The Child Support Scheme

Failures of the first decade

Ross Hyams

This article focuses upon the first ten years of implementation of the Australian Child Support Scheme. It investigates the philosophy and social ideology which underpin the Scheme and questions whether the objectives of the Scheme are being achieved. The central thesis is that the ideology of the Scheme needs to be fundamentally altered in order to properly cater for financial support of children of separated families.

The article suggests that the amendments put forward by the recent Joint Select Committee investigation into the Child Support Scheme will not ameliorate the deficiencies in the Scheme as they do not go to the pivotal core of what a child support scheme is created to do. The article describes how the ideologies inherent in the Scheme might be altered in order to create a system of child support which would cater for all system users.

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1. Ideology of the Child Support Scheme

At its most basic level, Australian society appears to hold the belief that children are important and that the community should value its youth. Our society thus puts a premium on children. Accordingly, the philosophical foundation underpinning the Child Support Scheme has its nascence in the slow realisation in the late 1970s and early 1980s that children were being severely disadvantaged by the separation of their parents[1]. Studies carried out in the mid 1980s[2] indicated that the economic impact of separation was markedly gender determined – that is, most women suffered economically post-separation. Further, when women became sole parents after separation, their reliance on social security was almost inevitable – in 1985, 89% of women who were sole parents were dependent on social security payments[3]. The main victims of this situation were, of course, the children of these separated family units who were plunged into poverty by virtue of their parents' separation.

Any community ideology, however, must be tempered with practical and political realities. Even if we believe that children should not suffer economically as a result of their parents' separation, it must be accepted that some financial dislocation will occur, at least in the short term. Thus, any system of child support must accept that it will not be fully effective in returning children to the same level of financial support as they had pre-separation. The system would also have to take into account the parents' desire to re-partner and become parents of new families. Somehow, these new children, who also require an adequate level of support, must be catered for, without disadvantaging the children from the first relationship. Further, the political reality in the creation of a system of child support is that it will not be popular with all sections of the community. If the arrangement is under-resourced, it is subjected to criticism for undervaluing children and punishing the carer for his or her desire to remain in the parenting role. If it is over-resourced it can be condemned for penalising parents who do not stay with their children – an unfair situation when often the decision to be the non resident parent is not made by choice. Accordingly, the planners of a system of financial support for children must walk a careful line between ideology and the acceptance of political reality.

1.1 Political limitations

On 24 March 1987 the Child Support Scheme was announced in the House of Representatives by the then Minister for Social Security, Mr. Brian Howe. Five objectives of the Scheme were announced, being[4]:

1. That non custodial parents should share the cost of supporting their children according to their capacity to pay.
2. That adequate support be available for all children of separated parents.

3. That Commonwealth expenditure be limited to what is necessary to ensure that those needs be met.
4. To ensure that neither parent is discouraged from participating in the work force.
5. That the overall arrangement should be simple, flexible, efficient and respect personal privacy.

It was accepted by the Opposition that there was a genuine need for reform and that the current child maintenance situation was untenable. However, Mr. Howe's Ministerial Statement immediately came under criticism, specifically by the member for Richmond, Charles Blunt. In a strong attack on the proposals, he raised many issues[5] including the comment that the Australian Taxation Office would be unable to administer the Scheme properly, as it was already over-burdened and inefficient.

It is noteworthy that almost 10 years after these criticisms were levelled at the objectives of the Scheme, some still remain relevant and can be applied today to the way the Scheme is administered. As in many political situations, Parliament created a scheme in order to solve a particular problem – the drain that social security was making on public resources. The Child Support Scheme was not created to solve an ideological dilemma, but a practical problem. The question of whose responsibility it should be for the support of children was answered by a makeshift response, fraught with political compromise. Thus, it cannot be perfect. A system has been created which bows to the reality of politics and thus simply cannot cater for all individuals affected by it.

Thus, despite the laudable objectives of the Scheme which were announced in 1987, it must be accepted that the Scheme is subordinate to political limitations and motivations. When criticism is levelled at the deficiencies of the Scheme, such criticism cannot take place in a vacuum, but must have regard to the social and political milieu in which the Child Support Scheme is placed. It is the aim of this paper to investigate the development of the Scheme and inquire as to whether it is achieving its stated objectives. The paper will further analyse the philosophical and practical limitations in creating a system of child support, and then will look at the recent Joint Select Committee's recommendations with the aim of investigating whether the suggested changes will ameliorate the current deficiencies in the system.

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2. THE STRUCTURE OF THE CHILD SUPPORT SCHEME

The current structure of the Child Support Scheme is divided into two separate and distinct phases. Participation in either stage of the Scheme depends on the following:

Stage One applies to all children where the parents were separated before 1 October 1989 and no child of the relationship was born after that date. A 'child' is a person under the age of 18, unmarried, present in, or a citizen of, Australia

Stage Two applies to children where:

- The parents were separated after 1 October 1989, or
- The child was born after 1 October 1989, or
- There are children born before 1 October 1989 whose siblings were born after 1 October 1989, and
- The applicant is the sole or principal provider of ongoing daily care for the child, or shares such care substantially equally with another person and is not living with the respondent on a domestic basis, and
- The respondent is a parent of the child (this does not include step-parents), and
- The respondent was a resident in Australia on the day of separation.

2.1 History of stages one and two

◆ ***Legislative provisions***

The creation of the Child Support Agency and the registration and collection of child support orders were the main functions of stage one of the Scheme. This came into effect on 1 June 1988, pursuant to the *Child Support (Registration and Collection) Act, (Cth) 1988* ('The Act'). The major changes that took place relating to child maintenance orders are as follows:

- Any person having a registrable court order or agreement can have it registered under the Child Support Scheme for collection of payments under the Scheme. Failure to register a registrable agreement is an offence punishable by a fine.[6]
- The only situation in which the Agency will not be involved in the collection of child maintenance is where the carer elects not to have a formal court order enforced under the Scheme or makes no demand on the other parent for maintenance, or where there is an informal arrangement entered into between the parties.
- Once an order or agreement is registered, payers of child support who are self-employed are required to make payments directly to the Child Support Agency[7]. If the payer is an employee, there is a mechanism for direct deductions from the payer's salary.
- The Child Support Agency is the only body that is able to enforce payments by civil enforcement methods. This may take place in either the Magistrates' or Family Court and may include the general enforcement mechanisms of seizure and sale of personal property and sale of real estate. The Act also provides for financial penalties for arrears in payments.

A Child Support Consultative Group was established in May 1987 consisting of eight members, representing welfare groups, the judiciary and the legal profession. This Group's main

functions were to monitor the progress of the Agency in its maintenance collection and to investigate the issue of the administrative assessment of child support by way of a formula.[8] After considering a number of submissions, the Group tabled a report in Parliament in May 1988, a month before stage one came into operation. This report, entitled *Child Support: Formula for Australia*, provided the structure for the commencement of stage two of the Scheme. Thus, in reality, stages one and two of the Scheme must be seen as one package, which was simply phased in over a period of sixteen months.

The second stage of the Scheme was introduced on 1 October 1989, pursuant to the *Child Support (Assessment) Act 1989 (Cth)*. This Act provided for the administrative assessment of child support by the Child Support Agency, without the need for a court ordered determination or court sanctioned agreement. The main provisions of this Act are as follows:

- The Act provides for six formulae (known as formulae 'A' to 'F'). Each formula applies to a different set of circumstances, depending upon whether non resident parent's or carer's wages are above the average yearly earnings, whether there is shared residence or major or substantial contact, whether the children have two or more carers and upon whether the payer has the responsibility to financially support other natural or adopted children.
- Child support agreements which conform to the requirements of the Act may be registered by the Agency, without the need for an administrative assessment. These will only apply in situations where the parties are eligible for an assessment.
- The Act establishes various ways of challenging an assessment, most of which do not require court intervention. These include an appeal where a child support agreement is refused, a substitution assessment for payment of child support other than by periodic monetary payments, and an application for a recalculation of assessment, based on a decrease of 15% or more in the payer's income.
- Further, the Act provides for a review of an administrative assessment, by way of a 'departure order' to the Family Court. In 1992, a Child Support Review Office and the position of Child Support Review Officer (CSRO) were created. Applicants wishing to challenge the administrative assessment via this method must first seek an 'internal' review, prior to applying to the Family Court if not satisfied with the decision of the CSRO.

◆ ***Granting and refusing departure orders***

Obviously, in a system of administrative assessment, there will be individuals whose circumstances must warrant a departure from the formula. The *Child Support (Assessment) Act* provides that a departure order can be applied for as an appeal from the decision of a Child Support Review Officer. Such an appeal must rely on the factors set out in s.117 of the Act, being the same factors the Review Officer had to utilise in the original decision regarding a review of the administrative assessment.

A number of early 1990s cases laid the groundwork for determining how s.117 is to be interpreted and for creating precedent which could be relied upon in order to depart from an assessment

Through an increasing body of precedents, departure orders have invoked judicial discretion. Because precedent in this area is still being created, it is sometimes not certain to whom an administrative assessment will apply, or when a departure application will succeed. The certainty inherent in an administrative system is thus compromised in order to provide flexibility, and thus stage two of the Scheme can also be seen as evolving, through both internal reviews and the increasing case law developing by way of departure orders.

2.2 Legislative and practical limitations of both stages

The Howard Government's Child Support Agency Policy states that the Commonwealth Ombudsman has received more complaints about the Child Support Agency since 1991 than about any other Commonwealth department. In 1995, the Ombudsman received 2,451 complaints out of the 300,000 cases dealt with by the Agency[9] – a complaint rate of almost 1%.

The Child Support Scheme has many limitations for both the carer and liable parent, the most prevalent pitfalls being:

◆ ***The different treatment between stage one and stage two***

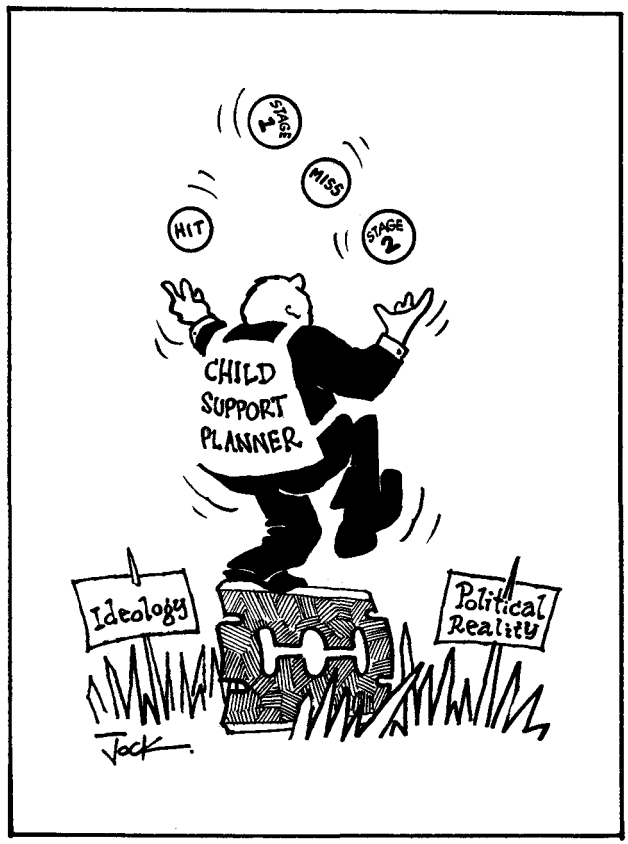
One of the major criticisms of the Scheme is the fact that there is a differentiation between children covered by each stage. Carers of stage one children are disadvantaged by their inability to obtain an administrative assessment, as the child support formulae are not relied upon to determine the payer's liability in these situations. It is submitted, however, that there is absolutely no sound rationale to differentiate in the calculation of financial support necessary for children, based on an arbitrary date on which the children were born. The law should accept the illogical and counter intuitive position it finds itself in, and do away with any distinction between stage one and stage two children in the way the liability for child support payments is assessed.

Further, anecdotal evidence from lawyers working in stage one matters suggests that the fact that the stage two formulae are not taken into consideration in court decisions under stage one, has lead to stage one court orders being generally lower than what the amount would have been pursuant to an administrative assessment.[10]

Thus, the fact that there are now two economic 'classes' of children in this country (one of which may have an inadequate standard of living arising simply out of the date on which the children were born) raises the issue of whether the current dual system of the Scheme constitutes a breach of Article 27 of the *United Nations Convention on the Rights of the Child*,[11] which requires all convention members to ensure an adequate standard of living for all children.

◆ ***Failure to enforce***

In October 1990, the Child Support Evaluation Advisory Group tabled its primary report, entitled *Child Support Scheme: Adequacy of Child Support and Coverage of Sole Parent Pensioner Population.* This report concluded that sole parent pensioners receiving child support had risen from 25.6% pre-Scheme to 36.5%.[12] However, recent statistics indicate that the overall collection rate for stage two assessments is about 50%.[13] Indeed, in the Joint Select Committee's *List of Recommendations* tabled in Parliament in December 1994, recommendation 95 urges that enforcement become a high priority activity, describing the current situation as 'five years of neglect in this area'.[14] The Joint Select Committee made 163 recommendations. The Child Support Registrar, in an interim response to the Committee's report (tabled on 29 March 1995), agreed with 43 recommendations, including instituting strategies to focus on collection and enforcement.



Anecdotal evidence from family law practitioners is such that enforcement is generally agreed to be a 'hit or miss' situation, which the lawyer is unable to ameliorate. The Agency itself admits that it does not follow up non-payments, unless impelled by the carer to do so.[15] A simple way of resolving this dilemma, whilst taking pressure off the Child Support Agency, would be to allow carers to 'opt out' of the enforcement system of the Scheme, once a certain time period has elapsed (say, three months) and the Child Support Agency has been either unable to enforce, or has not yet attempted enforcement due to lack of resources. Of course, the major difficulty with this suggestion is its social security implications. If 'opting out' was a real option, it would be in the Agency's interests to delay enforcement. The more people choosing private enforcement, the less work there would be for the Agency. Because enforcement is expensive, many people would probably give up in despair and return to reliance on social security, thus electing to abandon the Scheme entirely. An 'opting out' provision thus has ideological implications, as it returns us to the fundamental issue of where we are placing responsibility for the financial welfare of children – the public or private sphere. Finally, Article 27(4) of the *United Nations Convention on the Rights of the Child* requires that 'all appropriate measures' be taken to obtain maintenance for children. The lack of adequate enforcement under the Scheme is arguably another breach of the Convention.

◆ ***No maintenance guarantee***

Because the Scheme only collects payments and passes them along to the carer, no funds are available when collection has not taken place. If the liable parent absconds or is simply not known, the carer will receive no benefit under the Scheme and will be reliant on social security for financial survival. This again contravenes Article 27 of the UN Convention by failing to cater for all sole parent families. The discrimination against children of sole parent families, where the liable parent cannot be found, is thus duplicated – first by the fact that the child will lack a relationship with one of his/her parents (generally such a relationship is believed to be beneficial) and, secondly, the child may be economically discriminated against by the Commonwealth. If financial support of children is seen as a basic right, then this country must fulfil its responsibilities to its children and its obligations under the UN Convention.

Of course, it is not possible to devise a system of collection of child support which relies upon payments from the private sphere which will resolve the issue of 'missing' or dead liable parents, unless there is acceptance that reliance must be placed to some extent on the social security system. The issue remains as to whether we are prepared to accept a 'trade-off' situation which accepts that some dependence on social security will be inevitable, or whether the system will be firmly based in the private sphere. It appears, for example, that the child support system in the US has elected to place total reliance on personal parental responsibility and thus the issue of enforcement of child support payments in that country has received much attention.

Further, there is normally a delay between an application for an assessment and the first payment being available to the payee. The Agency allows thirty days to process an application for administrative assessment. It will then write to the liable parent with details of the assessment and request payment by the end of the first week of the next month. However, if an application is made late in the month, the payer is given a grace period of a month. For example:

- An application is made on 18 April.
- An administrative assessment will be made by 18 May.

- A grace period of one month is given to the liable parent on the understanding that it will be impossible for payment to be made by 7 June, thus
- Payment will be required by 7 July.

Thus, there can be a delay of some 70 days or more between making an application and the first payment. The Agency has no system to cater for the financial needs of the payee whilst this delay is occurring. Surely it would not be too burdensome for the Agency to retain a small 'delay' fund to assist carers whilst they wait for the administrative process to occur. A first payment of child support could be made out of this fund whilst the delay is occurring, which could be refunded by the payee at the end of her/his dealings with the Agency (for example, when the children turn 18). This would not necessarily even have to be refunded physically by the payee – the last payment of child support by the liable parent could be retained by the Agency.

◆ ***Limits on review***

The system of internal departures from an administrative assessment commenced on 6 April 1992. There must be an administrative assessment of child support in force to apply to the Child Support Registrar for a CSRO to make a determination that, because of special circumstances, the administrative assessment should be departed from. The Registrar must ensure that the provisions of s.117 of the *Child Support (Assessment) Act* are satisfied and will then review the administrative assessment. Such a hearing may be conducted by telephone and does not require the presence of the respondent.[16] However, legal representation is not permitted. Further, decisions of the CSRO are not reported and thus there is no public accountability.

Arguably, the lack of legal representation, the fact that decisions are not reported and are not subjected to judicial scrutiny, provide parties to the process of internal review with very little protection from Review Officers who may be biased, misinformed or simply wrong in their decisions. Although appeal is available by way of an application to the Family Court for a departure order, such action may be financially prohibitive for an applicant, for whom the very reason for an appeal is usually inadequacy of financial support.

Further, the legislation does not allow representation of children in either internal reviews or departure applications in the Family Court. This failure appears to point to the political reality of the Child Support Scheme. The only explanation that can be drawn from this is that the Scheme is more concerned with reducing social security payments than ensuring that children's economic rights are protected – as it gives the very children it purports to be catering for no voice in its implementation.[17]

3. DESIGNING A CHILD SUPPORT SCHEME - PHILOSOPHICAL DILEMMAS AND PRACTICAL LIMITS

In devising a system for the calculation and payment of child support, regard must first be had to what *kind* of system is being developed. Is it a scheme designed to achieve the objective of ensuring all children receive adequate support, regardless of their (or their parents') individual circumstances? Or, is it merely a contrivance for shifting responsibility from the public to the private purse? Arguably, the current Australian Child Support Scheme has attempted to accommodate both of these objectives in the present system. This attempt at reconciling the unreconcilable leads to a number of ideological dilemmas and practical limitations.

◆ ***Social security and child support***

The *Child Support (Assessment) Act* states that parents have a primary duty to maintain their children. The basic economic argument which is often used in favour of maintaining the current level of resources to the Child Support Scheme is that the public purse should not have to bear the cost of raising children of separated parents. The Act demands that both parents shoulder responsibility for the financial support of such children. Thus, the Department of Social Security will assist a new carer for a short period, but will soon demand that the parent apply for an assessment of the other parent's liability. Arguably, as the operation of the Scheme requires enormous Commonwealth resources, the question remains as to whether financing the Scheme is a more economically viable venture than simply diverting these funds into social security payments for all single parents. This, however, ignores the apparent ideological justification of forcing a liable parent to take financial responsibility for raising children.

Our social security system does not have an ideological rationale which expects an aged or disabled person's relations to financially support that person. We may think that there is a moral commitment to do so, but this society has not enshrined such a commitment in its legislation. Why, when the debate turns to children, must there be an ideological bias which does not exist in relation to the support of others in society? Arguably, if our nation believes it is axiomatic that children are the way to perpetuate a positive future, then it should simply take over the financial support of children where separation of families have made it impracticable for such support to be maintained in the private sphere.

The Child Support legislation is framed in gender neutral language and provides for payments from the liable parent to the carer, irrespective of gender. However, in the overwhelming majority of situations, the liable parent is the father. Thus, the expectation that single parents (usually mothers) should remain dependent on the liable parents (usually fathers) for support of children again perpetuates the patriarchal bias of society. Women are thus forced into economic reliance. By depriving women of the financial ability to be the single head of the household, the Child Support Scheme makes unfair assumptions about the structure of modern society. It perpetuates the myth that women wish to accept the yoke of 'primary caregiver'. Sandra Berns believes that parents are under a dual obligation – the first to provide socially necessary care for the development of children, the second being to provide the basic resources necessary for survival[18]. She states:

> Our society is problematic because it treats these obligations as gendered. Many of our traditions suggest that only women are morally obligated to directly provide the care and nurture required by children while only men are morally obligated to provide the resources needed to secure food, shelter and other necessary goods.[19]

The Child Support Scheme simply continues this tradition. If all child support payments occurred through the Department of Social Security, regardless of wage scales or attempts to enforce against recalcitrant parents, it is suggested that this may be liberating for single mothers who find themselves financially male reliant long after they have made a decision not to continue to be involved in such a relationship.

◆ ***The basis for support***

The calculation of the formula is based on research carried out in 1984 by K. Lovering[20] and in 1989 by D. Lee.[21] The Lovering scale calculates spending on children based on a standard set of items that a child of a given age may need – thus, it describes a theoretical or model spendi ng pattern. By contrast, the Lee scale is a calculation of how much parents *actually* spend on their children. This expenditure is then compared to a household without children with an analogous living standard. The difference between the two is then ascribed to the cost of raising children.[22] The difficulty with either of these approaches is that the data upon which the current child support formula is based are Lee 's figures from 1984 (Lee 1989). The Joint Select Committee described both approaches as 'dated and possibly misleading'[23] and thus suggested as one of its recommendations that a new survey take place in order for figures to be updated and to evaluate the current child support formulae which are based on old research methodologies.[24]

Thus, the system of administrative assessment cannot satisfy all situations. Because the applicability of the formula itself may be questionable and thus appears to be becoming less relevant each year, it is questionable as to what is the most applicable approach for determining the level of support.

In the Child Support Consultative Group's 1988 report entitled *Child Support: Formula for Australia,*[25] three approaches were described regarding the suitable level of child support. These can be summarised as follows:

Income equalisation
The income of both carer and liable parents' households are pooled and divided pro rata according to the number of members in each of the household's family.

Income sharing
A certain proportion of each parent's income is designated for child support, predicated on the concept that children should continue to receive a portion of each parent's income as they would if their parents had not separated.

Cost sharing
This approach determines the cost of child rearing and allocates those costs between parents proportion-ally according to their respective incomes.

By depriving women of the financial ability to be the single head of the household, the Child Support Scheme makes unfair assumptions about the structure of modern society.

Basically, the Australian Child Support Scheme has adopted the second of the above approaches.[26] The ideology which underlies this method is that each parent during marriage spends a certain percentage of their income on child rearing. Thus, the children should continue to receive that proportion after separation and should therefore not be disadvantaged financially as a result of the separation. Of course, this methodology does not take into account 'opportunity costs' of the carers – that is, it does not factor in the loss of income (or income earning opportunities) borne by the carer due to child care requirements. Further, if the carer attempts employment and must pay child care fees, such fees are also not factored in pursuant to this method of calculation.

In the United States, child support is handled by the individual States. A combination of the first and second approaches (income equalisation and income sharing) is the most prevalent.[27] The difficulty with this structure is that it causes problems when the child's parents re-partner. Pursuant to the US Department of Health and Human Services guidelines, one of the principles to be adhered to in the making of child support legislation by the States is that:

> (7) A guideline should not create extraneous negative effects on the major life decisions of either parent. In particular, the guideline should avoid creating economic disincentives for remarriage or labor force participation.[28]

Obviously, the philosophy underlying this principle is that child support legislation cannot be seen to dissuade the citizenry from creating families, assuming that we accept that the family (however it is constructed) is the base unit of society.

Thus, the notion of each 'household' has become complicated as parents re-couple and new families are raised. The liability to support new, dependent families complicates the issue when income must be pooled and made proportionate to the members of each new household. However, carers feel that it is inequitable when they are forced to pro rata their children's share of the liable parent's income with children of a new relationship. The fundamental policy issue remains whether child support legislation should encourage men to sire new offspring, when they are not in a financial position to support them as well as their existing children. The notion that creating families is positive must have a limit which is at least defined by the economics of the situation. Couples in many intact marriages choose not to have several children because they simply cannot afford to. Why then should separation confer a financial benefit to the father, which society is expected to bear through social security payments to the

mother? It should not. Thus, it can be argued that there **should** be financial disincentives for *re-fathering* (not remarriage) based on the fact that the requirement to share limited financial resources with a new family creates a disadvantage to offspring of the first relationship which is unfair.

Of course, this does not resolve the issue of how to treat the children of a new, existing family. Society may be comfortable in dissuading the formation of new families, but may feel most uncomfortable in punishing already existent children of a second family. This problem was tackled by Justice Kay of the Family Court in his submission to the Joint Select Committee.[29] He recommended that the child support formula should be altered so that the liability is determined on a pro rata basis, without allowing any increase to the payer's self support component. Thus, the formula percentage would apply to *all* children of the payer regardless of which family they came from. Arguably, this would not disadvantage children from either family and seems an eminently logical way of untangling this particular dilemma.

◆ ***Balancing discretion and certainty***

One of the objectives put forward for the creation of the Child Support Scheme[30] was that the system be 'simple, flexible and efficient'. Simplicity and flexibility seem incongruous in this context. Broad-based legislation such as this, which encompasses massive social change, must carry with it a certain rigidity if it is to remain simple. Conversely, if society requires flexibility, complex legislative machinery must be put in place to enable such flexibility to exist. The legislation, by the use of departure orders, attempts to come to terms with this requirement. However, it is possible that providing this flexibility has led to a 'watering down' of the Scheme, both in the benefit achieved by it being clear and uncomplicated, and in its reliability. The number and complexity of departure orders increases as each year of the Scheme elapses. Arguably, as new precedents allowing departure orders continue to develop, certainty in assessments created by the Scheme will continue to erode. Accordingly, it is arguable that the entire system allowing internal reviews of assessments and departure orders should be abolished. Both administrative discretion (through a review officer) and judicial discretion (through the Family Court) would be eliminated, leading to a Scheme which provides simplicity and absolute predictability, for carer and non-carers alike. Further, eradication of internal reviews and departure orders will deliver a number of benefits to the system:

- The Child Support Review Office would be abolished. This would save a large amount of funds which could be used for enforcement of administrative assessments.
- The liable parent would be unable to harass the carer with vexatious or frivolous reviews and subsequent litigation, of which the main objective is nuisance value.
- The concept that financial responsibility for a child's welfare can be abrogated or modified would be abolished.

The fundamental policy issue remains whether child support legislation should encourage men to sire new offspring, when they are not in a financial position to support them as well as their existing children.

The message conveyed to parents by such a change to the Child Support Scheme is that parental responsibility is not avoidable whether the parent lives with the children or not, and is irrespective of any argument that such responsibility can be diminished because of personal circumstances. Both parents remain responsible for the upbringing of their children. For the parent that resides with the children, this will continue to mean both financial and personal day-to-day obligations. For the parent who does not reside with the children, the day-to-day obligations may be removed, but the financial obligation remains, regardless of other circumstances. Granted, the extent of the financial obligation varies according to income levels, but this is catered for by a formula assessment. Thus an argument certainly exists that no discretion should exist which would relieve or reduce such responsibility.

◆ ***Taking account of the cost of care***

The current legislation brings into account the carer parent's income only if it has reached above a threshold of the average weekly earnings.[31] This is known as the 'disregarded income amount'. It is disregarded because the system allows the carer to earn a certain sum of money for self and children support. After the threshold, the amount of child support receivable starts to be reduced.

There is a lack of equality, however, which is entrenched deeply in the social philosophy of the Scheme. This is due to the fact that the carer's role is not defined in monetary terms, except in the token way in which the carer's disregarded income amount is higher than that of the liable parent. This difference purports to take into account the cost of caring for children, but it does not factor in the 'ripple effect' of caregiving – that is, the costs associated with lost income opportunities due to the responsibilities undertaken by the caregiver. The time, effort, lost financial and social opportunities and sheer stress of being the full-time caregiver are not taken into account in any calculation relating to the assessment of child support. However, income is brought into account once it passes the average weekly earnings threshold. This bestows no financial value whatsoever to the carer's (usually the mother's) domestic labour.

There is a built-in dual disincentive for the carer to earn a reasonable wage in the framing of the Scheme. The Scheme is specifying that society values the caregiving role, but that this is the role expected of women and thus it is unnecessary to accord it any financial merit. It is also stating that women should not deviate too far from the role

expected of them as any variation that goes too far will be financially penalised.

4. DIRECTIONS FOR THE FUTURE

4.1 A critique of the Joint Select Committee's recommendations

As the Child Support Scheme completes its first decade, alterations are required to the system to render it simple, equitable and yet, predictable for all users. The limitations which have been discussed in this paper need to be viewed in light of the extensive report prepared by Parliament of the Commonwealth of Australia Joint Select Committee on Certain Family Law Issues (hereafter referred to as the 'JSC'), entitled *The Child Support Scheme: An Examination of the Operation and Effectiveness of the Scheme* in November 1994 and tabled in Parliament in December 1994. Many of the issues which were discussed in this report relate to small or cosmetic modifications to the Scheme. It is, however, the fundamental issues in the ideology and implementation of the Scheme which need to be investigated.

◆ ***The issue of discretion***

One of the fundamental areas which must be explored regarding the future of the Scheme is whether we want to retain a formula-based approach at all, and, if so, whether it should be further moderated by expanding the range of exceptions available to an assessment. In this regard, it is worthwhile looking to overseas jurisdictions. The formula-based system imposed by federal legislation on the states in the US comes under strong criticism. It is argued that it is inflexible and thus imposes unfair burdens on the liable parent. Further, in that country it is argued that the very rigidity of formula-based assessment makes a mockery of the concept of parental personal responsibility by taking financial control from parents and putting it in the hands of the state.

Conversely, it is probable that removing the formula-based approach, and thus its attendant rigidity, would take Australian society back to the pre-1988 position. Judicial discretion in this area leads to unfair and anomalous results, especially when decisions are being made in the Magistrates' Court by persons with little or no understanding of either family law or the costs of raising children. Further, if 'parental responsibility' was not being adhered to by fathers here or in the US in the 1980s, no social revolution has taken place in either country in the 1990s to alter child maintenance avoidance.

For a child support system to be fair, it must retain a degree of certainty, so there can be confidence in the system.

The JSC attempts to come to terms with this issue by affixing another level of complexity to the Scheme. Recommendations 77 to 82 suggest the establishment of an external Child Support Appeals Office to which an appeal from an internal review would go at first instance and thence to a Child Support Claims Tribunal, or to the Family Court on a point of law. This suggestion is made because the current review procedure is not seen as being independent from the Scheme. This creates a cumbersome review process. It makes a mockery of the original objective of simplicity as enunciated in 1987. It proposes that the emphasis at the appeal level should be on 'mediation and simplified procedures'.[32] Surely, by the time that such a matter has reached the fourth level of determination (administrative assessment, internal review, external review, appeal), procedures are no longer simple and the opportunity or desire for mediation has passed long before. Further, creating another level of determination further reduces certainty and predictability in the Scheme, increases its complexity, and will require a huge funding commitment. Such a suggestion neither accords with the current philosophies of the Scheme, nor is practicable in reality.

The question of discretion in child support is based in social policy. For a child support system to be fair, it must retain a degree of certainty, so there can be confidence in the system. However, there must exist the ability to take into account the fact that we live in a heterogeneous society which incorporates various versions of family units, each with its own specific circumstances. Perhaps it should be recognised that it would be detrimental to the current Child Support Scheme to further expand discretion so as to reduce certainty in the outcomes under the Scheme. A body of precedent has developed which gives direction as to what factors will be acceptable to depart from an administrative assessment. This precedent now spans almost 10 years. In order to travel the fine line between discretion and certainty in the Scheme, these factors could be codified to provide a catalogue of matters which will then become the only considerations which can be relied upon by an applicant for departure from an assessment.

Thus, the Scheme, in taking into account the last ten years, could place a moratorium on departure orders which fall outside those that already form part of the body of law. It is arguable that discretion be neither expanded nor reduced but remain static, taking into account the years of case law which have enabled discretion under the Scheme to be refined to this point.

◆ ***Enforcement***

In a 1994 submission to the JSC, the Child Support Agency advised the Committee that more than 97,500 payers were in arrears and that more than half of the total debt of $481.5 million due to the Agency had been outstanding for more than a year.[33] Clearly enforcement continues to be a major issue and a major failing of the Scheme. The JSC makes various insubstantial recommendations in this area, none of which appear to go to the core issues surrounding enforcement. The strongest suggestion appears to be that private collection agencies be used to collect debts and that carer parents have the ability to apply to the Agency for private enforcement.[34] Whether this will, in fact, achieve anything is doubtful. Private enforcement is again

an ideological issue. Allowing parents to opt out of enforcement through the Scheme conveys the message that child support is, in fact, a private issue after all – a matter between two spouses and not one in which society has an interest. If we are in earnest about the community enforcing child support obligations, then all enforcement would have to be carried out by the Scheme.

Surely, with statistics as grim as those submitted by the Agency to the JSC, if we wish to take the view that parental responsibility is a primary objective of the Scheme, then it is time for more effective enforcement mechanisms to be established.

In the US, enforcement of child support obligations is taken very seriously and is pursued rigorously because the legislature has adopted a positive philosophical stance to child support. It is firmly viewed as a matter of private parental responsibility which is to be resolutely administered by government. In this country, our ideology does not appear settled and it is questionable whether we are prepared to go to such lengths. If not, we cannot argue that our system is aiming to ensure liable parents adhere to their financial obligations. Perhaps we should accept the trade-off that some will and some won't. Again, if we are serious about society taking responsibility for the financial welfare of children, the time, energy and resources which are currently being put into enforcement (and which are obviously not being particularly effective) should be withdrawn and diverted to improving social security for families of ex-spouses who will not pay voluntarily. Accordingly, perhaps the JSC should adopt the suggestion that enforcement be cut back and the Commonwealth should step in by way of social security and honour society's obligation to such children.

5. Conclusion

There is no doubt that the current Child Support Scheme is not a perfect system. It is fraught with controversy and is restricted by perceived political, practical and ideological limitations After ten years of implementation of the Child Support Scheme, it behoves us to investigate the philosophy and social ideology which underpin the Scheme and question whether the objectives of the Scheme are being achieved. The central problem is that the ideology of the Scheme needs to be fundamentally altered in order to properly cater for financial support of children of separated families.

Australia's Child Support Scheme is now progressing into its second decade and concurrently into the 21st Century. It is hoped that in the future we will have the prudence, as a nation, to be prepared to set aside political considerations in favour of a consistent ideology.

The amendments put forward by the recent Joint Select Committee investigation into the Child Support Scheme will not ameliorate the deficiencies in the Scheme as they do not go to the pivotal core of what a child support system is created to do. The current inadequacies in the system must be amended to remove inequalities at all levels. The central ideology of the Scheme might be altered in order to create a system of child support which would cater for all system users.□

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