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## ARTICLES

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### The Future of Child Support

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*The Ministerial Taskforce on Child Support, which reported in 2005, recommended major changes to the Child Support Scheme. The government has passed legislation in response to these recommendations. The new Scheme will be fully operational on 1 July 2008. The author, who chaired the Taskforce, explains the rationale for the changes and explores the major implications for family law practice. The changes will have a number of implications for parenting arrangements after separation. There are also important changes to the law on grounds for departure from the formula and on the law concerning child support agreements.*

#### IF IT AIN'T BROKE ...

The problem with law reform commissions, taskforces and other such advisory bodies is that they are always reforming things. It is their job to do so. What law commission ever concludes a major report by saying that the law is fine as it is and makes no recommendations for change? Advisory bodies chaired by academic lawyers are particularly dangerous. Academic lawyers are in the business of criticising existing laws and proposing new ideas. Putting an academic lawyer in charge of a policy review is like asking Oliver Twist to review the adequacy of gruel rations in the workhouse.

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To a family law profession fatigued by both the pace and extent of change in this area of law, it must have seemed a foregone conclusion that the establishment of a Child Support Taskforce in 2004 would lead to recommendations for reform.<sup>1</sup> Change, in family law, is constant. Improvement is a rarer outcome. Child support was one area of family law practice that seemed to be relatively stable. The formula was simple and easy to explain to clients, even if the legislation in its detail was not for the faint-hearted. If it ain't broke, don't fix it.

Why then, did the Taskforce have to propose a completely new formula and to recommend so many other major changes? Actually, the Taskforce did not begin with any assumption that reform was needed, and certainly not major reform. Nor did the Government have any particular agenda for change. What it did want was to have a comprehensive review of the formula in the light of the best available research, and for the Taskforce to consider a range of other matters as well.<sup>2</sup>

After careful consideration of all the available evidence, and substantial new research, the Taskforce concluded that the current formula could not be defended in the light of what we now know about the costs of children at the beginning of the 21st century. This is not to say that it was flawed from its inception – far from it. The child support formula was based upon recommendations of a Consultative Group chaired

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1. The review was initiated in response to a report of the House of Representatives Committee on Family and Community Affairs, *Every Picture Tells a Story* (2003). It made a few recommendations for changes to the Child Support Scheme. However, the Committee also recognised that given the complexity of the issues, it was best for a comprehensive examination to be conducted by a specialised ministerial taskforce. The Prime Minister announced the government's acceptance of this recommendation on 29 July 2004 and the Taskforce, aided by a Reference Group, began its work shortly thereafter. Members of the Taskforce had expertise in one or more of: social and economic policy, family law, family policy, and the costs of children. Members of the Reference Group represented the interests of child support payers and payees, and also included members who had expertise in family relationship counselling and social policy. It included a former minister of the Department of Family and Community Services.
  2. The Terms of Reference provided that the Taskforce should:
    1. Provide advice around the short-term recommendations of the Committee along the lines of those set out in the Report (Recommendation 25) that relate to:
      - increasing the minimum child support liability;
      - lowering the maximum 'cap' on the assessed income of parents;
      - changing the link between the child support payments and the time children spend with each parent; and
      - the treatment of any overtime income and income from a second job.
    2. Evaluate the existing formula percentages and associated exempt and disregarded incomes, having regard to the findings of the Report and the available or commissioned research including:
      - data on the costs of children in separated households at different income levels, including the costs for both parents to maintain significant and meaningful contact with their children;
      - the costs for both parents of re-establishing homes for their children and themselves after separation....
    3. Consider how the Child Support Scheme can play a role in encouraging couples to reach agreement about parenting arrangements.

by Justice John Fogarty, which reported in 1988.<sup>3</sup> The Fogarty Committee gave to Australia an excellent first generation child support scheme which has served the country well compared to the schemes of other countries.<sup>4</sup> The formula devised by the Fogarty Committee was based on the limited research knowledge available at that time. The country needed a relatively simple formula that could be easily administered when computer technology was much less advanced than it is now and before the age of public access to the Internet. To a considerable extent, the Child Support Scheme has achieved the objectives that successive governments have given for it. The Scheme has also been successful in promoting community acceptance of the idea of child support obligations.

However, much has changed since 1988. The Australian scheme was modelled on an approach that had been adopted in Wisconsin and certain other American states in which the child support obligation is based upon a flat percentage of the liable parent's income.<sup>5</sup> This model is known as the percentage of obligor income approach. Now the majority of US states have adopted the income shares approach, basing the child support obligation on the relative incomes of each parent.<sup>6</sup>

Major changes have also occurred since 1988 in social security and income distribution policies, and these have important interactions with child support policy. The circumstances of Australian families have also changed since 1988.<sup>7</sup> There is now a greatly increased emphasis on shared parental responsibility, and greater recognition of the importance of both parents remaining actively involved in their children's lives.<sup>8</sup> Child support policy can no longer just be concerned with enforcing the financial obligations of reluctant non-resident parents. Ensuring the payment of

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

3. Child Support Consultative Group (CSCG), *Child Support: Formula for Australia* (Canberra: AGPS, 1988).

4. Compare, for example, the travails of the English child support scheme which has struggled since its inception: see N Wikeley, *Child Support: Law and Policy* (Oxford: Hart, 2006) ch 5. The British government has recently proposed the abolition of the Child Support Agency and its replacement by a new Child Support Enforcement Commission: see Department of Work and Pensions, *A New System of Child Maintenance* (Dec 2006) Cmnd 6979.

5. I Garfinkel & M Melli, 'The Use of Normative Standards in Family Law Decisions: Developing Mathematical Standards for Child Support' (1990) 24 Fam LQ 157.

6. For the different models used in the US, see RG Williams, 'An Overview of Child Support Guidelines in the United States', in MC Haynes (ed), *Child Support Guidelines: The Next Generation* (New York: US Dept of Health & Human Services, 1994) 26; LW Morgan, *Child Support Guidelines: Interpretation and Application* (New York: Aspen Law & Business, 1999); JM Beld, 'Improving Child Support Guidelines in Minnesota: The "Shared Responsibility" Model for the Determination of Child Support' (2001) 28 William Mitchell LR 791; L Harris, 'The New ALI Child Support Principles' (1999) 35 Willamette LR 717.

7. See Taskforce Secretariat, *Social Change in Australian Families*, <[http://www.facsia.gov.au/internet/facsinternet.nsf/family/childsupport\\_resources.htm](http://www.facsia.gov.au/internet/facsinternet.nsf/family/childsupport_resources.htm)>, resources for researchers>.

8. Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).

child support is one part of a bigger picture of encouraging the continuing involvement of both parents in the upbringing of their children, both through financial provision in accordance with the parents' respective means and by spending time regularly with the children (unless contact is impracticable or contrary to the child's best interests).

## WHY REVIEW THE 'COSTS' OF CHILDREN?

For a child support scheme to be successful, it must be seen as reasonably fair. Liabilities in excess of the 'reasonable' costs of children may be considered a form of spousal maintenance by payers, while payments lower than the real costs of children may be justly criticised by payees.

### The continuity of expenditure principle

Obtaining the best possible estimates of the costs of children in modern Australia was fundamental to the work of the Taskforce because the Scheme is based upon the notion that the non-resident parent should contribute a similar level of support to the children as he or she would have contributed if the parents were living together.

This is known as the continuity of expenditure principle. It was utilised by the Fogarty Committee which proposed the original formula in 1988,<sup>9</sup> and it has been the basis not only of the Australian scheme but of many others around the world.<sup>10</sup>

In setting the percentages applicable for the payment of child support, the Fogarty Committee therefore drew upon estimates of the percentage of gross income that is spent on children in an intact relationship. For one child, those estimates, based mainly on American research (with limited Australian input) varied between about 16 per cent and 20 per cent of gross income.<sup>11</sup> The Committee proposed on the basis of this, that the child support obligation should be calculated by taking a percentage of the liable parent's gross income after deducting an exempt amount designed to

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9. It was explained by the Committee as follows: 'As a starting point in considering what proportion of income should be shared, the Consultative Group accepted the proposition that wherever possible children should enjoy the benefit of a similar proportion of parental income to that which they would have enjoyed if their parents lived together. This proposition is based on the view that children should not be the economic losers from the separation of the parents or where the parents never lived together': CSCG, above n 3, 67.
  10. In Britain, see eg Department of Social Security, *A New Contract For Welfare: Children's Rights and Parents' Responsibilities* (1999) Cm 4349, 9–10. In the USA, see JC Venohr & RG Williams, 'The Implementation and Periodic Review of State Child Support Guidelines' (1999) 33 Fam LQ 7; I Ellman, 'Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines' [2004] Uni of Chicago Legal Forum 167.
  11. CSCG, above n 3, 70.

meet the self-support costs of the payer.<sup>12</sup> They settled on 18 per cent for one child, 27 per cent for two children, 32 per cent for three children, 34 per cent for four children, and 36 per cent for five children.

### **The continuity of expenditure principle and living standards after separation**

It may be argued that the continuity of expenditure principle should not be the basis for child support obligations.<sup>13</sup> It could be said, for example, that policy makers should look at the relative incomes of each household *after* separation rather than looking to what each would be contributing if they were still together based on their present incomes. After all, the continuity of expenditure principle does not mean that children will necessarily be able to maintain the same living standards after their parents' separation as they enjoyed before. Children's living standards depend on the overall income of the households in which they spend their time. It is widely accepted that primary caregivers, mainly women, often experience a substantial fall in living standards following separation and divorce.<sup>14</sup> Family lawyers are particularly aware of this, as they tend to see clients in the immediate aftermath of separation and for a year or two after that – depending on how long it takes to resolve the legal issues.

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12. The Committee wrote: 'However, in designing an appropriate formula it was necessary to temper the application of this proposition in order to ensure a workable scheme and one which took into account the realities of capacity to pay and maintained appropriate incentives to work for both parents.... The recommended formula therefore guarantees the non-custodial parent a protected component of income, the self-support component, on which no child support is levied.' CSCG, *ibid* 67.
  13. For a review of the different approaches that could be taken, see Ministerial Taskforce, *In the Best Interests of Children: Reforming the Child Support Scheme* (Canberra: AGPS, 2005) 110–13.
  14. For Australian research, see P McDonald (ed), *Settling Up* (Sydney: Prentice-Hall, 1986); K Funder, M Harrison & R Weston, *Settling Down* (Melbourne: AIFS, 1993); B Smyth & R Weston, *Financial Living Standards After Divorce: A Recent Snapshot* (Melbourne: AIFS, 2000); J Silvey & R Birrell, 'Financial Outcomes for Parents after Separation' (2004) 12 *People and Place* 45; S Kelly & A Harding, *Love Can Hurt, Divorce Will Cost*, (2005) 10 AMP/NATSEM Income and Wealth Report 1–16; D de Vaus, M Gray, L Qu & D Stanton, *The Consequences of Divorce for Financial Living Standards in Later Life*, Research Paper 38 (Australian Institute of Family Studies, 2007). For international evidence, see H-J Andreß, B Borgloh, M Bröckel, M Giesselmann & D Hummelsheim, 'The Economic Consequences of Partnership Dissolution: A Comparative Analysis of Panel Studies from Belgium, Germany, Great Britain, Italy and Sweden' (2006) 22 *European Sociological Rev* 533. See also J Eekelaar & M Maclean, *Maintenance After Divorce* (Oxford: Clarendon, 1986); JB McLindon, 'Separate But Unequal: The Economic Disaster of Divorce for Women and Children' (1987) 21 *Fam LQ* 351; M Garrison, 'Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes' (1991) 57 *Brooklyn LR* 621; L Weitzman & M Maclean (eds), *Economic Consequences of Divorce: The International Perspective* (Oxford: Clarendon, 1992).

However, while the standard of living of many resident parents falls after separation,<sup>15</sup> this loss in living standards may be ameliorated if they re-partner.<sup>16</sup> The child support formula needs to apply generally until the children are 18, and the circumstances of parents can change considerably over this time. While a child support requirement which is substantially in excess of the amount justified by the continuity of expenditure principle may seem reasonable in the first year or two after separation, it may look grossly inequitable if the payee re-partners and has the benefit of another income in the household, while the payer only has his own income to support him.<sup>17</sup> Over time also, and as the children grow older, the primary carer may be able to improve his or her financial position substantially through increased workforce participation, and may not have the same financial needs as in the first year or two after separation.

For these reasons, a child support formula which applies until the children are 18 cannot be based on the amelioration of the payee's living standards in the immediate aftermath of separation. Part VIII of the Family Law Act 1975 gives the courts wide-ranging powers to divide the property of parents, and the financial needs of the children's primary caregiver following separation are an important factor that courts consider. Certain powers to alter interests in property and to award maintenance also exist under State and Territory laws concerning *de facto* relationships. Spousal maintenance can be ordered in appropriate situations. Government benefits such as Parenting Payment, the provision of Family Tax Benefit (FTB) for sole parents, rent assistance, special health care benefits and the pension concession card also help cushion the effects of separation for primary caregivers.

The continuity of expenditure principle is widely accepted. The idea that a parent ought to contribute approximately what he or she would have been paying if the parents had not separated is a reasonable moral position to take. It justifies the requirement that liable parents on higher incomes pay more than those on lower incomes. It allows the children to continue to share to some extent in the living standard of the liable parent. It is a morally defensible basis for calculating child support even where for the liable parent with new housing costs and other additional costs after separation, finances are much tighter than they were before.

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15. The terminology of resident parent is used in this article for convenience. Under the amendments made to the Family Law Act 1975 (Cth) in 2006, the terminology of residence orders is no longer used.

16. Funder, Harrison & Weston, above n 14.

17. Of course, it would have been possible to devise a formula based upon household income and not parental income. However, that would bring its own complexities and administrative costs. Up to four incomes would have to be taken into account if both parents re-partnered. Arguments would open up about whether a shared housing arrangement was an intimate relationship that should be taken into account in the formula, and another set of complaints would be generated from new partners who argued that their incomes should not be used to relieve the liable parent of his or her responsibility.

## What do we mean by the costs of children?

Of course, children do not have a fixed cost. The 'cost' of children depends on a range of factors including their ages, their needs, the expenses of the household of which they are a part, and the choices that parents make concerning their discretionary expenditure. Once basic needs are met, the 'costs' of children depend on the resources available to their caregivers and how much they choose to spend on them.

The widely used term, the 'costs of children', is, in developed societies like our own, really a short-hand way of referring to patterns of expenditure on children after basic needs are met. There is an extensive body of research now on the costs of children, and the methodologies that are used to provide estimates of those costs, based on responses to survey data, are very well established.<sup>18</sup> The costs of children include infrastructure costs; that is, they are calculated as a proportion of the costs of all goods shared by members of the household, such as housing, running a car, and fuel bills. Depending on which methodology is used, account may also be taken of depreciation costs.

Research on the costs of children can only provide a broad estimate. For example, because it includes a proportion of the housing costs incurred by the family, the costs of children will vary depending on the location of the family. While the Taskforce considered the housing costs in different locations, it was necessary to average out the housing costs for the purpose of the child support formula. The averages also take no account of the gender mix of children. There are likely to be greater economies of scale in a family with two children of the same gender than if the family has a boy and a girl.<sup>19</sup>

## Three approaches to estimating the costs of children

The Child Support Taskforce utilised three different methodologies to reach the best and most up-to-date estimates possible of the costs of children in Australian families. The Household Expenditure Survey was used to examine actual patterns of expenditure on children.<sup>20</sup> The budget standards approach was utilised to assess

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18. No single method of calculating the costs of children is unproblematic: see Ellman, above n 10. He critiques the methodologies used to translate the continuity of expenditure principle into child support guidelines in the USA. For a discussion of the methodological issues prepared for the Ministerial Taskforce, see M Gray, *Costs of Children and Equivalence Scales: A Review of Methodological Issues and Australian Estimates* (May 2005) <[http://www.facsia.gov.au/internet/facsinternet.nsf/via/childcare/\\$file/Costs\\_children-equivalence-scales.pdf](http://www.facsia.gov.au/internet/facsinternet.nsf/via/childcare/$file/Costs_children-equivalence-scales.pdf)>.

19. Ministerial Taskforce, above n 13, 132.

20. R Percival & A Harding, *The Estimated Costs of Children in Australian Families in 2005-06*, Research Report (Canberra: NATSEM, 2005) <[http://www.facsia.gov.au/internet/facsinternet.nsf/via/childcare/\\$File/natsem\\_costs\\_of\\_children.pdf](http://www.facsia.gov.au/internet/facsinternet.nsf/via/childcare/$File/natsem_costs_of_children.pdf)>.



how much parents would need to spend to give children a specific standard of living, taking account of differences in housing costs all over Australia.<sup>21</sup> A review was also done of all previous Australian research,<sup>22</sup> so that the outcomes of these two studies could be compared with previous research findings. Ultimately, the Taskforce made a considered judgment about the costs of children in four age groups: 0–4, 5–12, 13–15 and 16–17.<sup>23</sup>

## The net costs of children

A further complication in assessing expenditure patterns on children is that the Government actually provides significant support for children in both intact and separated families. This government assistance is provided especially through Family Tax Benefit (FTB). For lower-income families in particular, it provides substantial tax-free financial assistance with the costs of raising children. In order to work out the amount that it would be reasonable to expect a non-resident parent to pay in child support, it was therefore necessary for the Taskforce to take account of the FTB A that is paid to parents in an intact family at different income levels. This needs to be factored into any assessment of how much each parent contributes to the support of children out of their earned income.

The estimates of the costs of children, less the amount of FTB A in an intact family at that level of household income, gave the Taskforce an estimate of the ‘net costs’ of children in intact families. Its recommendations concerning the level of child support that ought to be paid are based as far as possible on these estimates of the net costs of children, adjusting for the impact of the Maintenance Income Test which offsets child support against Family Tax Benefit when parents are not living together.<sup>24</sup>

## ISSUES WITH THE CURRENT FORMULA

The Taskforce concluded that the current formula is no longer appropriate as the basis for child support liabilities for the following reasons.

- (i) The formula assumes that, across the income range, people spend the same proportion of their income on children. This justifies the fixed percentages above the self-support component based on the number of children being

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21. P Henman, *Updated Costs of Children Using Australian Budget Standards* (Brisbane: Uni Qld, 2005) <[http://www.facsia.gov.au/internet/facsinternet.nsf/via/childcare/\\$File/costs\\_of\\_children.pdf](http://www.facsia.gov.au/internet/facsinternet.nsf/via/childcare/$File/costs_of_children.pdf)>.

22. Gray, above n 18.

23. Ministerial Taskforce, above n 13, 132. These four age groups were utilised for the purposes of developing the new formula. The Taskforce finally recommended just two age brackets: 0–12 and 13–17.

24. See Ministerial Taskforce, above n 13, 73 and ch 11.



supported. However, the research of the Taskforce, and the preponderance of international research published since 1988, shows that, while the higher the household income, the more parents spend on their children in dollar figures, expenditure declines as a *percentage* of their income.<sup>25</sup> The impact of marginal tax rates is one reason that spending on children does not increase in proportion to the increases in people's taxable income. Furthermore, as income increases, expenditure becomes more discretionary. Parents who are already providing a comfortable standard of living for their children may choose to put more money into savings or to spend additional income in ways other than on their children.

These research findings make it difficult to justify the fixed percentages of taxable income under the present Scheme. At the higher ends of the income spectrum, the current child support liability is well in excess of levels of expenditure on children in intact families, especially for one or two children under 13 years of age.<sup>26</sup>

- (ii) The current formula applies the same percentage of income irrespective of the age of the children and therefore is not sensitive to the difference in the costs of children as they grow older. Research suggests that expenditure on teenagers is much higher than for younger children, and this pattern prevails at every income level. While the approach of averaging the costs of children over the entire age range has the merit of simplicity, it means that child support payments are likely to be inadequate at the time that the costs of children are at their highest, and too high when the children are younger.
- (iii) The substantial increase in the part-time employment of women with children since the Scheme was introduced means that a majority of intact families with children depend on two incomes.<sup>27</sup> The formula, however, is based only on the non-resident parent's income for the great majority of families,<sup>28</sup> since the resident parent's income is only factored in above the threshold of average weekly earnings for all employees.<sup>29</sup> It is therefore not obvious to child support payers that both parents are sharing in the cost of supporting their children according to their capacity.
- (iv) The way in which children of second families are taken into account under the current formula is of significant benefit to low-income, non-resident parents but does not provide much relief for those on higher incomes who have new children to support. This is because payers with new biological children are

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25. Ibid 133. Percival & Harding, above n. 20, 11.

26. Ibid 135.

27. Ibid 106.

28. The payee's income is high enough to affect the assessment in around 12% of cases (excluding shared care cases, where the payee's income is treated in the same way as the payer's income): see *ibid* 89.

29. The disregarded income amount is \$43 654 in 2007.

given a dollar-figure increase in their exempt income before the relevant percentage is applied. This does not reflect the reality that expenditure on children increases with household income. For low-income payers, this allowance represents a large increase as a percentage of their income, but it is proportionally only a small increase for higher-income payers. At both ends of the income spectrum, this results in unequal treatment of the children of the non-resident parent, as the amount allowed for the support of the new children may be much higher or much lower than the likely costs of the new children, and has unjustifiable effects on the amounts payable to the child support children. In some cases, the increased exempt amount may have the effect of reducing the payer's child support obligation to a minimal level.

- (v) The current formula does not take adequate account of the costs to the non-resident parent of spending time with the child. A parent has the same child support liability whether he or she has no contact with the children or has the children to stay overnight for 29 per cent of nights per year.<sup>30</sup> The Scheme therefore does not take proper account of the costs incurred when children are staying with the non-resident parent. Consideration of the costs incurred in regularly caring for the children must, however, be balanced by taking account of the fact that the infrastructure costs for the primary caregiver remain the same, whether or not the other parent has substantial contact.

## THE INCOME SHARES APPROACH

Consideration of these issues led the Taskforce to the conclusion that a child support formula based upon fixed percentages of income across the income range, and taking account of the income mainly of just one parent, could not be justified. In exploring the range of available alternatives, it concluded that the income shares approach was the fairest basis for calculating child support.

The income shares approach begins with a dollar figure for the costs of the child based upon combined parental income, and then distributes that cost between the parents in accordance with their respective capacities to pay. The primary caregiver is assumed to meet his or her share of that cost in kind. The non-resident parent's share becomes the child support obligation.

In US jurisdictions that utilise the income shares approach, the percentage of income required for the calculation declines as combined parental income increases. This is because, although the total child support required of the parents increases with combined income, it does not rise proportionately to income.

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30. Under the present formula, the non-resident parent's care of the child is only taken into account when he or she has the child for 30% or more overnights per year: Child Support (Assessment) Act 1989 (Cth) s 8(3).

But for this difference found in the income-shares jurisdictions, the percentage of obligor income approach and the income shares approach would yield the same child support requirement for the liable parent.<sup>31</sup> This is because, unless the percentage of income decreases as dollar income increases, any rise in the resident parent's income will increase the total cost of the child and the resident parent's share of that cost by the same amount, leaving the liable parent's dollar amount unchanged.

The income-shares approach was preferred by the Taskforce for the following reasons:

- (i) If the purpose of the Child Support Scheme is to ensure that parents share in the cost of supporting their children, according to their capacity,<sup>32</sup> then the amount of child support payable ought to be referable to some measure of the costs of, or average expenditure on, raising children.
- (ii) If the scheme does not generally take into account the income of both parents, then it cannot demonstrate that the parties are sharing equitably in the reasonable costs of raising children.
- (iii) The income shares approach is more transparent. It makes clear how much is being contributed by each parent to the child's support and this reinforces the notion of shared parental responsibility contained in Part VII of the Family Law Act 1975.<sup>33</sup>
- (iv) It makes change of assessment decision-making clearer. It is evident that if there is a reduction in the liability of one parent, then either the increased costs must be borne by the other parent, or taxpayers must pay more, or the child's living standards must suffer.

For these reasons, the Taskforce considered that, in principle, the income shares approach is more appropriate for Australia's current circumstances, and more in line with community values, than the current system in which most child support liabilities are based upon just the non-resident parent's income.<sup>34</sup> From the estimates made of the costs of children in the four age groups outlined above, the Taskforce sought to work out a formula based on the income shares approach that best approximated the costs of children as identified in this research.

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31. Ellman, above n 10, 181, n 29.

32. Child Support (Assessment) Act 1989 (Cth) s 4(2)(a).

33. Subject to any court orders to the contrary, each parent has parental responsibility: Family Law Act 1975 (Cth) s 61C. There is a presumption in favour of equal shared parental responsibility when courts are called upon to decide the matter: s 61DA.

34. See above n 28.

## THE PRINCIPLES OF THE NEW FORMULAE

There are many factors that need to be taken into account in a child support formula, including the economies of scale that apply in families with different numbers of children, or with children of different ages or gender; how income of the resident parent should be taken into account; how opportunity costs and childcare expenses should be treated; and how shared care should influence liability. Such issues remain matters for judgment using the best available evidence.

The essential feature of the proposed new Scheme is that the costs of children are first worked out based upon the parents' combined income, with those costs then distributed between the mother and the father in accordance with their respective shares of that combined income and levels of care. The resident parent is expected to incur his or her share of the cost in the course of caring for the child. The non-resident parent pays his or her share in the form of child support. Both parents will have a component for their self-support that will be deducted from their income in working out their child support income. There are other formulae to deal with the range of more uncommon family circumstances that can arise, based upon the same underlying concepts. In total six different formulae have been enacted, but the great majority of all cases will fall within formula 1.<sup>35</sup>

### The Costs of the Children Table

The Taskforce devised a Costs of the Children Table based upon the parents' combined taxable income in two age bands, 0-12 and 13-17.<sup>36</sup> This reflects the fact that expenditure on teenagers is generally much higher than for younger children.<sup>37</sup> The Costs of the Children Table also deals with the situation where there are children in different age bands in the one family.<sup>38</sup>

These costs are not expressed as fixed percentages across the entire income range. Since parents spend a higher amount on children the more money they have, but spend less as a percentage of their household income in the higher income ranges, the percentages applicable in this formula gradually decline as combined taxable

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35. Formula 1 is the basic formula applicable to cases in which the parents are supporting children of their relationship, and there are no other child support cases that have to be taken into account. Formulae 2, 4, 5 and 6 allow child support payable to non-parent carers of children to be worked out in different circumstances. Formula 3 is applicable where there are multiple child support cases.

36. This is now enacted in the Child Support Legislation Amendment (Reform of the Child Support Scheme – New Formula and Other Measures) Act 2006 ('CSLA Act'), and takes effect from 1 July 2008. Various amendments, mostly of a technical nature, are proposed by the Families, Community Services and Indigenous Affairs Legislation Amendment (Child Support Reform Consolidation and Other Measures) Act 2007.

37. See research cited above nn 18, 20, 21.

38. CSLA Act sch 1, div 9.

income increases. As a consequence, a liable parent with a high income will pay much more in child support than a parent on a low income, but less as a *percentage* of his or her taxable income than the parent on a low income. Similarly, where the resident parent is earning a sufficient amount that the combined child support income of the parents takes them into a higher bracket, then her or his income will reduce the amount that the non-resident parent has to pay. It will do so in a much more graduated way than under the current formula, which reduces liabilities more rapidly than is justified by the research on the costs of children. Under the proposed formula, child support obligations will be based upon the relativity between the parents' respective incomes.

The costs of children will be capped at a combined child support income of 2.5 times MTAW (‘male total average weekly earnings’, as reported by the Australian Bureau of Statistics). Where both parents have adjusted taxable income up to the self-support threshold, the Taskforce calculated that this equated to a projected maximum combined income in 2005–06 of over \$160 000. The change of assessment process will still be available to take account of very high incomes above this cap where it is appropriate to do so. The most likely situation would be to deal with high private school fees where the parents cannot agree about this.<sup>39</sup> All other thresholds are expressed as a proportion of MTAW above the self-support amounts, so that the Costs of the Children Table is indexed annually.

The Taskforce gave consideration to the commonly advocated idea that child support should be based on after-tax income, and rejected this course. The reasons were that taxable income is more readily identifiable and predictable; that using after-tax income could impact more heavily on low income earners; and that using taxable income allows for greater simplicity and alignment with the income definitions used for other government purposes.<sup>40</sup> However, the Costs of the Children Table takes account of the impact of taxation in a different way. The percentages in the Costs of the Children Table reflect the fact that higher-income families pay a greater percentage of their income in tax, and this is one reason why they spend a lower percentage of their income on children. Thus, although the proposed formula continues to be based on taxable income, the impact of income taxation on disposable income has been taken into account indirectly.

## Number of children

The Costs of the Children Table applies to one child, two children and three or more children, rather than up to five children as at present. This simplification is possible because, after taking account of the impact of FTB A, the Taskforce found that family spending on four or more children is little different from that on three children. FTB A is payable on a per child basis, and does not take account of the economies

39. Child Support (Assessment) Act 1989 (Cth) ss 117(2)(b)(ii) and 117(2)(c)(i)(a).

40. Ministerial Taskforce, above n 13, 114–16.

of scale that are possible for larger families. This means FTB A is proportionately more generous to large families. While families with higher incomes receive less FTB A, and may not receive any at all, their capacity to spend on each child is constrained as the number of children increases. Consequently, approximately the same proportion of private income is spent on four or more children as would be spent on three. In setting the final percentages for three children, the Taskforce took account of its research findings in relation to the costs of four or more children.

## Child care and opportunity costs

Taking account of child care costs was particularly problematic for two reasons. First, child care costs vary widely across Australia depending on location, the quality of the childcare provision and the provider. Secondly, because of the way government benefits and rebates affect how much parents pay for child care, working out the net costs of child care for parents was far from straightforward. In particular, while the Child Care Tax Rebate provides reimbursement for 30 per cent of out of pocket expenses beyond the fee relief provided by Child Care Benefit, receipt of this was substantially delayed because it was rebated through the tax system. This required the completion of a tax return following the end of the financial year. In the 2007 budget, the Government announced that henceforward the Rebate will be paid through the Family Assistance Office at the end of the financial year in which the child care costs were incurred.<sup>41</sup>

The Taskforce considered that whether or not a parent used child care or stayed at home looking after a child, the same allowance should be made. The parent who uses child care incurs expenditure; but, conversely, the stay-at-home parent forgoes income, and this may affect her or his earning capacity in the longer term. This is the case also for primary carers who engage in part-time work.

In order to take account of the costs of childcare or income forgone, the costs of children aged 0-12 were based upon the research evidence on the costs of 5-12 year-old children, which are substantially higher than for children 0-4 if child care costs are excluded.<sup>42</sup> Where childcare costs are particularly high, the parent incurring this cost will be able to apply for a change of assessment to help meet this cost. This is an existing ground for a change of assessment under the Scheme.<sup>43</sup> The Taskforce considered that the change of assessment system was the fairest way of dealing with situations where the costs of childcare in a particular location or from a particular provider are significantly in excess of the Australian average. These cases raise quite similar issues to private school fees, which can also be addressed through the change of assessment system.

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41. See Department of Families, Community Services and Indigenous Affairs, *Child Care Budget 2007-08*, <[http://www.facsia.gov.au/internet/facsinternet.nsf/childcare/child\\_care\\_budget07-08.htm](http://www.facsia.gov.au/internet/facsinternet.nsf/childcare/child_care_budget07-08.htm)>.

42. Ministerial Taskforce, above n 13, 132.

43. Child Support (Assessment) Act 1989 (Cth) s 117(2)(b)(ib).

## **An increased self-support amount**

Following the Taskforce recommendation, the current self-support amount, which is set at 110 per cent of the Parenting Payment Single rate, will be increased to one-third of MTAW. <sup>44</sup> This increase was justifiable because the Taskforce research shows that after taking account of the numbers of children in the household, resident parents who are on incomes below the proposed self-support threshold have significantly higher equivalised disposable incomes (ie, taking into account the size and composition of the household) as a result of government benefits than non-resident parents who are on incomes below the proposed self-support threshold. The Government's welfare to work changes announced in 2005 did not substantially change the applicability of this analysis, although they involve reduced income support payments when the youngest child turns eight. <sup>45</sup>

Because the new formula calculates the cost of the children using the parents' combined income and then explicitly calculates the share that each parent must contribute, rather than implicitly assuming the resident parent's contribution, each parent will have the same self-support amount.

## **Regular care and shared care**

The costs of regular care are given greater recognition in the new formula. If a parent has the care of the children once a week or two nights per fortnight on average (14 per cent of nights per year), it is likely that he or she will need accommodation that is appropriate for a child to stay regularly overnight. This and other infrastructure costs do not vary much depending on how much contact the parent has. For this reason, the Taskforce considered that recognition of contact arrangements in the formula should begin when a non-resident parent has at least 14 per cent care. Adopting thresholds that reflect the real arrangements that parents have after separation was regarded as better than round numbers such as 15 per cent, 20 per cent or 30 per cent.

The new formula provides that where the non-resident parent is caring for the child between 14 per cent and 34 per cent of nights per year, child support should be calculated on the basis that the non-resident parent is credited with a contribution of 24 per cent of the costs of supporting the child through the provision of that care. <sup>46</sup> This figure has been informed by research on the costs of children in separated

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44. CSLA Act s 45.

45. Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Act 2005 (Cth). The Taskforce was aware of the proposed reforms in general terms but the details were not announced until after it submitted its recommendations to the Government.

46. This is achieved by deducting the parents' cost percentage (the share of the cost that they bear directly through care) from their income percentage (their share of the combined income, which gives their share of the total cost) to give their child support percentage



families. This research demonstrates that when children are being cared for in two households, the combined costs are much higher than when the children are being cared for in only one household. While the costs of providing for the children do not diminish much for the resident parent (because so many of those costs are related to infrastructure), the costs are, to a significant extent, duplicated in the other parent's household.

Consequently, there is recognition in the new formula that just as a proportion of the housing costs and the cost of running a car should be taken into account in working out the child-related expenditure in the resident parent's household, so it is reasonable to make similar allowances in the non-resident parent's household, proportionate to his or her level of care. A parent with regular care is likely to incur similar infrastructure costs - for example, the purchase of a larger car or rent for a flat with a second bedroom, whether they care for the children 2 nights per fortnight or 4 nights per fortnight. The allowance of 24 per cent credit for regular contact was not reached by splitting the difference between 14 per cent and 34 per cent of nights per year. Rather, it was determined on the basis of the research findings of the Taskforce on how the proportionate costs of children across two households are distributed when children spend significant amounts of time with the non-resident parent.<sup>47</sup>

Where the parent is caring for the child for 35 per cent of the year, child support will be calculated on the basis that the non-resident parent is bearing 25 per cent of the costs, and this proportion rises gradually until each parent is sharing 50 per cent of the costs for approximately equal care.<sup>48</sup> Under the new formula, the higher income parent makes a contribution to the lower income parent after taking account of the proportion of time the children are in each parent's care.

This new system of credit for the expenditure incurred while caring directly for the child or children replaces the system of prescribed non-Agency payments for parents with regular or shared care of children. Section 71C of the Child Support (Registration and Collection) Act 1988 (Cth) currently provides that a payer who has incurred certain kinds of costs such as school fees, child care fees, costs of school uniforms and medical or dental expenses may ask for this to be credited against his or her child support liability. The categories for which credit may be sought are prescribed by regulations and can be up to a maximum of 30 per cent of the liability without the payee's agreement.<sup>49</sup> As a consequence of the reforms, payers who receive the

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(the share of the cost that they need to transfer). This child support percentage is applied to the total cost to determine the dollar amount to transfer: see CSLA Act sch 1.

47. Ministerial Taskforce, above n 13, 155.

48. CSLA Act s 55C.

49. Any expenditure incurred directly for the child or paid to a third party directly on behalf of the payee (eg, rent on the payee's home) can be credited against a child support liability by agreement up to 100% of the periodic liability: Child Support (Registration and Collection) Act 1988 (Cth) s 71B.

24 per cent or higher credit for the costs of caring for the children while they are with him or her from 1 July 2008 will not be able to claim credits for expenditure incurred directly for the child as well. That would be a form of double-dipping. The system of non-Agency payments will be confined to those parents who do not have the care of the children for at least 14 per cent of nights per year.<sup>50</sup>

### **The interface with Family Tax Benefit**

Currently, the way in which contact and shared care arrangements affect entitlement to FTB is quite different from the position under the Child Support Scheme. In the Child Support Scheme, the child support obligation is not affected unless a parent has the child staying with him or her for 30 per cent or more nights per year.<sup>51</sup> In contrast, FTB can be split where a non-resident parent has 10 per cent or more of the care. Although the care is normally based upon nights, it may be calculated by reference to hours of care. The FTB split is in direct proportion to the level of care, so that a parent with 20 per cent of the time with the child will be eligible for 20 per cent of both FTB A and B.

The Taskforce recommended that the child support and FTB systems be aligned, so that, rather than having two different systems for taking into account regular contact and shared care, there is one consistent approach. This was part of a wider reform strategy proposed by the Taskforce and accepted by the Government. The Taskforce examined child support policy together with family tax benefit, income support and a range of other benefits as they apply to families after separation. It became apparent that the various systems had been designed at different times and pursuant to different policy concerns, with the consequence that there was a growing problem of incoherence in the policy settings for the financial support of families after separation. Many of the recommendations made by the Taskforce, and accepted by the Government, involved the alignment of child support policy with policy concerning other benefits and pensions, so that a common set of principles is applied across Government in dealing with patterns of care for families after separation.

The outcome of the Taskforce deliberations on this issue was that while much greater recognition should be given to the costs of contact in the child support formula, resident parents should be entitled to 100 per cent of the FTB where the care of the child is not being shared, and FTB splitting should be confined to those who have shared care – that is, where each parent has the children for at least 35 per cent of nights, or five nights per fortnight.

Consequently, recognition of the costs of regular contact will be dealt with through the Child Support Scheme rather than through FTB splitting and the level of child

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50. Ministerial Taskforce, above n 13, 180–81.

51. See above n 30.

support payable is calculated on the assumption that the resident parent has the benefit of all the FTB A where the care is not being shared.

## **Recognition of costs of contact for low-income parents**

There are a number of non-resident parents who will not be as well off under these reforms as under FTB splitting. These are non-resident parents who will receive a lower reduction under the proposed arrangements for taking account of regular care in the Child Support Scheme than they gain currently as a result of FTB splitting.

The research of the Taskforce demonstrated that a significant effect of not splitting FTB A for non-resident parents would be the loss of entitlements to ancillary benefits that flow from eligibility for FTB A, including rent assistance and other valuable benefits. To ensure that these benefits remain for those exercising regular contact, the Taskforce proposed, and the Government accepted, that non-resident parents who have contact between 14 per cent and 34 per cent of nights per annum will continue to have access to rent assistance, the health care card, and Medicare Plus if the other eligibility criteria for FTB A are met.<sup>52</sup> Changes have also been made to the 'with child' rate of the Newstart Allowance so that it applies when a parent has the care of a child for at least 14 per cent of the nights per year.

## **Second families**

The Taskforce concluded that children from first and second families ought to be treated as equally as possible. The Taskforce proposed that this should be achieved by taking the amount that the non-resident parent would pay for the new dependent child if he or she were paying child support based upon his or her child support income alone, and then deducting this amount from the non-resident parent's available financial resources (together with the self-support amount) in working out his or her capacity to pay child support for the child or children in the first family.<sup>53</sup>

While some parents with second families may receive a reduced allowance for the new child or children on the basis of this principle compared to the present provisions, the effect of this needs to be considered together with the impact of all the other reforms, including a greatly increased self-support amount, fairer recognition of the costs incurred in contact, recognition that the same percentages of before-tax income should not be applied across the income range, and other changes to the way in which child support obligations are calculated. The availability of FTB to the second family should also be taken into account.

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52. CSLA Act sch 8.

53. CSLA Act s 46.

## Minimum payments

The minimum payment was \$5 per week. From 1 July 2006, the payment was increased in line with the increase in the CPI since the minimum payment was first introduced in 1999. The current minimum payment is \$333 per year, or \$6.40 per week.<sup>54</sup> This will continue to be indexed. Under the reforms that will commence in July 2008, it will become a minimum per child support case, so that a parent with a liability to children in more than one household should pay the minimum to each household. This will be capped at three such payments. Where the parent has care of at least 14 per cent with the children, the minimum will not be payable in that case, as the parent will be directly meeting some of the children's costs during that care.<sup>55</sup>

## Impact of the reforms on incentives for workforce participation

In reaching its decisions on the formula, the Taskforce was concerned to lower the disincentives to workforce participation arising from the Scheme. These disincentives apply both to payers and to payees. The new self-support component will improve workforce incentives for payers in particular. Parents on Newstart will be able to take on casual or part-time jobs to supplement their benefit, without it having implications for child support until their earnings reach a level close to where entitlement to Newstart cuts out. Parents on other income support payments will also be able to keep some of their casual or part-time earnings without any impact on the child support payable.

The increased self-support amount also benefits low income payees. Primary caregivers on income support can gain some part-time income without it affecting child support up until the self-support threshold is reached. Thereafter, the primary caregiver's income affects child support payments in a very gradual way, with very little impact on child support payments for resident parents on low incomes.<sup>56</sup> This is unlike the current system, in which the primary caregiver's income over a disregarded amount reduces the payer's income for child support calculation purposes by 50 cents for each dollar. Thus, there will be greater work incentives

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54. See Child Support Agency, 'Do I Qualify for a Minimum Assessment?', <<http://www.csa.gov.au/payer/minimum.aspx>>.

55. CSLA Act s 66.

56. See Ministerial Taskforce, above n 13, 240. This is because, as the resident parent's income rises, so the costs of the child rise for the purposes of the formula. As long as the resident parent's income is much lower than the non-resident parent's income, the resident parent's share of that increased cost is modest in comparison to the non-resident parent's share. They share proportionate to their respective incomes in the *increased* cost of the child. It is only when their combined incomes reach a point where a lower percentage for the costs of the child is applicable, and the primary caregiver's income represents a substantial proportion of the parents' combined income, that more significant effects of those earnings will be seen.

under the new formula for those resident parents who are capable of earning above average weekly earnings.<sup>57</sup>

## **Complexity in legislation, simplicity for the public**

The legislation to give effect to these changes must of necessity be more complex than the description given above. It must present a precise methodology for use not only by the Child Support Agency but, where departures are necessary, by the courts. The legislation must take account of all the possible permutations of family arrangement, including situations where the children are being cared for in whole or in part by someone other than the parents, situations where different care arrangements apply to each child in the child support case, and a multitude of other complexities.

Although the formulae are legislatively more complex than the current formulae, they will be no more complex administratively in an age of computers, nor will there be any greater complexity for members of the general public. At the present time, people can use a calculator available on the Child Support Agency website<sup>58</sup> to obtain an estimate of a child support liability if they know the father's income, the mother's income, and the number of children. With the addition of the requirement to enter the ages of the children, it will be as simple for most parents to obtain an estimate of the new child support liability as at present.

## **ASSESSMENT OF REAL INCOMES**

The use of taxable income as the basis of child support means that those people who legally or illegally manage to minimise their tax also pay unrealistically low levels of child support. As has been recognised for many years, self-employed non-resident parents who do not meet their obligations to their children represent a particular challenge for the Agency, both in assessment and enforcement.

### **The \$20 default payment**

The Taskforce found that more than 40 per cent of all payers in the Child Support Scheme are paying \$260 per year (\$5 per week) or less. Only about half of these are on Newstart, Disability Pension, or other income support. There is a reasonable explanation why some people are only paying the minimum amount while not being on income support. For example, some mothers who have re-partnered and are at home looking after other children have a minimum child support liability in respect

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57. The disregarded amount is based on average weekly earnings for all employees : see above n 29.

58. Child Support Agency, Child Support Calculator, <<http://www.csa.gov.au/ChildSupportCalculator/Calculator.aspx>>.

of a child in their former partner's care. Some liable parents are students who still live at home. Having accounted for all those who might have legitimate explanations for how they manage apparently without income, there are still many liable parents whose reported taxable incomes are not explicable in the light of the fact that they appear to have no other sources of income.<sup>59</sup>

To give effect to the principle that both parents should contribute at least something towards the costs of supporting their children, there will be a payment of \$20 per week per child for those who were not on income support during the tax year on which the current child support amount is calculated, and who report taxable incomes below the level of maximum Parenting Payment Single.<sup>60</sup> This will be capped at three children. It is of course open to them to persuade the Agency that their reported income does indeed reflect their real income and financial resources.<sup>61</sup> If the Registrar is persuaded of this, the normal minimum under the formula will apply. Where there is a ready explanation for the low income despite not having an income support payment, the process of satisfying the Registrar can be expected to be straightforward. It is expected that there will be many who will prefer to pay the \$20 per week per child than to have their financial affairs exposed to close scrutiny.

### **Registrar-initiated changes of assessment**

Another strategy for ensuring that parents who have the capacity to pay reasonable levels of child support do so, is the greater use of Registrar-initiated changes of assessment.

At present, the Child Support Agency has a range of methods by which it can assess the real capacity to pay of a self-employed person who has structured his or her financial affairs so as to minimise taxable income. It also has methods of estimating the real income of those who fraudulently conceal income derived from cash transactions. However, it normally relies on the payee to initiate a change of assessment process on the basis that the parent has a higher capacity to pay than is reflected in his or her taxable income.

Since 1999, the Agency has had the power to initiate changes of assessment of its own motion. This can be very useful in enabling the Agency to look at categories of child support cases that have shared characteristics and where a closer examination of the payer's finances is warranted. The Taskforce recommended increased resources for this work,<sup>62</sup> and the Government has responded positively to this recommendation.<sup>63</sup>

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59. Ministerial Taskforce, above n 13, 95–96.

60. CSLA Act s 65A. This level was about \$12 300 in 2006.

61. CSLA Act s 65B.

62. Ministerial Taskforce, above n 13, 176 and Recommendation 2.

63. See Child Support Agency, “‘Building a Better CSA’ Reform Package”, <[http://www.csa.gov.au/bbcsa/csa\\_reform.aspx](http://www.csa.gov.au/bbcsa/csa_reform.aspx)>.

There is no reason why the Agency should not engage in a Registrar-initiated change of assessment even where a \$20 per week per child minimum payment has been applied. Indeed, these are the very cases which deserve close scrutiny, and such a change of assessment procedure, or a payee-initiated change of assessment process, may result in a child support liability greatly in excess of \$20 per week.

## **BETTER ENFORCEMENT**

The Taskforce considered that the proper enforcement of child support obligations in relation to all child support payers is essential for popular acceptance of the Scheme.<sup>64</sup> A number of the Taskforce recommendations were concerned with enforcement.<sup>65</sup> Part of the funding package announced by the Government for implementation of the reforms includes substantially increased funding for enforcement measures.<sup>66</sup>

## **IMPLICATIONS FOR FAMILY LAWYERS**

The fundamentals of the Scheme remain unaltered. One administrative formula will be replaced by another, but the child support assessment will continue to be calculated by the Agency and both lawyers and clients will be able to work out an approximate figure from the calculators on the CSA website. Family lawyers will of course need to be able to explain to clients the principles behind the applicable formula in general terms. Beyond this, there are a few significant implications for family lawyers that need to be considered.

### **Child support, family tax benefit and parenting arrangements**

The changes to child support will naturally have a number of implications for parenting arrangements after separation.

#### **1. Establishing parenting arrangements immediately after separation**

Currently, the operation of the FTB system is such that parents who seek more than the base rate FTB A must apply for child support almost immediately, at a time when little discussion may have occurred between the parents about the parenting arrangements after separation.

To give parents more time to adjust to the separation and to discuss a parenting arrangement, there has been, since 1 January 2007, an extension of the moratorium

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64. See Ministerial Taskforce, above n 13, 81–85, 177–78.

65. Ibid, Recommendations 3–5, 7.

66. See Child Support Agency, above n. 63.



on the requirement to apply for child support (the Maintenance Action Test – or ‘MAT’) from four weeks to 13 weeks. In that period, FTB will be determined as though the MAT has been satisfied. Of course, nothing prevents a parent from applying for child support during this period. They simply will not be compelled to do so by Centrelink.

## **2. The 14 per cent threshold**

For the reasons given above, the Taskforce recommended that an allowance should be made for the costs of caring for the children when the non-resident parent has regular care. The threshold was set at 14 per cent, which is an average of one night per week or two nights per fortnight. The same allowance (of 24 per cent of the costs) is given across the spectrum of care arrangements between 14 per cent and 34 per cent of nights. While the 24 per cent allowance for these costs may overstate the costs for those who only care for the child for 14 per cent of nights per year, it might understate the costs for those who have the care of children for 34 per cent of nights per year. It was considered better to have a fixed allowance across this range of regular care than to create incentives for argument where small changes in the level of care (eg, an extra overnight in the midweek) have financial implications which provide a motivation either to seek or resist more contact between the non-resident parent and the child.<sup>67</sup>

This is a significant problem of the existing scheme. Under the current law, different child support formulae are operative when the level of care reaches 30 per cent and 40 per cent respectively. Small variations in the parenting arrangements may make a substantial difference to the amount of child support when that threshold is crossed. This is known as a ‘cliff effect’. The proportionate shares of FTB, which can be a significant proportion of household income for lower income families, vary with every 1 per cent change in levels of care above 10 per cent. Thus, arguments about whether the children will stay with the non-resident parent for two nights per weekend or three, or will have time with him or her in the middle of the week, may have significant financial implications.

The new formula substantially eliminates these cliff effects. Although some initial turbulence is to be expected, it is unlikely that the 14 per cent threshold will produce anything like the same adverse effect on negotiations for parenting arrangements as the current 30 per cent threshold. Most non-resident parents who are seeing their children will fall either side of that threshold by a clear margin. Those who have care of the children every other weekend and half the school holidays, with varying permutations, will fall within the middle of the 14–34 per cent band. Those who see the children only for occasional visits during the holidays, by reason of distance or for other such reasons, are unlikely to have the children to stay for close to 52

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67. Ministerial Taskforce, above n 13, 154–55, 272.

nights of the year. A substantial proportion of non-resident parents see their children once per year or less, or only during the daytime.<sup>68</sup>

It is very likely that in the months leading up to the implementation of these reforms in mid-2008, and for a while afterwards, family lawyers will experience numerous inquiries from non-resident parents who have hitherto had little contact with their children and who want to make parenting applications in order to get across the 14 per cent threshold. The motivation for such applications ought to be as obvious to practitioners and judicial officers as the smoke from an approaching bushfire on an otherwise cloudless summer day. It is to be hoped that judicial officers will deal with such applications robustly, and that lawyers, counsellors and family consultants will make it clear to those who demonstrate a renewed interest in seeing their children for financial reasons that such alterations to the status quo have little chance of success.

### 3. The 35 per cent threshold

The effect of the new formula is that there is only one cliff effect – at 14 per cent. When a parent is caring for the children for five nights per fortnight on average (35 per cent) then the shared care formula operates, and this allows for a gradual change in the proportion of care attributed to each household (starting at 25 per cent of the costs of the child) until the position of equal cost for approximately equal caring is reached. It is unlikely that the difference in child support payable will provide any incentive to seek, or oppose, an increase in the number of nights above five nights per fortnight. When parents share the care of their children to this extent, the practicalities of the arrangements in terms of work and school attendance are likely to be the most significant factors in deciding what parenting arrangement will be best.

There will, however, be a cliff effect at 35 per cent in relation to FTB. The trade-off for substantial recognition of the non-resident parent's care in the formula was for the

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68. In one study of a nationally representative sample of separated parents interviewed in 2001, it was found that 36% of children had not seen their non-resident father in the last 12 months; a further 17% had day-only contact: See P Parkinson & B Smyth, 'Satisfaction and Dissatisfaction with Father-Child Contact Arrangements in Australia' (2004) 16 *Child & Family LQ* 289. The data came from the 'Household Income and Labour Dynamics in Australia' survey. Interviews were conducted with 13 969 members of 7 682 households. The methodology required respondents to focus on the youngest natural or adopted child, and averages the responses of both mothers and fathers. The figure of 36% is exactly the same as that reached by the Australian Bureau of Statistics ('ABS') in 1997: ABS, *Family Characteristics Survey 1997*, Cat. No. 4442.0 (Canberra: AGPS, 1998). A further analysis of ABS interviews in 2003, again based only on resident parents' reports, found that 26% of parents saw their child less than once per year, or not at all: B Smyth, 'Time to Rethink Time? The Experience of Time with Children after Divorce' (2005) 71 *Family Matters* 4. The ABS surveys are based on resident parents' reports only and report on contact patterns for all the children.

primary carer to receive all the FTB. The non-resident parent will no longer be able to claim a proportionate share of the FTB based upon his or her proportion of the care at 10 per cent or above. The split of FTB will follow the same formula for the recognition of care as for child support. The cliff effect will be modest in relation to FTB. It tends to be higher income families who adopt shared care arrangements, and since each parent's share of eligibility for FTB is based upon his or her household income, there will be little incentive if any for higher income parents who have care of the children for 35 per cent of nights or more to claim a proportionate share of the FTB. Where one parent is on a low income and the other has an income at average weekly earnings or above, seeking a split of FTB will reduce the household income of one parent while not increasing it in the hands of the other parent to anything like the same extent.

### **Family Relationship Centres and dispute resolution over child support**

The new Family Relationship Centres ('FRCs') will have a role to play in helping separated parents to understand the Child Support Scheme and to discuss issues about child support obligations in the event of disputes.<sup>69</sup> General information about child support will be provided by FRCs, and it is to be expected that they will form close working relationships with the nearest office of the Child Support Agency to assist parents to seek the individual advice and assistance they may need.

The FRCs have also been funded to provide dispute resolution services in relation to child support.<sup>70</sup> Some issues will arise when working out parenting arrangements, and these can be discussed in mediation at the centres. The centres may also be able to play a useful role in providing dispute resolution opportunities in relation to applications for change of assessment or other such disputes between the parents.

### **Variations and departures from the formula**

Certain changes will be made concerning variations and departures from the formula. On application, the Child Support Registrar will be able to disregard a proportion of a person's income from overtime and second jobs in the first three years after separation to take account of re-establishment costs.<sup>71</sup> The current provisions in

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69. This was recommended by the Ministerial Taskforce, above n 13, ch 15. For the background to Family Relationship Centres and an explanation of their different roles, see P Parkinson, 'Keeping in Contact: The Role of Family Relationship Centres in Australia' (2006) 18 *Child & Family LQ* 157.

70. See further Department of Families, Community Services and Indigenous Affairs, 'Child Support Reforms – Family Relationship Centres', <<http://www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/budget/budget2006-wnwd-20.htm>>.

71. CSLA Act sch 1, inserting new s 44 to the Child Support (Assessment) Act 1989 (Cth).

relation to overtime and second jobs to support a second family<sup>72</sup> will be removed since, with a completely new formula in place, they were regarded as unnecessary.

There will also be a few changes to the grounds for departure from the formula. The most significant change is in relation to the law on capacity to earn, which was introduced from 1 July 2006. This restricted and clarified the circumstances in which a parent could be assessed to pay child support on the basis of a higher capacity to earn than that which they are exercising.<sup>73</sup>

From 1 July 2008, in very limited circumstances, financial obligations towards step-children may be taken into account. The parent being assessed for child support will need to show that neither of the step-child's biological parents are able to provide financial support because of specified circumstances.<sup>74</sup>

## Child support agreements and lump sums

The current rules on the making of child support agreements can lead to serious disadvantage to payers, payees, or the taxpayer, depending on the circumstances. The Taskforce considered that parents need to be given as much flexibility as possible in making their own agreements on child support, but there should be sufficient safeguards to ensure that agreements that have long-term financial consequences for the parents and children are freely and fairly made, and are not used to increase costs for the Commonwealth.<sup>75</sup>

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72. Child Support (Assessment) Act 1989 (Cth) s 117A.

73. Child Support (Assessment) Act 1989 (Cth) s 117(7B) provides:

'In having regard to the earning capacity of a parent of the child, the court may determine that the parent's earning capacity is greater than is reflected in his or her income for the purposes of this Act only if the court is satisfied that:

(a) one or more of the following applies:

- (i) the parent does not work despite ample opportunity to do so;
- (ii) the parent has reduced the number of hours per week of his or her employment or other work below the normal number of hours per week that constitutes full-time work for the occupation or industry in which the parent is employed or otherwise engaged;
- (iii) the parent has changed his or her occupation, industry or working pattern; and

(b) the parent's decision not to work, to reduce the number of hours, or to change his or her occupation, industry or working pattern, is not justified on the basis of:

- (i) the parent's caring responsibilities; or
- (ii) the parent's state of health; and

(c) the parent has not demonstrated that it was not a major purpose of that decision to affect the administrative assessment of child support in relation to the child.'

It should be noted that this does not affect decisions about capacity to *pay*, where a parent's taxable income does not accurately reflect the resources that he or she has available to support his or her children, due to the use of corporate and trust accounts, for example.

74. CSLA Act sch 6, inserting new s 117(3) to the Child Support (Assessment) Act 1989 (Cth).

75. Ministerial Taskforce, above n 13, ch 13.

Parents will be able to make binding agreements in relation to child support, whether or not they were married to one another, on the same basis as they can do for property, superannuation and spousal maintenance. The agreements can be for any amount, and parents' entitlement to FTB will be calculated on what would have been payable under the formula (including any departures).<sup>76</sup> This will provide parents will flexibility without increasing costs for the Commonwealth. Independent legal advice will be necessary for parents wishing to enter these agreements. However, parents will also be able to make less formal agreements. These will be readily terminable by either party after the first three years of the agreement, and in situations where their circumstances change substantially.<sup>77</sup> Because these agreements will not require legal advice, they will need to be made for at least the formula amount.<sup>78</sup>

The current rules of the Child Support Scheme also make it difficult for parents to make agreements about the payment of some child support in a lump sum, including in the form of property, even when this would be of advantage to both parents in establishing themselves in different households after relationship breakdown. The Taskforce considered that certain provisions that inhibit parental agreement about lump sum child support, in particular, section 128 of the Child Support (Assessment) Act 1989 (Cth), are no longer needed to protect the Government from increased expenditure on FTB.<sup>79</sup> A new type of lump sum agreement will also be available, allowing parents to access normal formula assessments calculated each year, and drawing down on the lump sum 'credit' to meet some or all of the liability. The remaining lump sum will be adjusted each year in line with changes in the Consumer Price Index.<sup>80</sup> The reforms will make it easier both for parents to reach agreement on lump sum child support and for courts to make lump sum awards where appropriate.

## Appeals to the Social Security Appeals Tribunal

Until 1 January 2007, parents who disagreed with a CSA decision had no avenue for external review of the decision except through the courts. This could be time-consuming and expensive, and was beyond the reach of many parents. It was also an anomalous situation for the decisions of a government agency to not be subject to external administrative review.

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76. This is known as a notional assessment and will occur at least once every three years.

77. The new s 80G(1)(d) of the Child Support (Assessment) Act 1989 (Cth) provides that if the notional assessment of the amount of child support that would have been payable by one party to the previous agreement to another party is varied by more than 15% from the previous notional assessment in circumstances not contemplated by the previous agreement, then a party to the agreement may give the registrar a written notice of termination.

78. CSLA Act sch 5.

79. Ministerial Taskforce, above n 13, 219–20.

80. Child Support (Registration and Collection) Act 1988 (Cth) s 69A.

Since 1 January 2007, the Social Security Appeals Tribunal (SSAT) has had jurisdiction to review decisions made by the Child Support Registrar<sup>81</sup> (once they have been subject to an internal objection and review process).<sup>82</sup> This provides parents with the opportunity for external review without the cost and formality of the court process. It is also expected to improve the consistency and transparency of child support decisions, particularly in complex areas such as change of assessment.<sup>83</sup> Most of the limited appeals that could previously be made to the Administrative Appeals Tribunal ('AAT'), relating to decisions primarily affecting only one parent, such as the remission of late payment penalties, are now also to be made to the SSAT.

SSAT decisions on child support matters are generally appealable to the courts only on a question of law.<sup>84</sup> Decisions about levels of care can be appealed to the AAT, to ensure consistency with AAT decisions on objections to Centrelink decisions about care for FTB purposes. The SSAT may also refer questions of law to a court for decision.

However, where the parents are involved in litigation on other family law matters, it is now easier for the court to deal also with the child support matter than it was under the previous legislation. The courts have increased powers to seek information, and are also be able to continue hearing the child support matters, even if the other family law matters settle first.<sup>85</sup>

## CONCLUSION

It will be for others to judge whether the reforms are a major change or a major improvement. There will always be a settling in period for major reforms, and some turbulence is only to be expected in the first few months after implementation. People may have different views about what is a fair level of child support. They are entitled to do so. What the Taskforce sought to do was devise a new child support formula that could be defended as being based on the best available estimates of the costs of children and consistent with community values on child support.<sup>86</sup> There can be no other adequate foundation for child support policy.

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81. CSLA Act sch 3, inserting new Part VIIA into the Child Support (Assessment) Act 1989 (Cth).

82. CSLA Act sch 3, inserting revised Part VII into the Child Support (Assessment) Act 1989 (Cth).

83. Child Support (Assessment) Act 1989 (Cth) s 117.

84. CSLA Act sch 3, inserting new s 110B into the Child Support (Assessment) Act 1989 (Cth).

85. CSLA Act sch 4.

86. B Smyth & R Weston, *A Snapshot of Contemporary Attitudes to Child Support*, Research Report No. 13 (Melbourne: Australian Institute of Family Studies, 2005).