

# REFORMING CHILD SUPPORT LAWS

## Breaking the cycle

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In the 15 years since their inception, Australian child support laws have attracted more than their fair share of criticism. There have been repeated calls for an overhaul of the system and, in particular, of the formula used to calculate child support. The fact that much of the reform activity has come about as a result of processes designed to consider other matters is evidence of the strength of feeling this issue generates. However, to date, significant substantive reform has not followed even the most detailed reconsiderations of the child support scheme. Most notably, a decade ago the government handed down its report, *The Operation and Effectiveness of the Child Support Scheme* ('the 1994 Report'),<sup>1</sup> which contained 163 recommendations, including for substantial amendments to the formula. While many of the recommended changes have been adopted, the basic formula did not undergo any significant changes.

Ten years on, the Minister for Children and Youth Affairs has announced the creation of a yet another committee to examine the child support scheme ('the Taskforce'). In keeping with tradition, the genesis of this reform inquiry was a process designed predominantly to consider other family law matters and yet it is the child support formula that is squarely in the spotlight.

This article considers this most recent move to reform child support laws in the context of a cyclical pattern of law reform typical to family law. The article begins by tracing the path leading to the establishment of the Taskforce and then looks at its terms of reference and considers why certain areas were selected for investigation and others ignored. It comments on what might presently be driving the reform agenda in the area of child support and discusses the implications this has for users of the system. It concludes with some thoughts about the opportunities the Terms of Reference offer the Taskforce in reconsidering the direction of child support reform.

### The road to the Taskforce

In May 2000 the Federal Government created the Family Law Pathways Advisory Group ('the Pathways Group') to advise it on how to achieve a family law system that provides effective support systems for families, co-ordinates client-focused information and services and provides pathways that are effective and appropriate.<sup>2</sup> The ensuing report, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* ('the Pathways Report')<sup>3</sup> stuck to its brief and avoided commenting on the predictable and numerous submissions it received (largely from non-

resident parents and male advocacy groups) attacking the child support scheme in general. The Government's response to the Pathways Report was equally silent on child support. However, on 26 June 2003 the House of Representatives Standing Committee on Family and Community Affairs had referred to it Terms of Reference which included '[w]hether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children'.<sup>4</sup>

The report that followed — *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* ('the Every Picture Report') — was delivered in December 2003 and contains a host of recommendations about child support. As the full title implies the Standing Committee had much broader Terms of Reference than just child support. The key focus of its work was the consideration of a legal presumption in favour of shared physical custody of children post parental separation. Rather than opting for such a presumption — which would have been a cheap outcome for the government — the Every Picture Report proposed the establishment of a new 'families tribunal'. Any new tribunal was bound to be a far more expensive reform, and the Government was cautious in its initial response to this proposal.<sup>5</sup> However, within a day of the release of the Every Picture Report, the Minister for Children and Youth Affairs was reported as saying that changes, such as to the child support scheme, could be considered for the next budget.<sup>6</sup>

The child support reforms suggested in the Every Picture Report were extensive, ranging from suggested changes to the formula to a recommendation for external review of Child Support Agency (CSA) decisions. A further recommendation was the creation of yet another committee to consider these matters further. As a result, on 16 August 2004 the Minister for Children and Youth Affairs announced the creation of the Taskforce, which is to examine the child support scheme. The Taskforce has until March 2005 to report.

### The family law reform cycle and its implications

In summary, the Every Picture Report made the following child support-related recommendations:

- specific changes to the formula including increasing the minimum payment; reducing the maximum child support income amount; removing the link between child support and the time spent with each parent; reducing the child support payable on

#### REFERENCES

1. Joint Select Committee on Certain Family Law Issues, *The Operation and Effectiveness of the Child Support Schemes* (1994).
2. See the Terms of Reference to the Report of the Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (July 2001).
3. *Ibid.*
4. House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003) xvii <[www.aph.gov.au/house/committee/fca/childcustody/report.htm](http://www.aph.gov.au/house/committee/fca/childcustody/report.htm)> at 2 February 2005.
5. 'Cautious Backing for Family Court Reform', *The World News*, 30 December 2003 <[www9.sbs.com.au/theworldnews/region.php?id=75876&region=7](http://www9.sbs.com.au/theworldnews/region.php?id=75876&region=7)> at 2 February 2005.
6. L Martin, 'Custody Deal: Lawyer-Free Divorce', *Sydney Morning Herald* (Sydney), 30 December 2003 <[www.smh.com.au/articles/2003/12/29/1072546473278.html?oneclick=true](http://www.smh.com.au/articles/2003/12/29/1072546473278.html?oneclick=true)> at 2 February 2005.

- additional income or overtime; ensuring exempt and disregarded income levels move closer together
- significantly strengthening enforcement powers of the CSA including the removal of driving licences
- increasing the extent to which paying parents could get credit towards their child support for payments in kind, such as school fees
- a re-evaluation of the whole scheme which included: establishing actual costs of raising children in separated households; some reflection of parents' costs of re-establishment of their home after separation; ensuring the scheme takes account of tax changes including company tax rates and trusts
- the need for external review of CSA decisions.<sup>7</sup>

In comparison, the Taskforce's Terms of Reference are to:

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
- 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
- Advise on what research program is necessary to provide an ongoing basis for monitoring the child support formula

3. Consider how the Child Support Scheme can play a role in encouraging couples to reach agreement about parenting arrangements.

4. Consider how the Family Relationships Centres may contribute to the understanding of and compliance with the Child Support Scheme.<sup>8</sup>

The striking contrast between the recommendations from the Every Picture Report and the Terms of Reference for the Taskforce is that the latter concentrate on reforms that will benefit payers of child support whereas the former covered more evenly areas of concern to both payers and payees.

In addition to foreshadowing possible (predominantly downward) changes to the child support formula,

the Every Picture Report made some very specific recommendations about matters that adversely affect payees of child support. There was the question of self-employed payers of child support organising their affairs in a way that reduced their liability to pay child support,<sup>9</sup> the problem of payers choosing unemployment or underemployment to avoid child support<sup>10</sup> and the burgeoning level of child support arrears. The Report went on to note the additional collection powers referred to in the 1994 Report and by the Department for Family and Children's Services and added to these lists further suggested powers to enhance the CSA's ability to recover its debts.<sup>11</sup>

The consideration given to unfair under-assessment of child support (as would be caused by the first two issues mentioned above) and non-payment of child support in both the 1994 Report and the Every Picture Report show just how significant these issues are to payees. And yet only the fourth Term of Reference of the Taskforce touches on these problems. On their face, these latest Terms of Reference fail to validate the concerns of payees who are not receiving the child support they should or who face unfairly low assessments of child support.

In contrast, some key factors that would address payers' primary concerns of over-assessment have been targeted. Indeed, if all of the changes being considered were implemented, the result would be substantial reductions in child support payments. The Taskforce is to consider these matters against the backdrop of existing or commissioned research into the actual cost of raising children in separated households. This clearly indicates the Government's intention to try and 'solve' the very contentious issue of whether current child support assessments reflect a fair contribution by each parent to the costs of raising their children post-separation.

In current debate as to the fairness of the level of child support payments, the pre-eminent question is whether they are generally too high.<sup>12</sup> Apart from the suggestion of doubling the minimum payment (currently about \$5/week), the Taskforce has been given a clear focus on the potential downward move in payments. *Of course* current, robust evidence of the financial impact of separation and the costs of sharing of care of children when parents do not live together will help the analysis of whether child support payments required under the child support scheme are equitable. Addressing this issue is important, whatever the outcome of that inquiry, if only to put the matter to bed (at least for a while). I would suggest, however, that focusing on this as

7. See Recommendations 25–9.

8. See The Hon Larry Anthony MP, 'Taskforce to Examine Child Support Scheme' (Media Release, 16 August 2004) <www.csa.gov.au/release2.pdf> at 2 February 2005.

9. The Every Picture Report, above n 4, paras 6.163 – 6.174.

10. The Every Picture Report, above n 4, paras 6.175 – 6.181

11. The Every Picture Report, above n 4, para 6.191.

12. The most frequent comment made to the 1994 Joint Select Committee related to the formula being unfairly harsh (see above n 1, para 4.43).

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the pre-eminent reform issue endangers the likelihood of reforms that actually improve the situation for parents trying to support their children when they are not living together. But it is a cycle of 'law reform' that has become all too familiar in family law.

It has been argued that the family law reform agenda is currently being driven by fathers' advocacy groups, seemingly *despite* the evidence before the federal government. Graycar, having reviewed a number of areas of family law says:

To sum up, in a number of different contexts changes have either been made or proposed to 'marriage and divorce law' that respond to what are either purely anecdotal stories of problems with the law or rhetorical resort to notions like formal equality to suggest that previously recognised gendered disparities in outcomes for women and men have simply disappeared through resort to the rhetoric of 'social change'.<sup>13</sup>

Rhoades and Boyd, in a comparison of the custody reform process leading to the Every Picture Report with a similar Canadian review process, noted the international trend that has witnessed the 'central role played by fathers in triggering legislative reviews ... [and] that these legislative changes have largely proceeded with scant regard for the state of empirical knowledge of family life'.<sup>14</sup>

This trend is as apparent in the child support arena as in other areas of family law. For example, apart from anecdote, what is the evidence supporting the claim that the rate of child support is punitive? Drawing on a sample of 474 separated parents, Smyth and Weston found that 'conclusions drawn from early Australian Institute of Family Studies (AIFS) work continue to hold: in general, women are more likely than men to experience financial hardship after divorce ...'<sup>15</sup>

For the 2002–03 year, the CSA published this data about clients for whom they collect child support:<sup>16</sup>

- the average weekly child support liability is \$48.53
- the average weekly child support liability for one child is \$38.46, \$62.66 for two children and \$70.68 for three children, beyond which the figures begin to decline again
- the median income used in child support assessments for payers is \$18,275 and for payees \$10,553.
- only 54.1% of cases had a child support liability over the statutory minimum liability of \$260/year (in private collect cases that figure rises to 66.6%)
- the higher a paying parent's income, the less likely they were to have a child support debt.

Percival and Harding (having recognised the inherent difficulties in evaluating the costs of raising children) recently estimated that an Australian couple having a total household income of \$567 a week (\$29,484 a year) were spending \$55 a week on one child aged 0–4 and up to \$213 a week for one child aged 15–17.<sup>17</sup>

Of course, every study of the costs of raising children has been the subject of criticism and so in 2000 the AIFS published a Guide to Calculating Costs of Children,<sup>18</sup> which included the various approaches that have been taken to this problem over recent years in Australia. Even the study producing the lowest result (which has been criticised internationally, in part because it can show four children costing less than three) estimated that in 1993–94 a low-income family<sup>19</sup> spent \$59 a week on one child.<sup>20</sup>

This data, when read together, does not indicate that the average level of child support is unreasonably high as a contribution to the expected costs of raising a child. It may tell us that most child support families have low incomes and so levels of child support are low.<sup>21</sup> The figures for high-income payers (who are a very small minority) will look different, but CSA statistics show they are the most likely to pay. The higher proportionate liability of a high income payer also makes some sense, as the higher a payer's income, especially in relation to the payee's income, the more appropriate it is that the payer should contribute a greater share of the costs of raising the children. Indeed, in intact families that parent would often meet all of the costs of raising the children. No doubt the Taskforce will cover all this and more in considerable depth.

This, then, is the familiar first step in family law reform — the Government is persuaded by the most vocal critics that, despite the evidence, there is a major problem due to the unfairly high rate of child support. However, the mere fact that the Government has been convinced to reconsider a particular family 'law' is no guarantee, in this cycle, of any significant change to that law. Rhoades and Boyd point out that:

The outcomes of the recent Australian and Canadian custody reform processes suggest that the role of empirical research is no longer confined to evaluating the impact of reforms after they have been enacted *but is beginning to play a positive role in averting policy changes that are based solely on the claims of disaffected consumers*. At the same time, we have found that some law reform measures that would have better reflected the reality of families' lives have been avoided, in part in order to placate disaffected consumers. [emphasis added]<sup>22</sup>

So, the next step in the cycle is to have an inquiry, actually consider the evidence, and then to end up with

13. R Graycar, 'Law Reform by Frozen Chook: Family Law Reform for the New Millennium' (2000) *Melbourne University Law Review* 737, 750.

14. H Rhoades and S Boyd, 'Reforming Custody Laws: A Comparative Study' (2004) 2(18) *International Journal of Law, Policy and the Family* 119, 119–120.

15. B Smyth and R Weston, 'Financial Living Standards after Divorce: A Recent Snapshot', (Research Paper No 23, AIFS, 2000) 19.

16. Child Support Scheme Facts and Figures 2002–03, <[www.csa.gov.au/publications/f03.pdf](http://www.csa.gov.au/publications/f03.pdf)> at 2 February 2005.

17. See generally R Percival and A Harding, 'AMP–NATSEM Income and Wealth Report: All they Need is Love ... and around \$450,000', Issue 3 (2002).

18. Australian Institute of Family Studies, 'A Guide to Calculating the Costs of Children' (2000).

19. With a total household income of \$16,900.

20. R Valenzuela, 'Costs of Children in Australian Households' (1999) 53 *Family Matters* 71.

21. See for example the conclusions drawn in J Silvey and B Birrell, 'Financial Outcomes for Parents after Separation' (2004) 12(1) *Monash University Law Review*.

22. Rhoades and Boyd, above n 14, 20.

relatively modest reforms. However, as part of that process, reform issues that would not be palatable to the original lobby groups are being abandoned.

This seems to be where we are heading yet again with the Taskforce. As in the United States, the Government has been convinced by fathers' rights groups to pour money into the question of whether the rate of child support is fair to them.<sup>23</sup> In this process, other clearly identified problems payees face with assessment and enforcement have been abandoned. And as before, the chance of any major reforms, particularly to the formula, seems unlikely. To take steps that would dramatically reduce the outcome of the application of the formula would seem hard to justify given the available data and would dramatically increase the welfare budget. While an automatic joint custody regime might have significantly affected child support, that fight was (predictably) lost. Radical change therefore seems unlikely — instead, if anything, we will probably see fine-tuning. The fine-tuning payers are likely to see is no more than payees are asking for, as incorrectly low assessments and habitual non-payment affect only a minority of payees.

However, this cyclical process provides the Government with the strategic advantage of looking as if it is trying to alleviate the problems of those most vocally disaffected, whilst at the same appeasing the 'other' camp by not making any radical changes. Could this be a cost effective mechanism for 'damping down' the calls of the most extreme groups? Given the history of family law reform, it is hard to imagine the government really believes this latest inquiry will lead to some improved view of the child support scheme by payers (and hence fewer complaints to MPs) and to an improvement in family life for parents not living together.

History and research suggest fine-tuning the formula will *not* dull the complaints of those opposed to the scheme<sup>24</sup> (though of course it might buy their votes in a few elections). This is because fathers' views on the scheme do not seem to be linked to their rate of child support or their capacity to pay that level of support in the way this reform process assumes. Consider these findings:

- Smyth and Weston's sample suggested that younger repartnered men with better than average incomes and no children in their new household perceived their financial situation as worse than might be expected given their situation.<sup>25</sup>
- Davis and Wikeley, having surveyed 2500 UK child support customers, concluded that a child

support payer's assessment of the fairness of an assessment is not solely judged by reference to its financial implications. Frequency of contact and the relationship between child and paying parent were also influencing factors.<sup>26</sup> Not surprisingly, the strength of the parent/child relationship also influenced compliance rates for payers.<sup>27</sup>

- Mandell's literature review confirms the significance of contact in the payment of support, but also the relationship between former spouses.<sup>28</sup> She says that '[r]esearch does not support the contention that all non-payment is a result of inability to pay ...'<sup>29</sup> As a result of her own Canadian study she posits that non-payment of child support by fathers can be '... an expression of resistance to identities that the system imposes on them and that they do not perceive as congruent with their own identities'.<sup>30</sup>

In other words, and rather obviously, the reasons for the discontent of payers with the child support system are complex and not solely — if even predominantly — due to the allegedly high rate of child support assessments. Let us not forget that of the few reforms of the formula to date, arguably the most significant have improved the position of payers. And yet the bulk of the Terms of Reference are directed *again* at this issue.

This cycle reminds me of the way many adults offer bribes to non-compliant children, only to find that this system of 'rewards' in fact escalates the non-compliant behaviour. The real challenge in parenting is to discover what drives the behaviour and develop strategies to help the child avoid the need for these attention-seeking stunts. But this requires not only time and dedication but also a willingness to accept that relationships are complex and that it may not be only the child who needs to rethink the way they interact within this relationship.

### Opportunities for the Taskforce

Is there, then, within the Taskforce's Terms of Reference, scope for a contribution to this debate that actually has some hope of improving the operation and effectiveness of the child support scheme? It is trite but true to say that fundamental issues lie at the heart of the family law 'gender war' being played out in family law reform debates and this is equally true in the area of child support. Australia is not in a situation like the United Kingdom, where there was an administrative crisis in the delivery of their child support scheme, in large part due to their overly complex formula. In such a situation, rethinking the child support formula was vital. I would suggest the pressing child support

23. E C Crowley, *The Politics of Child Support in America* (2003) 192–3.

24. *Ibid.*

25. Smyth and Weston, above n 15, fig 7.

26. G Davis and N Wikeley, 'National Survey of Child Support Agency Clients — The Relationship Dimension' (2002) 32 *Family Law* 522, 524.

27. *Ibid.*, 526.

28. D Mandell, *Deadbeat Dads: Subjectivity and Social Construction* (2002) 16.

29. *Ibid.*, 232.

30. *Ibid.*, 226.

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issues faced by Australia — having done a reasonable job of implementing its scheme in the first place — are now much more complex and cannot be remedied by tinkering with the formula. A reconsideration of the underlying fundamentals is required. The Taskforce's Terms of Reference suggest the Government is determined to avoid this process. Rather, the core assumptions seem to be that modifying the formula and some limited parental education are the key factors in achieving parental success at emotional and financial parenting when those parents are not living together.

These Terms of Reference also ignore the reality that the support of children is not simply a problem of the parents. In particular, they do not explicitly acknowledge the ongoing debate as to the proper balance between state and private financial support for children. After all, consider a system that deems stay at home spouses to be dependents of their spouse for the purposes of welfare payments, but disregards that support for the purposes of child support. The only policy logic for this is that it minimises welfare outlay. This may be financially convenient for the Government, but it ignores the daily reality of scores of re-partnered parents. In fact, it might be said that the Terms of Reference are deliberately cast to avoid looking at this relationship. In the Every Picture Report, Recommendation 25 suggested that the link in the formula between child support payments and the time children spent with their parents be *eliminated* in favour of a new parenting payment to paying parents who had more than 10% care of their children. In the Terms of Reference, however, the Taskforce has been directed to consider 'changing' the link. This sounds more reminiscent of old debates about whether paying parents should get more significant reductions based on the amount of time their children stay with them.

Of course, by asking the Taskforce to reconsider the formula a door has been opened for the Taskforce to consider the balance between state and private support obligations, as a reduction in child support will affect welfare payments. Also, the inclusion of the third and fourth Terms of Reference provides some scope for considering other fundamental issues, as they not only allow the connection to be made between child support and parenting, they point us (if rather obliquely) in the direction of one of the key fundamentals to improving parental co-operation: better and different relationships. These Terms of Reference, in particular the fourth, invite us to remember that many post-separation problems arise from the way marriage (and its de facto counterparts) and parenthood are constructed.

For example, Flood has recently reminded us that changing social expectations of men (and women) provide a golden opportunity to improve the actual quality of fatherhood, but only if the problems associated with pre-separation fatherhood are tackled — '[w]orkplace relations, policy barriers, practical disincentives and social obstacles'.<sup>31</sup> In considering, and rejecting, a legal presumption of post-separation shared physical care, he notes that 'Australian fathers need policies that help them connect with their children at all stages of life, not simplistic laws that fail to address the real obstacles to involved fathering'.<sup>32</sup> As Flood is suggesting, these are the kinds of fundamentals one needs to explore to lead to real improvements for parents and they apply equally to all aspects of parenting, whether emotional or financial.

The Taskforce has the opportunity to break the largely futile (and expensive) cycle of 'law reform' we are presently seeing in family law. It could start by ensuring it does not get wholly distracted by the fine-tuning Terms of Reference. Incremental improvement informed by new and better data will always be a positive part of any law reform process. However, this fine-tuning should not cater to only one interest group. Nor should it be done at the expense of considering the causes underlying the dissatisfaction of users of the system. The Taskforce could therefore explore what the research tells us — and does not tell us — about *why* some parents (both mothers and fathers) do not or cannot support their children financially. Then it could consider what role *government* might play in creating a climate in which more parents can and do support their children. This will, as Flood highlights, inevitably take it beyond the confines of the child support, indeed the family law, systems. Most importantly, the Taskforce could avoid the pretence that the fundamental problems facing Australian families are somehow caused by the family law system and can therefore be fixed by simply changing legislation or the administrative delivery of that legislation.

Perhaps this all sounds rather naïve. After all, in a democracy, why would a government behave any differently? But the Taskforce is *not* the government and it has the opportunity to move away from knee-jerk reactions to emotive anecdotal 'evidence' and towards a more complex response to the very real issues that face many Australian families.

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31. M Flood, *Fatherhood and Fatherlessness*, (Discussion Paper Number 59, The Australia Institute, November 2003) xi.

32. *Ibid.*, xii.