automatically cease. Full maximum rate is currently \$120.05 per week. The mother's/guardian's allowance is \$12 per week and additional payments for children are \$22 per week per child under 13, and \$28 per week per child for children between 13 and 15. The maintenance free area in the case of a woman with 2 children is \$20.

Example: A woman with two children 10 and 12 has imputed income of \$200 per week from housing maintenance. Her pension rate is $\$120.05 + \$12 + \$44 = \176 . The maintenance free area is \$20. The aggregate of 50% of maximum rate plus the maintenance free area = \$88 plus \$20 = \$108. The amount taken into account will be \$108 and any amount above that will be disregarded. Accordingly, her rate will be reduced by $\$176 - \$20 = \$88/2 = \44 . (This calculation follows the example at para 37.705 of the Pensions Policy Manual.)

While the threshold protects the pensioner from having zero income, if she is required to, for example, pay the mortgage on the property, she may find that very difficult, if not impossible, with any reduction of income. Housing experts predict that women may be forced to sell their homes in these situations.

The maintenance income test applies to all pensions and benefits and is dealt with in separate parts of the Act for pensions on the one hand, and benefits on the other (see s.122A for the maintenance income test on benefits). However, only widow's pensioners and supporting parent beneficiaries are required to seek maintenance. As discussed below, women (and male supporting parent's benefit recipients) will, subject to s.47 and s.55, be required to seek maintenance, where the Secretary considers it reasonable, or face losing their benefit.

Reasonable steps to take maintenance action

This is provided for by ss.47 and 55

which will require widows and supporting parents to claim maintenance for themselves and their children where they have an entitlement to do so. If the Secretary considers that they have not taken reasonable steps to secure adequate maintenance, they will not be granted, or have their existing pensions cancelled.

These provisions, while significantly recast, are by no means new. Previously, ss.62 and 83AAD (the relevant provisions prior to the July 1987 renumbering of the Social Security Act) required widows and supporting parents to take maintenance action as a condition of grant. However, the previous statutory obligation was not enforced by the DSS, except for a brief period at the end of the Fraser government and until late in 1987, the DSS guidelines provided that claims were not to be rejected on that ground alone.

Sections 47 (widow's pension) and 55 (supporting parent's benefit) differ from the old ss.62 and 83AAD in three significant respects. First, as mentioned, while the old provisions created an eligibility hurdle, they were expressed to apply only at the time of grant. New ss.47 and 55, in addition to providing a threshold eligibility test, are also a condition of continuing eligibility. Secondly, the former provisions did not distinguish spouse and child maintenance, whereas ss.47 and 55 require action in respect of both, (though only where the widow or supporting parent 'is entitled to claim maintenance from another person'). Finally, the reference to 'appropriate maintenance' has prompted some lawyers' groups to suggest that the DSS now has a broad discretionary power to scrutinise the level of maintenance being paid, and to require action on the part of clients to secure more maintenance, or else risk cancellation.

There is provision for the granting of exemption from these requirements. Guidelines in the Pensions Manual, paras 37.900 and following, outline what the DSS considers to be reasonable grounds for not pursuing maintenance action. The Minister in his second reading speech assured the Parliament that, for example, maintenance action would not be required where there was a genuine fear of violence, and this is reflected in the guidelines at para 37.910. Other grounds for exemption include that a court has declined to make an order, or that legal advice (evidenced by a written legal opinion) is that action would be futile; that pursuit of maintenance may be a cause of domestic disruption; or that the identity of the father, or his whereabouts (where there is no subsisting order) are unknown. Although para 37.911 goes on to list a number of examples of reasons that will not in themselves be considered sufficient to warrant exemption from the requirement to seek maintenance, this is qualified by a suggestion that if any of those reasons are given, fear of violence may be an underlying concern, in which case a referral should be made to a social worker.

Questions remain as to what will be required by way of proof? The guidelines

express a preference for some documentary evidence, though there is also a clear recognition that this will not always be available. Some solicitors have expressed concern that clients will be expected to demonstrate, for example, fear of violence by producing an order such as, in NSW, an apprehended domestic violence order (ADVO). This is a matter which should be further clarified. All requests for exemption are to be dealt with by way of a social worker referral, and in addition, the guidelines suggest that inquiries generally should be referred to social workers.

The guidelines state that women who have not been married will not be required to seek 'spouse' maintenance for themselves, a clear recognition of the fact that there is no legal basis for women who have not been married to do so (except in the most limited way under the *De Facto Relationships Act*, 1984 (NSW)). Moreover, spouse maintenance action will apparently not be required in respect of women continuously in receipt of widow's pension or supporting parent's benefit after June 9, 1988. (Guidelines, para 37.910).

Effectively, the procedures laid down in the pensions manual provide a period of up to seven months before cancellation action will be taken. The maintenance requirement is to be mentioned at the pre-grant interview, then pursued at a three month review. At that stage, either a social worker referral will be made if there are possible grounds for an exemption, or the client will be advised that she must pursue court action (or make a private agreement) within three months. At the end of that period, after a further month the client will be asked for an action for maintenance form. If at that stage, no action has been taken and exemption has not been granted, the client will face cancellation of pension or benefit.

If a woman's pension or benefit is cancelled because of failure to take maintenance action, or to seek 'appropriate' maintenance, she will then have to test her eligibility for unemployment or special benefit. The Guidelines state that cancellations may only be made by the regional manager. In such a case, the review officer will be the area manager or deputy area manager. It is anticipated that most SSAT appeals in relation to the scheme will concern the 'reasonableness', or otherwise of seeking maintenance.

As mentioned above, there is some concern about the discretion to determine that the pensioner/beneficiary 'has not taken such action as the Secretary considers reasonable to obtain appropriate maintenance from the other person' (see s.47; s.55) as this can be read as enabling the DSS not only to require a person to take maintenance action, but also to secure an 'appropriate amount'. This is reinforced by the suggestion, at para 37.513 of the guidelines that in circumstances where, for example, the child is getting a large amount of 'pocket money' while the maintenance paid is low, review action may be sought to require the custodial parent to seek

maintenance 'at a reasonable level'.

Application

The Child Support Scheme (according to the *Child Support Act* explanatory memorandum, and the Ministerial Statement of 24 March 1987), will apply to all orders or maintenance agreements that relate to children of parents who separate after the commencement of the Act; and, where the parents have not cohabited, all children born after the Act comes into force. Details of excluded liabilities are contained in the Child Support Regulations made under the Act. The DSS guidelines make it clear that where the payee is in receipt of an income tested pension, etc. the Registrar will be able to collect maintenance under an order or agreement whether the child was born before or after the commencement of the scheme, and irrespective of the date of separation. With respect to spouse maintenance, this will only be collected where it is paid in addition to child maintenance, or where only spouse maintenance is payable to a pensioner or beneficiary over 45.

It is clear from the wording of new ss.47 and 55 (the *Social Security Act* maintenance requirement provisions) that failure to take reasonable maintenance action can result in either pension or benefit not being granted or being cancelled: i.e. it does not just apply to people who become pensioners or beneficiaries after 1 June 1988. Yet the Policy Manual seems directed only at requiring new clients to seek maintenance, or those with existing orders to have them enforced. It seems likely that the DSS will wait until stage 2 of the Child Support Scheme, providing for administrative assessment of maintenance, before widening the implementation of the reasonable maintenance action provisions. This is a matter which requires further clarification.

Savings provisions

There are transitional savings provisions designed to ensure that women already in receipt of (and declaring) maintenance income at the time of commencement of the scheme do not face a loss of income. This would occur if the new maintenance income test applied to them, but the old general income test will continue in these situations, subject to s.21 of the amending legislation. However, as soon as they begin to receive a higher rate of income, they will cease to be 'saved'. The savings provisions also appear to lock women whose income from other sources (say, work) decreases after the commencement of the scheme into the pre-amendment rate of pension or benefit. This is because s.21(5) provides that a person cannot get a higher rate of pension, benefit or allowance than they were getting in the 'final pre-amendment period'.

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