ONE EYE OPEN:

ADMINISTRATION OF PRIVACY IN CHILD SUPPORT CASES

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ABSTRACT

The Child Support (Assessment) Act 1989 and the Child Support (Registration and Collection) Act 1988 confer broad powers upon the Child Support Program (CSP), within the Commonwealth Department of Human Services (DHS), to collect and disclose personal information regarding Australian families. Against the background of the historical intentions of Parliament for the protection of privacy in the administration of child support cases, this paper evaluates the privacy practices currently employed by the CSP, the contemporary requirements informing the duty to accord procedural fairness, and demonstrates that current practices relating to the collection and disclosure of personal information in child support matters are not aligned with the intentions of Parliament, are not informed by a full reading of the statutory context, and lead to unwarranted interferences with the privacy of Australian families. Finally, this paper will propose a framework to guide administrators in the establishment of the boundaries of procedural fairness in the administration of individual child support cases.

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I INTRODUCTION:

PARLIAMENTARY INTENTIONS FOR THE ADMINISTRATION OF PRIVACY IN CHILD SUPPORT MATTERS

In 1986 the Commonwealth Government Cabinet Sub-Committee on Maintenance published a discussion paper (the "Howe Report") outlining 'the Government's broad proposals for reform of Australia's existing child maintenance system.'[1] The paper identified various issues for community consultation including a number of key principles that were held to be essential to any reform of the child support system as it then stood, namely that:[2]

a) *non-custodial parents share in the cost of supporting their children according to their capacity to pay;*

b) *adequate support is available for all children not living with both parents;*

c) *Commonwealth expenditure is limited to the minimum necessary for ensuring those needs are met;*

d) *work incentives to participate in the labour force are not impaired; and*

e) *the overall arrangements are non-intrusive to personal privacy and are simple, flexible and efficient.*

[1] Australia. Cabinet Sub-Committee on Maintenance. and Howe, Brian. and Australia. *Child support: a discussion paper on child maintenance, October 1986 / Cabinet Sub-Committee on Maintenance*. Australian Govt. Pub. Service Canberra 1986. 14.

[2] Ibid 3.

The paper drew specific attention to the importance of privacy in the administration of child support, and from the outset the Government's stated intention was 'to keep any intrusions on privacy to the absolute minimum necessary to ensure parental obligations are fulfilled' [3] and that '[a]ny compromise of the objective of privacy would be to the minimum necessary and with adequate safeguards against abuse.' [4]

This concern for non-intrusiveness upon personal privacy recognised the sensitivities surrounding separated families and was intended to place an obligation upon the agencies involved in the design and administration of child support processes. Throughout the development and passage of the child support bills[5] into law draft legislation, explanatory memoranda and parliamentary statements reiterated this key principle. For example, with the introduction into Parliament of the *Child Support Bill 1987* on 9 December 1987 (which would ultimately lead to passage of the *Child Support (Registration and Collection) Act 1988*), the associated Explanatory Memorandum[6] emphasized the intention to ensure attainment of the privacy principle stated in the Howe Report:[7]

[3] Ibid 20.

[4] Ibid 14.

[5] Child support legislation is comprised of two Acts (and associated Regulations), *Child Support (Assessment) Act 1989* (referred to throughout this paper as the *CSA Act*) and the *Child Support (Registration and Collection) Act 1988* (referred to throughout this paper as the *CSRC Act*).

[6] *Explanatory Memorandum, Child Support Bill 1987*. Accessed at: <http://www.austlii.edu.au/cgi-bin/download.cgi/au/legis/cth/bill_em/csb1987180.txt>, page 2.

[7] Ibid.

> *The overall objectives of the reform are to ensure that: […] the overall arrangements are simple, flexible and respect personal privacy.*

The Explanatory Memorandum provides an additional explicit statement of "*the intention of Parliament*", stating that the privacy obligation was to apply to the administration and interpretation of the Act by the Child Support Program (CSP) within the Department of Human Services (DHS), the courts and the Administrative Appeals Tribunal (AAT):[8]

> *Clause 3: Objects of Act Subclause (2) of this clause demonstrates the intention of the Parliament that recognition be given, in both the **administration** of the Bill by the Child Support Registrar and the **interpretation** of the provisions of the Bill by the courts or the Administrative Appeals Tribunal, to the need to protect individuals' rights to privacy.*

The Explanatory Memorandum to the *Child Support (Assessment) Bill 1989*, presented to the House of Representatives on 1 June 1989, restated the privacy principle:[9]

> ***Objects of Reform***
>
> *The overall objects of the Bill are to ensure that:* […] *access to child support is simple, timely and flexible and respects personal privacy.*

[8] Ibid 9. Throughout this paper the concerns described in relation to the CSP are relevant to the practices employed by the AAT. Author's emphases added.

[9] Explanatory Memorandum, *Child Support (Assessment) Bill 1989*, 16.

These Objects were ultimately codified in, respectively, section 3(2) of the *Child Support (Registration and Collection) Act 1988* [10] and section 4(3)(b) of the *Child Support (Assessment) Act 1989*:[11]

Child Support (Registration and Collection) Act 1988

3 Objects of Act

(2) It is the intention of the Parliament that this Act shall be ***construed and administered***, to the ***greatest extent*** consistent with the attainment of its objects, to ***limit interferences with the privacy of persons***.

Child Support (Assessment) Act 1989

4 Objects of Act

(3) It is the intention of the Parliament that this Act should be ***construed***, to the ***greatest extent*** consistent with the attainment of its objects:

(a) to permit parents to make private arrangements for the financial support of their children; and

(b) to ***limit interferences with the privacy of persons***.

[10] *Child Support (Registration and Collection) Act 1988.* Accessed at: <https://www.legislation.gov.au/Series/C2004A03596>. Author's emphasis added.

[11] *Child Support (Assessment) Act 1989.* Accessed at: <https://www.legislation.gov.au/Series/C2004A03872>. Author's emphasis added.

The words of the Bills, Acts and Explanatory Memoranda make clear that the interpretation of child support legislation was intended to lean toward protection of the privacy of individuals rather than, in contrast, the development of administrative processes allowing unrestricted disclosure of information or the prioritization of the administrative convenience of the CSP or the AAT.

In addition to specific concern for the limitation of interferences with the privacy of persons in the interpretation and administration of the child support Acts, the statutory framework surrounding administration of child support is augmented, and subject to, the requirements of the *Privacy Act 1988*. That Act permits ***collection*** of personal information where 'the information is reasonably necessary for, or directly related to, one or more of the entity's functions or activities'[12] or if 'the collection of the information is required or authorised by or under an Australian law or a court/tribunal order.'[13] The Act also permits ***disclosure*** of that information if, inter alia, 'the individual has consented to the use or disclosure of the information'[14] or if 'the use or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order.'[15]

[12] *Privacy Act 1988*, Australian Privacy Principle 3.1. Accessed at: <https://www.oaic.gov.au/agencies-and-organisations/app-guidelines/>.

[13] Ibid, Australian Privacy Principle 3.4.

[14] Ibid, Australian Privacy Principle 6.1(a).

[15] Ibid, Australian Privacy Principle 6.2(b).

II INFORMATION COLLECTION AND DISCLOSURE METHODS

A *Collection Methods*

A common reason for which the CSP will collect personal information is to assist in the administration of requests that may be made by a parent to change a current child support assessment.[16] This assessment is formally known as a "departure assessment"[17] (and colloquially as a "change of assessment" (COA)) and is intended to enable the *ad hoc* adjustment of child support transferrable between parents should the circumstances warrant, such as the income of a payee increasing or the relative percentage of care of the children between the parents changing due to altered care arrangements. Departure assessments operate to enable one of the particular objects of the child support scheme to be met, namely 'that the level of financial support to be provided by parents for their children is determined according to their capacity to provide financial support.' [18]

When an application is submitted to the CSP to request a departure assessment the applicant completes the *Application to Change your Assessment - Special Circumstances* form provided by the CSP under s98D of the *CSA Act*.[19] This one form covers the various "Grounds for departure order" provided for by

[16] A more detailed list of the circumstances in which information is collected or disclosed is provided in the CSP's document *The collection, use and disclosure of personal information for Child Support purposes.* Accessed at:
<https://www.humanservices.gov.au/sites/default/files/2017/04/child-support-purposes.docx>

[17] The word "departure" is employed because in the ordinary course changes in assessment take place on an annual basis after the income tax returns of the parents are processed by the Australian Taxation Office and notification of the taxable incomes of each parent is transmitted to the CSP.

[18] *Child Support (Assessment) Act 1989*, section 4(2)(a).

[19] Department of Human Services, *Application to Change your Assessment - Special Circumstances form*. Accessed at:
<https://www.humanservices.gov.au/customer/forms/cs1970>.

section 117(2) of the *CSA Act*, and gathers these together under the headings of ten *Reasons* in the form. The form requires an applicant to provide a variety of personal details regarding their personal and financial circumstances and is accompanied by a statement that "A copy of your application and all supporting documents will be given to the other party who may respond in writing. An open exchange of information means all parties have the opportunity to respond and comment on the information used by the decision maker."[20]

Where medical considerations may be relevant to an application, the CSP may issue a "Request for medical information" form[21] asking a medical practitioner to voluntarily provide information to 'help the Australian Government Department of Human Services make a Change of Assessment decision under the *Child Support (Assessment) Act 1989*.'[22] This form also states that information provided in the forms 'must be given to the other party if it is going to be considered as part of the Change of Assessment application.'[23]

Other collection mechanisms available to the CSP, generally used outside the change of assessment process and more usually to probe into the financial circumstances of a party (and which will be given only brief consideration in this paper), are CSP's 'proactive information gathering powers' (i.e. to compel provision of information, where failure to do so is punishable on conviction by imprisonment for a period not exceeding 6 months), namely under section 161 of the *CSA Act* and section 120 of the *CSRC Act*:[24]

[20] Ibid.

[21] Department of Human Services, *Request for medical information*. Accessed at: <https://www.humanservices.gov.au/sites/default/files/documents/cs4597-1412en.pdf>.

[22] Ibid.

[23] Ibid.

[24] Department of Human Services, *Child Support's information gathering powers 277-04210000*. Accessed at: <http://operational.humanservices.gov.au/public/Pages/separated-parents/277-04210000-01.html>.

- *section 161 is used to seek information about incomes to amend a formula assessment - it cannot be used to seek information about collection to help collection action because collection action falls under the Registration and Collection Act*

- *section 120 is used to seek information about collection to help collection action - it cannot be used to seek information about incomes to amend a formula assessment because formula assessments fall under the Assessment Act*

Where a parent disagrees with the decision made following submission of a change of assessment application, they may lodge an objection under Part VII of the *Child Support (Registration and Collection) Act 1988.* This process may involve the collection of further information provided by the objector in support of their objection. If at the conclusion of the objection process either party is dissatisfied with the outcome (either allowing or disallowing an objection), a review may be sought via the AAT. When an application for review of an objection decision is submitted to the AAT, an applicant is provided with the *Statement of Financial Circumstances* form.[25] This form collects information regarding the personal and financial circumstances of the applicant and states,

> Please note that any information collected by the tribunal will be made available to all other parties to the review, including the Child Support Registrar.[26]

B *Disclosure Methods*

[25] Administrative Appeals Tribunal, *Child Support Forms*. Accessed at: <http://www.aat.gov.au/social-services-child-support-division/forms/child-support-forms>.

[26] Ibid.

The primary provisions upon which the CSP relies when sharing information between parties in a change of assessment process is section 98G(1) of the *CSA Act*, in change of assessment applications, and section 85 of the *CSRC Act*, in objections to decisions made by the child support Registrar. Under these provisions, all information provided in support of a change of assessment or objection application will be disclosed to the other party.

98G - Other party to be notified

(1) If section 98E or 98F or subsection 98J(2) does not apply, the Registrar must cause a copy of:

(a) the application; and

(b) any document accompanying it;

to be served on the other party to the proceedings.

(2) The Registrar must, at the same time, inform the other party to the proceedings in writing that he or she may make any representation (a reply) regarding the application that he or she considers relevant.

(3) If the other party to the proceedings makes a reply, the Registrar must serve a copy of the reply and any accompanying documents on the applicant for the determination.

If an application for review is made to the AAT, the CSP will also cause a copy of all relevant records held within DHS to be transferred to the AAT 'to assist with an AAT hearing of an appeal from a Child Support customer'.[27]

Another disclosure practice routinely utilised by the CSP on a large scale occurs under section 76 of the *CSA Act* when the CSP issues a notice of assessment to each party and 'discloses some personal information about one parent to the other parent in child support assessment notices. This information can include the parent's name and income, the number and age ranges of any dependent children the parent has, and the number and age ranges of any other children the parent is assessed to pay child support for.'[28]

The information collection and disclosure practices outlined above will be explored in more detail below; specifically, in relation to the requirements given explicit expression in the child support legislation to "limit interferences with the privacy of persons".

III - CURRENT PRACTICE IGNORES

THE INTENTIONS OF PARLIAMENT

In articulating the principle that privacy of individuals must be respected in the administration of child support, the intention expressed by Parliament was enlivened by both sensitivity to the personal circumstances in which separated and divorced couples find themselves and by a desire to introduce a child support scheme that would aid families to meet their obligations with the least intrusion by government through the employment of arrangements that are "simple, flexible and efficient."

[27] Department of Human Services, *The Collection, Use and Disclosure of Personal Information for Child Support Purposes*, p. 3. Accessed at: <https://www.humanservices.gov.au/sites/default/files/2017/04/child-support purposes.docx>.

[28] Ibid 4.

The member for Curtin Allan Rocher, on 3 March 1992, observed during his second reading speech for the *Child Support Legislation Amendment Bill 1992* (the bill which introduced section 98G, et al): [29]

> In cases where there have been acrimonious separations, […] breaches of privacy can result in serious embarrassment, and even pose a threat to the safety of the parents, and maybe the children concerned. Thus we have every reason to demand the highest standards of administrative propriety from the Child Support Agency. This is true not just of the Child Support Agency, but also of the many other Government departments that regularly deal in confidential information.

The intention of Parliament that the administration and interpretation of child support legislation "limit interference with the privacy of persons" has repeatedly been affirmed in the years following the commencement of the Acts.

At regular intervals throughout the development, passage and amendment of the various child support bills and Acts over the past thirty years or more, numerous parliamentary documents and eminent persons have affirmed successive governments' bi-partisan intentions for the treatment of personal information in child support matters. For example, the principle of non-disclosure of private information, due to the sensitivity of that information, was addressed in relation to the SSAT, the precursor to the AAT's Social Services & Child Support Division:[30]

> Given the sensitive nature of child support proceedings, it is important that private information is treated confidentially and not disclosed.

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[29] Commonwealth of Australia, House of Representatives. *Official Hansard No. 182, 1992 Tuesday, 3 March 1992*. Accessed at: <http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/1992-03-03/toc_pdf/H%201992-03-03.pdf;fileType=application%2Fpdf#search=%22chamber/hansardr/1992-03-03/0056%22>.

[30] Explanatory Memorandum, *Child Support Legislation Amendment (Reform of the Child Support Scheme -- New Formula and Other Measures) Bill 2006*, page 121. Accessed at: <http://www.austlii.edu.au/au/legis/cth/bill_em/cslaotcssfaomb2006974/>.

As the following discussion will demonstrate, the administrative practices that have developed and are currently in use, are **blunt**, **intrusive** and **arbitrary**. By making unfettered disclosures, even in the face of objections by the persons whose information is disclosed, the CSP's information disclosure practices appear not to be informed by a full reading of the relevant privacy provisions within each Act. This leaves the agency operating at odds with the intentions of Parliament.

The full intentions of Parliament in articulating and emphasising the boundaries of privacy protection, and relevant administration under the *CSA Act* and the *CSRC Act*, are pertinent to the information collection and disclosure practices employed by the CSP and the AAT. Disclosures of information for a purpose, or to persons, that cannot assist the Registrar in being satisfied that circumstances warrant a departure assessment arguably are not permitted by a full reading of the "limit interferences" provisions of the Acts. Those provisions arguably narrow and limit the disclosure of personal information to only that information which the Registrar requires in aid of decision-making (such as for a change of assessment or an objection).

The *CSA Act* requires that the Act be 'construed, to the greatest extent consistent with the attainment of its objects, to limit interferences with the privacy of persons.' This statement is one of only four instances in the Act in which the intentions of Parliament are singled out for explicit articulation and particular directive emphasis.

In making disclosures of personal information under section 98G of the *CSA Act* and section 85 of the *CSRC Act*,[31] the CSP, its parent agency DHS, and

[31] Throughout the remainder of this paper, reference to s98G of the *CSA Act* is taken to be analogous with s85 of the *CSRC Act* given that the provisions operate with similar effect.

policy owner (the Department of Social Services (DSS)), contend[32] that the Acts *require* disclosure of *all* information to the other party. The CSP's internal operational guidance to staff states, 'Information used to make these decisions must be exchanged with both customers to ensure a transparent, fair and reasonable decision-making process.'[33] Indeed, the use of the word "must" in the context of section 98G would appear to be unequivocal. However, in relying upon sections 98G (*CSA Act*) and 85 (*CSRC Act*) *alone* of all the relevant provisions relating to the protections of privacy afforded by child support legislation, the CSP overlooks the directive sections in each Act regarding the limits placed on the operation of administrative processes in relation to privacy.

While section 98G of the *CSA Act* requires the CSP to forward documents to the other party, section 4 of the same Act effectively limits the operation of section 98G in a manner not reflected in current practice. The disclosure of information may be permitted under section 98G, to the extent that section 98G withstands scrutiny,[34] but must be tempered by a full reading of the legislation.

The *CSRC Act* uses almost identical wording as appears in section 4 of the *CSA Act*, reinforcing the consistent view of Parliament that administration of child support matters must limit intrusion upon the privacy of persons.

In the *CSRC Act* the use of the wording "shall be construed *and administered*" implies a greater imperative upon the CSP (and the AAT) than even the use of the word "should" does in the same context in the *CSA Act*. Again, this section

[32] Department of Social Services, *Child Support Guide*, "2.6.5 Change of Assessment Process - Application from Payer or Payee". Accessed at: <http://guides.dss.gov.au/child-support-guide/2/6/5>.

[33] Department of Human Services. *Open exchange of information for Child Support customers 277-09190000*. Accessed at: <http://operational.humanservices.gov.au/public/Pages/separated-parents/277-09190000-03.html>.

[34] See section below for discussion in consideration of the very existence of section 98G.

is one of only four instances in the CSRC Act in which intentions of Parliament are singled out for explicit articulation and particular directive emphasis.

Against the backdrop of administrative best-practice, as it was then understood, the addition of section 98G in 1992 was intended to ensure that procedural fairness was accorded to the parties affected by the outcome of the departure assessment decision-making process. The passge into law of the *Child Support Legislation Amendment Bill 1992* introduced section 98G into the *CSA Act* some three years after the Act first came into effect. The Explanatory Memorandum provided an explanation of the intent behind this amendment:[35]

> *2.6. The Registrar may refuse to make a determination, if in the application, the grounds have not been addressed or it would be otherwise not just, equitable and proper to make a determination. If the grounds have been properly established in the application, the other party is to be advised that a valid application for review has been lodged and will be provided with a copy of the application to show the grounds relied upon. They will be invited to reply and make any representations they think relevant.*

The intention, as expressed, was to disclose information to the other party only if grounds for a departure determination had been met. If those grounds were met, disclosure was intended to convey the *grounds* relied upon (and for which disclosure of source documentation provided by the applicant in support of those grounds would not necessarily be the only, or most appropriate, means available). The implication of limited disclosure of information would appear to be consistent with the requirements expressed in section 4 and stands in contrast with the "total disclosure" practices currently employed. As will be demonstrated in detail in the following section, the translation of the principle of procedural fairness into practice, as it is currently administered, represents a

[35] Explanatory Memorandum, *Child Support Legislation Amendment Bill 1992*, page 10. Accessed at <http://www.austlii.edu.au/cgi-bin/download.cgi/au/legis/cth/bill_em/cslab1992372.txt>.

superficial reading of the contemporary understanding of procedural fairness as expressed by the courts.

Against this statutory backdrop, consideration now turns to evaluation of current practice in relation to the "limit interferences" requirements imposed by child support legislation. While collection and disclosure of personal information is permitted within the constraints imposed by section 4 of the *CSA Act*, those constraints are routinely and consistently disregarded by the CSP in the interpretation of the Acts and in the administration of child support cases.

The limitations on practice created by section 4 require the CSP to avoid collection or disclosure of information unless necessary or where such collection or disclosure would not contribute to administrative decision-making in each case.

C *Collection Examples*

Through the mechanism of the *Application to Change your Assessment - Special Circumstances* form used by the CSP the agency requests a range of information that extends beyond the confines of the specific Reason(s) under which a change of assessment application might be made. The form requests a wide variety of information, extending across the ten Reasons and into other areas potentially not relevant to the reason under which a change of assessment is sought.

Parties to a change of assessment would likely be comfortable providing information relevant to the specific reason under which they seek a change of assessment through the CSP. Additionally, an applicant is less likely to be comfortable providing irrelevant information knowing that such information will be forwarded to other party, an ex-partner with whom an applicant may not enjoy cordial relations.

This raises concerns for individuals who may be experiencing high conflict—including a history of domestic violence—and low trust with an ex-partner; concerns regarding potential use of personal information for identity theft, fraud, or other unauthorized or vexatious purposes to which information so collected and disclosed might be turned.

The generic 'one-size-fits-all' omnibus form used by the CSP might represent administrative convenience for the CSP by collecting a range of information *just in case* it becomes necessary in the evaluation of a child support case; however, that convenience comes at a cost to the privacy of the individuals from whom a disproportionate amount of personal information is thereby collected *and* shared with other parties, often with disregard for the objections raised by one or both parties.

The information collection form is presented at the outset of a change of assessment process but before the circumstances of the case have been considered by the CSP, and before information has been identified as relevant to the decision-making of the CSP. To request detailed financial information, information that will be shared *unredacted* with the other parties to a review, and ***before*** the utility of that information in a case has been determined, or before the existence of grounds for a departure assessment have been confirmed by the CSP, is premature and inconsistent with the *Privacy Act 1988*, the privacy constraints articulated in the *CSA Act*, and guidance provided by the OAIC. These constraints in relation to information collection activities are considered below.

Collection of information by the AAT is authorised by section 33(1)(c) of the *Administrative Appeals Tribunal Act 1975* (the AAT Act), and it is upon this section of the Act (and the President's Directions under section 18B which

follow from section 33(1)(c)) that the AAT relies in requiring each party to a review to complete the *Statement of Financial Circumstances* form.[36]

> **33 Procedure of Tribunal**
>
> (1) In a proceeding before the Tribunal:
>
> (a) the procedure of the Tribunal is, subject to this Act and the regulations and to any other enactment, within the discretion of the Tribunal;
>
> (b) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit; and
>
> (c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

However, the President's directions must be given consistent with the requirements to which the Tribunal is subject under section 33(1)(a), namely "any other enactment", which would introduce into the practices of the AAT the requirement to "limit interferences with the privacy of persons" as articulated by child support legislation. The AAT currently adopts a similar stance to the CSP in that the collection and disclosure practices are total rather than limited.

[36] *Administrative Appeals Tribunal Act 1975.* Accessed at: < https://www.legislation.gov.au/Series/C2004A01401>.

In 2015–16 the number of parents applying to the CSP for a change of assessment was 17,232 and the number of objections to change of assessment decisions in this same period was 2,888.[37] During the same financial year 2,136 applications were lodged with the AAT for review of decisions made by the CSP.[38] Each application will have required an applicant to complete the forms described above. Therefore, under current practice, in 2015-16 alone 22,256 applications may have been exposed to inappropriate collection and disclosure of personal information**.**

D *Power to Compel Provision of Information*

The broad collection powers provided by section 161 of the *CSA Act* and section 120 of the *CSRC Act* enable the CSP to obtain information directly from financial institutions in aid of the evaluation of the financial circumstances of parties to a child support assessment. Such evaluations might be undertaken as a precursor to child support debt collection action under a section 72A notice (*CSRC Act*): [39]

> *The Registrar can issue a section 72A notice to any person who holds money for, or on behalf of, a child support debtor, or to any person who may hold money for the child support debtor in the future. A notice issued to a person under section 72A of the CSRC Act requires that person to pay the money to the Registrar.*

[37] Department of Human Services, *Annual Report 2015-16*, p69. Accessed at: <https://www.humanservices.gov.au/sites/default/files/8802-1610-annualreport2015-16.pdf>.

[38] Administrative Appeals Tribunal, *Annual Report 2015–16*, 32. Accessed at: <http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201516/AAT-Annual-Report-2015-16.pdf>.

[39] Department of Social Services, "5.2.9 Collection from Third Parties". Accessed at: <http://guides.dss.gov.au/child-support-guide/5/2/9>. It is worth noting that section 72A is a word-for-word transposition from section 218(1) of the *Income Tax Assessment Act 1936* (section 218 of that Act is no longer in force yet remain in child support legislation).

However, a notice under section 72A cannot be effective against a joint bank account for the reason that it is not possible to identify any portion of the funds as belonging solely to either of the account owners (per the judgment in *DFC of T v Westpac Savings Bank Ltd* 87 ATC 4346).[40] It follows that if no portion of a joint bank account can be attributed to any one of the account holders, section 161 and section 120 notices should not be issued with respect to joint bank accounts as the financial resources of a child support customer cannot be ascertained from information obtained in relation to a joint account. Accordingly, any information obtained erroneously via section 161 and section 120 notices should not be disclosed to the other party in a child support case. Such intrusions, were they to occur, would be unwarranted and inconsistent with the explicit direction from Parliament that administration of child support limit interferences with privacy. Additionally, such intrusions would expose all other owners of a joint account to unwarranted intrusion upon privacy, particularly where those other owners are not the subject of a relevant child support case.

E *Concerns Re Legislative Constraints of APP 3.1 and 3.5 in the Context of "Limit Interferences"*

In relation to the collection of solicited personal information the *Privacy Act 1988*, under Australian Privacy Principle 3.1, requires that an agency:

> … must not collect personal information (other than sensitive information) unless the information is reasonably necessary for, or directly related to, one or more of the entity's functions or activities.[41]

[40] Ibid.

[41] *Privacy Act 1988*, Australian Privacy Principle 3.1. Accessed at: <https://www.oaic.gov.au/agencies-and-organisations/app-guidelines/>.

The *APP Guidelines* published by the Office of the Australian Information Commissioner (OAIC) provide the following guidance in the interpretation of this principle:

> Factors relevant to determining whether a collection of personal information is reasonably necessary for a function or activity include: whether the entity could undertake the function or activity without collecting that personal information, or by collecting a lesser amount of personal information.[42]

The totality of information sought via the CSP's *Application to Change your Assessment - Special Circumstances* form is more than the information ordinarily required for the CSP and the AAT to undertake their functions in individual cases. The CSP and the AAT could reasonably collect a lesser amount of financial information than is called for by the forms and still be able to effectively review a case (i.e. they could limit collection to information directly related to the reason under which an applicant seeks reassessment). Under APP 3.1 the full range of information sought by the CSP, information that strays into areas not applicable to the Reason under which a change of assessment is sought (or is sought in dragnet fashion under a section 161 or 120 notice), is not 'reasonably necessary for one or more of the entity's functions or activities.' If a broad view of "the entity's functions or activities" is taken, virtually any collection activity would be permitted (which would, arguably, not be in the spirit of the *Privacy Act*); however, the "limit interferences" requirements of child support legislation narrow the meaning such that collection (and subsequent disclosure) of a wide range of information on a 'just in case it is required' basis does not meet the "reasonably necessary" test. Current practice stretches the capacity of "a reasonable person who is properly informed to agree that the collection is necessary." [43]

[42] Office of the Australian Information Commissioner, op cit, 3.19.
[43] Ibid 3.18.

F *Privacy Act 1988: Australian Privacy Principle 3.5*

In relation to the collection of solicited personal information the *Privacy Act 1988*, under Australian Privacy Principle 3.5, requires that an agency:

> … must collect personal information only by lawful and fair means.[44]

The *Explanatory Memorandum* to the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* and the *APP Guidelines* provide clarification:

> The concept of fair would also extend to the obligation not to use means that are unreasonably intrusive.[45]

The forms and notices used by the CSP and the AAT represent a generic "catch-all" method to conveniently obtain information from parties to a review *just in case* that information becomes necessary for a review of a case. It is open to question whether, within the meaning of APP 3.5, it is fair for the CSP to solicit a broad range of information whose relevance to a review has not been determined (and with APP 3.1 implications) and where, as stated on the form, that information will be wholly shared with the other party. Is it fair to gather irrelevant information only to disclose that information? This approach to information collection, and with its subsequent disclosure, represents a degree of intrusion that is not required at an early stage in a case (if it is required at all), as more information than is necessary for a functional conduct of a reassessment will be collected by the form and shared with other parties. Upon review of an application, should additional information become relevant in aid of decision-making, the CSP could request/compel provision of that information through appropriate mechanisms.

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[44] *Privacy Act 1988*, Australian Privacy Principle 3.5. Accessed at: <https://www.oaic.gov.au/agencies-and-organisations/app-guidelines/>.

[45] Explanatory Memorandum, *Privacy Amendment (Enhancing Privacy Protection) Bill 2012*, 77. Accessed at: <http://www.austlii.edu.au/au/legis/cth/bill_em/pappb2012476/>. And Office of the Australian Information Commissioner, op cit, 3.62.

Additionally, the terms of a change of assessment application are such that, "If the third party or parent providing the information does not want the details provided to the other parent, the Registrar will not consider the statement when making a decision," and also states, "The Registrar will … not imply that any person is obliged to provide information to the Registrar."[46] Is it fair to require consent to disclosure—against a party's preference/will—of personal information to an ex-partner? Where personal information is in the form of a medical report, and is key to the establishment of grounds for reassessment, such obligations are problematic: refuse to allow disclosure, and the application may fail; consent to the disclosure (however reluctantly), and expose personal medical information of the applicant and/or third parties to an ex-partner.

G *Disclosure Examples*

In addition to the concerns raised by the CSP's collection practices the disclosure practices employed by the CSP raise more pressing concerns. A party seeking reassessment of their child support case would be eager to provide any information that may assist the CSP. In that context, appropriate collection practices are essential to the attainment of a fair outcome. Most customers, however, would be very reluctant to have their personal information disclosed to the other party without good reason.

In the context of changes of assessment, current disclosure practice employed within the CSP considers almost no limit upon disclosure other than the wording of section 98G.[47] The "limit interferences" requirement is not readily apparent in the practices currently employed; and when taken in the context of

[46] Department of Social Services, op cit, '6.3.4 Collection & Use of Third Party Information'. Accessed at: <http://guides.dss.gov.au/child-support-guide/6/3/4>.

[47] The CSP identify a limited list of information that must not be sent to the other party in Department of Human Services, *Open exchange of information for Child Support customers 277-09190000*. Accessed at < http://operational.humanservices.gov.au/public/Pages/separated-parents/277-09190000-01.html>.

the nuanced articulation of the boundaries of procedural fairness to be discussed in the following section, that omission is all the more concerning – not least for its impact upon the privacy of families.

H *Section 98G*

The key wording within section 98G affecting the disclosure practices of the CSP in the administration of change of assessment applications is *'the Registrar must cause a copy of the application and any document accompanying it to be served on the other party to the proceedings.'* When the wording is taken on its own the intention would appear to be clear: everything provided by the applicant must be disclosed to the other party. However, when taken in the context of the requirement to "limit interferences with the privacy of persons" the practice appears arbitrary and without consideration of what would constitute a reasonable degree of interference with the privacy of the parties involved. The CSP takes an absolute view of the requirement of section 98G: the word "must" is total; all information provided by an applicant is disclosed to the other party. However, when section 4 is given due consideration, this totalitarian construction of section 98G is capable of moderation (options for which are discussed in the following section).

Section 4 places express limits on the interference with privacy of individuals. The statute does not prescribe specific processes that must be employed in giving effect to those limitations; however, the wording of section 4 is broad enough as to require application to all processes administered by the CSP or the AAT in relation to child support. Therefore, the intention of section 4 can be taken to place limits on every section within the Act that involves administrative engagement with the personal information of individuals.

The apparent inconsistency between sections 4 and 98G has obtained since the introduction of section 98G in 1992. It is clear by the wording of section 4

("this Act should be construed") that parliament intended that such inconsistency be resolved in the favour of protection of privacy and not in the favour of unfettered disclosure (a "privacy first" principle). The primacy of section 4 is further enhanced by consideration of procedural fairness, the boundaries of which in the context of child support will be explored in the following section. Without a full reading of procedural fairness, administrative procedures employed in the name of 'procedural fairness' have the effect of overriding the intended protections of privacy required by section 4.

I *AAT: Client Information Provided to All Parties by CSP*

When a child support customer appeals to the AAT, the customer's entire file held by CSP is provided unredacted to the AAT and each parent, as parties to a review. Those documents could, depending on the records of conversation between the customer and CSP, include highly sensitive correspondence of only indirect relevance to a review and that a parent would reasonably believe to be confidential and not for disclosure to the other parent (e.g. correspondence on the topic of domestic violence experienced by the parent, and requests for CSP to treat such information with care). No consent for disclosure is obtained, and no redaction of information takes place prior to disclosure to the AAT and other parties.

J *Concerns Re Legislative Constraints Of APP 6.1 in The Context of "Limit Interferences"*

1 *Privacy Act 1988: Australian Privacy Principle 6.1*

Without due consideration and proper application of section 4 in the design and administration of departure assessments and objections, the CSP and AAT are arguably in breach of *Australian Privacy Principle 6: Use or disclosure of personal information*. Under the *Privacy Act 1988*, in relation to the use or disclosure of personal information, Australian Privacy Principle 6.1 requires that:

> If an APP entity holds personal information about an individual that was collected for a particular purpose (the primary purpose), the entity must not use or disclose the information for another purpose (the secondary purpose) unless:
>
> (a) the individual has consented to the use or disclosure of the information; or
>
> (b) subclause 6.2 or 6.3 applies in relation to the use or disclosure of the information.[48]

The *primary purpose* for which information is collected by the CSP under a change of assessment application is for the purpose of assisting the child support Registrar (or a delegate), under section 98C (*Matters as to which Registrar must be satisfied before making determination*), to be satisfied that the grounds for administrative reassessment exist and enable the Registrar to make a determination affecting an assessment.[49]

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[48] *Privacy Act 1988*, Australian Privacy Principle 6.1, Accessed at: <https://www.oaic.gov.au/agencies-and-organisations/app-guidelines/>. APP6.2 and APP6.3 relate to circumstances in which an individual would reasonably expect the information to be disclosed for the secondary purpose or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order.

[49] The powers of the Registrar also enable collection of data from other sources, and by other means, including searches made of data sources such as Centrelink and ATO records: the change of assessment form is not the only avenue available to the Registrar in meeting section 98C obligations under the Act. The form is but one tool assisting the Registrar in this purpose.

Disclosures of personal information to a third party person are made under section 98G ostensibly to enable that third party to "respond and comment"[50] on the information provided by the applicant.[51] However, the CSP makes such unfettered disclosures without first establishing whether grounds for a departure assessment exist or whether the third party is in a position to assist the Registrar's s98C obligations by corroborating or contradicting that information (see below for a real-world case study relating to the disclosure of third-party medical records).

The CSP releases information to the other party without establishing whether that disclosure, and the involvement of that third party, will assist the Registrar in attaining the primary purpose of reaching the satisfaction required under section 98C. The other party may no longer have close, if any, contact with the individual and therefore will be limited in their ability to corroborate/contradict information to a sufficiently high standard as to warrant setting aside the assertions of an individual about their own circumstances as contained in the information provided with their application. But for the registrar collecting and disclosing information for a change of assessment application such information would not be available to the other party.

The proposition that disclosure of personal information regarding an individual in such circumstances is a permitted *secondary purpose* under APP 6 is questionable. Furthermore, it is debatable whether disclosure of that information, under section 98G, to a third party who cannot influence or correct that information can be deemed to be a secondary purpose for which disclosure is anticipated under APP 6.2 or APP 6.3. Disclosure of irrelevant information is

[50] Department of Human Services, *Application to Change your Assessment - Special Circumstances form*, p4.

[51] There is no reciprocal requirement for the third party to provide evidence of their circumstances for the consideration of the Registrar. However, if the third party does make a reply the Registrar must serve a copy of the reply and any accompanying documents on the applicant for the determination.

not permissible; therefore, a fundamental question arises: for what purpose toward attainment of the Objects of the Act does the CSP disclose information to a third party unable to effectively comment?

This calls into question the continued existence of section 98G, as it is currently worded and administered. If collection is permitted for the primary purpose of enabling the Registrar (or Registrar's delegate, the decision-maker)—alone—to be satisfied of the circumstances in a reassessment, no disclosure to a third party is required – particularly where that third party can add no value to the process. A third party cannot claim to be denied procedural fairness in circumstances where they cannot add value to the deliberations of the Registrar. If disclosure of material to a third party is not a secondary purpose, such disclosure is not permitted and therefore not required. Given that section 98G was introduced to provide parties an understanding of the grounds upon which a COA is made, the process as it is currently administered goes too far in interfering with the privacy of persons.

Ostensibly, section 98G was intended to aid the decision-maker in evaluating the circumstances of each party to a child support assessment: the decision-maker does not know the truth of any unsupported assertion made in any application or response. Therefore, it appears the administrative process has been constructed to attempt corroboration of information by the other party for the benefit of the decision-maker, despite the fact that the other party may not be any better informed than the decision-maker as to the circumstances of the party. Sound decision making requires that a decision-maker must be assured that the information provided by a party is reliable; this can be achieved by requiring the provision of independently verified information: a standard of evidence. This collection and disclosure practice appears to be of long standing and not subject to critical scrutiny or review over time: a common occurrence—and risk—in government agencies administering large programs over long

durations where inherited practice can continue unquestioned for a significant length of time (reflecting the maxim 'We've always done it this way') even where the operating context has evolved such as, for example, here through the introduction of the *Australian Privacy Principles* in March 2014.[52]

It is worth noting that the DSS *Child Support Guide*, which is relied upon by DHS CSP decision-makers, is silent with regard to the "limit interferences" requirement articulated in the *CSA Act* and the *CSRC Act*. For example, *1.3.1 Objects of the CSA Act* includes the statement, "The CSA Act contains a statement of Parliament's intention in enacting that legislation"[53] and itemises all items provided in section 4 *except* for the specific provision to "limit interferences." The *Child Support Guide* also addresses the role of the *Privacy Act 1988* within the statutory framework surrounding child support legislation, "The Privacy Act must be read in conjunction with other legislation, such as the secrecy provisions in the Child Support and Tax Acts. The secrecy provisions of those Acts are more stringent than the Privacy Act in regards to the disclosure of information"[54] however, it is apparent from the administrative practices currently employed that the CSP has not structured its administrative procedures to reflect a full reading of these associated Acts.

The limitations on practice created by section 4 would reasonably require the CSP to avoid collection or disclosure of information unless demonstrably necessary in aid of administrative decision-making in each case. Current collection and disclosure practices employed by the CSP in the administration of change of assessment applications appear to be a laudable (yet partial)

[52] Section 98G of the *Child Support (Assessment) Act 1989* has not been amended in any consequential way since 1992, see *CSA Act* 'Endnote 3—Legislation history'. Perhaps the operation of privacy in child support legislation should be reviewed in light of the 2014 introduction of the APPs.

[53] Department of Social Services, op cit, "1.3.1 Objects of the CSA Act". Accessed at: <http://guides.dss.gov.au/child-support-guide/1/3/1> on 28 July 2017.

[54] Department of Social Services, op cit, "6.3.1 Privacy Act". Accessed at: <http://guides.dss.gov.au/child-support-guide/6/3/1>.

attempt to accord procedural fairness. This partial construction risks potentially harmful disclosure of personal information, itself a denial of procedural fairness.

IV THE BOUNDARIES OF PROCEDURAL FAIRNESS IN CHILD SUPPORT MATTERS

The current administrative processes employed by the CSP arguably place generic provision of procedural fairness above the requirement to limit interferences with the privacy of customers, perhaps representing confusion in the minds of administrators between these competing demands upon administrative design. Practical limitations upon the disclosure of information would represent a means to address the requirements of section 4; however, this approach would appear at first glance to represent an erosion of procedural fairness (which perhaps explains why limitations on disclosure have not made their way into practice). This section will discuss the contemporary formulation of procedural fairness, as expressed by the courts, and will consider the relevant procedural boundaries that follow and which delimit a practical way forward—an Ariadne's thread—through the maze of considerations relevant in the fair and accountable administration of child support. The framework thus articulated enables greater specificity in the articulation of procedural fairness in child support matters than currently exists in practice and provides a potential solution to the apparent conflict between the dual requirements of procedural fairness and "limit interferences" in the interests of attainment of the intentions of Parliament as expressed in legislation.

A *Procedural Fairness*

The duty to accord procedural fairness in judicial and administrative decision-making is a long-standing and well-established principle of natural justice. This paper does not propose to explore in detail the principles and consideration

documented at length in other sources;[55] rather, an outline of the elements considered essential to procedural fairness will be considered within the context of child support administration.

The *Australian Administrative Law Policy Guide 2011* encapsulates the principle succinctly:[56]

> Broadly, procedural fairness requires that the decision maker be, and appear to be, free from bias and/or that the person receives a fair hearing. *'The precise contents of the requirements... may vary according to the statutory context; and may be governed by express statutory provision'.*

This principle receives expression in the CSP's administration of child support through the practice of Open Exchange of Information, supported by the statement, 'Sections of the child support legislation require that *some* documents and information are provided to the other party in a child support case. Such disclosure is permitted by the secrecy and privacy provisions that apply.' [57] As we have seen above, the permissibility of *total* disclosure is questionable and there is little evidence to suggest that the CSP has adequately considered the intentions of Parliament in relation to treatment of personal information in child support cases.

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[55] Mark Aronson & Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 2013). See also 'Traditional Rights and Freedoms: Encroachments by Commonwealth Laws', *Australian Law Reform Commission,* Sydney, NSW. Accessed at: <https://www.alrc.gov.au/publications/freedoms-alrc129>.

[56] Attorney-General's Department, *Australian Administrative Law Policy Guide 2011*. Accessed at:

<https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/Australian-administrative-law-policy-guide.pdf>. and cites Administrative Review Council, *The Scope of Judicial Review* Report No. 47 (2006) 13 and *tiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 489 (Gleeson CJ).

[57] Department of Human Services, *Open exchange of information for Child Support customers 277-09190000*. Accessed at:

<http://operational.humanservices.gov.au/public/Pages/separated-parents/277-09190000-04.html>. Author's emphasis added to the word 'some'.

The following example from an actual case involving the disclosure of medical records is illustrative of the process employed by the CSP, the horror it elicited from the persons whose information was disclosed, and the justifications provided by the CSP and OAIC in defence of such egregious disclosures.

A current child support client (a payer)[58] submitted a change of assessment application to the CSP owing to the fact that the payer's partner was soon to give birth to multiple children and the payer would be required to provide care for a time to the newborn children and partner. During that period providing parental care, the payer's income would be significantly reduced, rendering inaccurate (and unaffordable) the income used as the basis of the current child support assessment. During the change of assessment process the CSP required the payer to provide medical reports proving that the payer's partner was indeed due to give birth to multiple children. Those medical records were provided to the CSP with a strong request that they not be disclosed to the payee in the case: the medical reports also contained other personal information relating to the pregnant partner of the payer. Importantly, those records were the records of a person not a party to the child support case. The CSP provided the documents in full to the payee stating that section 98G of the *CSA Act* required the CSP to make the disclosure. When the payer raised these concerns with the CSP and the OAIC, and highlighted the implications of section 4, both agencies responded to state that the CSP was permitted to make such disclosures in aid of procedural fairness. Notably, both agencies' responses ignored section 4 altogether.

The disclosure actions taken by the CSP under section 98G were inconsistent with section 4 of the *CSA Act* and *APP 6*, for the following reasons:

[58] The names of the parties have been withheld from publication in the interests of privacy.

- Section 98G is intended, if the widest reading is taken, to ensure that all parties to an assessment have an opportunity to review and correct information relied upon by the other party where a reassessment is sought. However, medical documents cannot be corrected by the payee for they are the objective and professional reports of a medical practitioner.

- Section 98C states that it is the Registrar alone who must be satisfied that grounds exist for a departure from an administrative assessment (i.e. the change of assessment). That is, the decision-maker is not required to defer to any other person or opinion in making a determination. It is the role of the decision-maker to review relevant documents; it is not an ex-partner's role. In the case of the provision of medical reports upon which one party relies for a change of assessment application *only the Registrar* need be satisfied that the document is true and correct. No other party to an assessment need be provided with such sensitive personal information, especially where the particular information relates to a medical condition that is not contestable by the other party, such as pregnancy and multiple-birth in this example.

- Therefore, withholding those documents from the payee would be appropriate and would not amount to a denial of procedural fairness. Such withholding would support procedural fairness by supporting the parties' right to a process that limits interference with privacy to only such interference as is absolutely necessary. Instead of full disclosure of source documents, the payee could be informed by the decision-maker that (1) a medical condition formed the grounds of the application, and (2) documentation was presented to the

> decision-maker certifying the veracity of the claims made in the application.

If we contrast this example with the privacy practices surrounding medical conditions experienced by employees in the workplace, we see that employers have no right to demand access to the particulars of a medical condition suffered by employees (an employee may choose to disclose details to an employer). In child support matters a party is not permitted to withhold from the other party information about a medical condition if they wish to have that medical condition taken into account by a decision-maker.[59] Non-consensual disclosure of information is, therefore, a prerequisite for a party access to the change of assessment process under the current formulation of administrative procedures. In any other context, this process would amount to a serious breach of privacy, not only by the disclosure itself but also by the compelled nature of the disclosure.

The impact of the disclosures made in the case of the example described above placed significant strain on the relationship between the payer and the payer's partner highlighting the fact that the current treatment of privacy in the administration of child support matters fails to meet the needs or expectations of Australian families. Existing information management practice, disclosures in particular, is clearly at odds with community expectations – particularly as public attention and concern increasingly turns to the ease, and potential impact, with which personal information may be abused.

The clear disconnect between the intentions of Parliament and the practices employed by the CSP raises the question of how best to resolve the impasse.

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[59] Department of Human Services, *Open exchange of information for Child Support customers 277-09190000*. Accessed at:
<http://operational.humanservices.gov.au/public/Pages/separated-parents/277-09190000-04.html>.

How can the requirement to "limit interferences" be reconciled with the duty to accord procedural fairness? By closely examining and applying the boundaries of procedural fairness as expressed by the courts, the duty is found not to be as fixed a proposition as the CSP would appear to believe. There are shades of grey that emerge from consideration of various aspects pertinent to a case: the specific circumstances of the parties and the information, the statutory framework guiding administration, and other considerations. These shades and considerations, when taken together as a whole, resolve to clarify a framework that may be used to establish the boundaries of procedural fairness in individual child support cases. This framework would assist child support decision-makers in their duty to limit the scale of disclosures where those disclosures represent an intrusion upon the privacy of individuals. The framework, drawn from contemporary judicial articulation of the boundaries of procedural fairness, provides a proactive process to guide consideration of procedural fairness and the determination of appropriate practice applicable to the administration of child support.

Before detailed discussion of the framework takes place, a question with bearing on the existence of such a framework must be addressed: is the content of procedural fairness most effectively determined through fixed rules or via flexible principles?

B *The Content of Procedural Fairness: Fixed Rules or Flexible Application of Procedural Fairness?*

The precise content of procedural fairness has long represented a challenging point of legal theory, with Australian courts "reluctant to reduce that content to fixed rules, preferring instead to use the intuitive standard of fairness that is moulded by reference to the statutory framework and the factual circumstances of each case."[60]

In *Kioa v West (1985) 159 CLR 550* at 585 per Mason J, the view was expressed that the term "procedural fairness":[61]

> ... conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e., in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations.

The consideration of the necessity to adapt procedures "to the circumstances of the particular case" strongly suggests that a fixed approach to procedural fairness is undesirable. The views expressed by Mason J support the assertion that section 4 requires administrative processes to be flexible to the circumstances of each case due to the fact that the degree of "interference" required would necessarily vary with the circumstances obtaining in each case.

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[60] Aronson and Groves, above n 56, 491.

[61] Justice Alan Robertson, Federal Court of Australia (2015), *Natural Justice or Procedural Fairness,* paragraph 4. Accessed at: < http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-robertson/robertson-j-20150904>.

The fundamental rules of procedural fairness, namely a fair hearing and freedom from bias, form a broad umbrella under which all other considerations of a decision-maker fall. These rules are informed by the principle that persons are entitled to challenge information that has the potential to adversely affect them. The rules "address the manner in which a decision is made and not the merits of the decision itself"[62] and are "concerned with the fairness of the procedure adopted, not the fairness of the decision produced by that procedure."[63]

The CSP's current approach to procedural fairness is closer to the fixed approach than a flexible approach. On every occasion all information provided in support of a change of assessment application is released to the other party. This approach has the advantage of reducing the workload of decision-makers in assessing and making decisions on the quality of the information; however, it has the distinct drawback of ignoring the specific circumstances of each case that might otherwise warrant specific attention. A fixed-rule approach will, by its very nature, ignore the particulars in specific cases. In child support matters, this places fixed-rule processes at risk of abrogating some rights in the name of according other rights. For example, and with section 4 in mind, the total release of information in the name of procedural fairness creates an unfair process by dint of the fact that information a customer would reasonably expect to remain confidential is instead disclosed. Consideration of the specific circumstances of each case would enable the CSP to deliver an administrative process that meets the full requirements of the legislation while also according an appropriate measure of procedural fairness.

[62] Aronson & Groves, above n 56, 399.
[63] Ibid.

In a fixed-rule environment there would be no need for a framework to establish the boundaries of procedural fairness: no considerations beyond total release would be necessary. This would represent an administratively lean approach to the administration of child support cases but, as the existence of section 4 demands, this option is not properly available to administrators. The intent expressed in section 4 requires that all administrative processes employed by the CSP must be sensitive to, and respect, the privacy of persons (echoing the requirement expressed in the Howe Report for simplicity, flexibility and efficiency[64]) lest unwarranted, unnecessary and potentially injurious disclosures are made.

With the clear requirement in mind to "adopt fair procedures which are appropriate and adapted to the circumstances of the particular case,"[65] rather than a fixed rule as to the content of procedural fairness, we may turn to the details of the framework referred to above in providing practical articulation of the requirement.

C *A Provisional Framework To Establish The Boundaries Of Procedural Fairness In Child Support Matters*

Considerations informing the primary rules of procedural fairness:

(1) Full reading of the statutory framework

(2) Consider the circumstances of each case:

a. Consider the nature of the information and parties:

[64] Australia. Cabinet Sub-Committee on Maintenance. and Howe, Brian. and Australia. op cit. 3.

[65] Justice Alan Robertson, above n 61, paragraph 4.

i. The nature of the information: can the recipient challenge or corroborate the information?

ii. The nature of the party to whom the information would be disclosed: can the decision-maker rely upon a response provided by the recipient (the hearsay risk)?

b. Consider limitations on disclosure:

i. Total versus sufficient disclosure

ii. Consider the perception that information may adversely affect a person

iii. Legitimate expectations

c. Nature of the decision-maker and the width of discretion

d. Avoidance of self-interest of an agency in guiding administrative processes: privacy first

Each element within this framework will be outlined below in relation to the views expressed by the courts and the relevance to CSP practice.

D *Considerations informing the primary rules:*

1 *Full reading of the statutory framework*

The statutory framework within which the CSP operates primarily includes, amongst others, the *CSA Act*, the *CSRC Act*, the *Privacy Act 1988*, the *Administrative Appeals Tribunal Act 1975*, the *Freedom of Information Act 1982*, and Taxation Acts (from which many child support provisions have been transposed verbatim). In determining the requirements for procedural fairness where decision-makers exercise statutory powers "the wider statutory framework within which that power is located is of crucial importance."[66] Aronson and Groves highlight reference made by Kitto J in *Mobil Oil Australia Pty Ltd v FCT (1963)* 113 CLR 475 to "the necessity of allowing full effect in every case to the particular statutory framework within which the proceeding takes place. By the statutory framework I mean the express and implied provisions of the relevant Act and the inferences of legislative intention to be drawn from the circumstances to which the Act was directed and from its subject-matter."[67] In the context of child support matters the statutory framework arguably contemplates that all administrative procedures derived from the provisions of the Act (and any other procedure devised via implication) must be designed and delivered so as to place a very high premium on the protection of privacy of persons. Accordingly, the apparently clear imperatives of section 98G are modified by inclusion of section 4 in the reading of the operation of section 98G. The requirement to "limit interferences with privacy" is expressed clearly, whereas the requirement for procedural fairness implied by section 98G is not as clearly articulated. The statutory framework, when taken as a whole, would require limitations upon the disclosures where those disclosures are demonstrably intrusive upon privacy.

[66] Aronson & Groves, above n 56, 501.
[67] Ibid.

E *Considerations informing the primary rules:*

2 *Consider the circumstances of each case*

In evaluating how most effectively to approach the balance between the limits of section 4 and the duty to accord procedural fairness, various elements can be defined in support of consideration of the circumstances of each case:

- **(2)a - Consider the nature of the information and parties**

    i. The nature of the information: can the recipient challenge or corroborate the information?

    ii. The nature of the party to whom the information would be disclosed: can the decision-maker rely upon a response provided by the recipient (the hearsay risk)?

- **(2)b - Consider limitations on disclosure:**

    i. Total versus sufficient disclosure

    ii. Consider the perception that information may adversely affect a person

    iii. Legitimate expectations

- **(2)c - Nature of the decision-maker and the width of discretion**

- **(2)d - Avoidance of self-interest of an agency in guiding administrative processes: privacy first**

(2)a. Consider the nature of the information and parties:

i. Can the recipient challenge or corroborate the information?

The suggestion that certain considerations and types of information cannot be challenged, corroborated or influenced by a party is articulated in *Jarratt v Commissioner of Police for New South Wales* [2005] HCA 50 224 CLR 44:

> It is conceivable that there may be cases of a valid exercise of the power for reasons, or on the basis of considerations, that are of such a nature that there would be nothing on which a Deputy Commissioner could realistically have anything to say.

The disclosure of personal information to a party who cannot contest or in any way challenge, corroborate or otherwise influence that information is unlikely to serve any purpose in aid of decision-making. Disclosure in such circumstances would be unnecessary and would amount to an interference with the privacy of the person whose information is disclosed. This type of information would be relevant for the deliberations of a decision-maker; however, in child support cases it is readily demonstrable that there may be nothing that a party can say to challenge information relied upon by a decision-maker in some types of information, by the very nature of that information:

- Medical documents and reports: the facts contained in a medical document are the product of professional inquiry and reporting; neither the other party nor the decision-maker (unless medically trained) will be able to challenge the facts reported in such documents. In *any* other situation medical documents of one parent would not be disclosed to the other parent; stringent privacy rules attend to medical information. Unnecessary disclosure of medical documents by decision-makers untrained in medicine introduces

the risk of inadvertent revelation of information about a person to another person.

- Bank statements: as an official record of past transactions those transactions cannot be altered by the other party. Nor might the other party have any specific knowledge to draw upon regarding the circumstances of the transactions contained in a statement.

- Taxable income as disclosed in assessment notices issued under section 76 of the *CSA Act*: when the Registrar makes an administrative assessment, current practice requires that a notice must immediately be given in writing to each parent and any non-parent carer applicant.[68] These notices would number in the hundreds of thousands each year. The type of information included in a notice of assessment includes the adjusted taxable income of both parents: information about each party that cannot readily be contested and which would not in the ordinary course of events be available to the other party. Generally, a parent's taxable income is the figure assessed by the ATO for the relevant year of income. An amended taxable income is taken into account only in certain limited circumstances.[69] An income figure determined by the ATO cannot be readily or reliably disputed by the other parent (nor by the CSP). In any case, the child support formula is transparent enough that a party could independently estimate to within a reasonable margin the income of the other party by entering their own income and care arrangements into the online child support

[68] Department of Social Services, op cit, "2.9.2 Assessment Notices". Accessed at: < http://guides.dss.gov.au/child-support-guide/2/9/2>.

[69] Department of Social Services, op cit, "2.4.4.10 Adjusted Taxable Income". Accessed at: <http://guides.dss.gov.au/child-support-guide/2/4/4/10>.

estimator,[70] taking an educated guess at the income of the other parent.

These, and many other, categories of document cannot reasonably be contested by a third party who knows little of the other party's circumstances. Under current practice, the CSP makes no effort to establish the level or quality of insight into, or knowledge of, one party about the circumstances of the other party. A common frustration expressed by families in the child support system is that the CSP leaves investigations in the hands of unskilled parties who have little or no contact with, or contemporary knowledge of each other, while the CSP has access to DHS and ATO data sources and investigative powers that could be turned to practical use in reaching an objective determination of circumstances. Given that the CSP has, in its own words, "broad powers to seek information and require third parties to provide information"[71] it should use those powers *where it has a reasonable justification for doing so* rather than rely on parents not resourced to undertake such investigative work. Under current practice information is simply disclosed by the CSP to the other party in the hope that the other party will be able to offer some intelligence of relevance to the decision-maker (calling into question the utility of section 98G and raising concerns with regard to the Commonwealth's obligations under Article 17 of the *International Covenant on Civil and Political Rights*[72]). The CSP appears to be acting on the assumption that the parties are able to respond effectively (and honestly) to information disclosed to them for comment. The information is disclosed "just in case" and *inviting* a challenge from the parties.

[70] Department of Human Services, *Child Support Estimator*. Accessed at: <https://processing.csa.gov.au/estimator/About.aspx>.

[71] Department of Human Services, *Child Support's information gathering powers 277-04210000*. Accessed at: <http://operational.humanservices.gov.au/public/Pages/separated-parents/277-04210000-01.html>.

[72] "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." Accessed at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

This approach does not assist in lowering the likelihood of conflict between separated parents.

The CSP presents this disclosure practice as an exemplar of procedural fairness but doesn't consider whether the practice is fair to either party in a child support case. It is only as a result of the current loose reading of relevant privacy provisions in child support legislation that the other parent can obtain access to such information. Accordingly, disclosure of such information by the CSP is, arguably, inconsistent with the "limit interferences" requirement of section 4.

ii. Can the decision-maker rely upon a response provided by the recipient? (the hearsay risk to procedural fairness)

A procedurally fair decision must be based on information whose content is reliable and (preferably) verifiable, not upon hearsay. A CSP decision-maker is unlikely to have firsthand knowledge of the parties to a child support case; and were the circumstance to arise where the parties were known to a decision-maker probity would require the decision-maker to be removed from the decision-making process lest a perception of bias or conflict of interest enter (one of the two basic rules of procedural fairness: freedom from bias). Without personal knowledge of the parties a decision-maker must be informed by facts that are accountable as facts. Where a type of information about a party is deemed by the decision-maker to be open to commentary or challenge, the following questions must be considered. Can a response by the other party reasonably be determined to be objective? Can the decision-maker rely on the content of the response? Is the information sufficiently factual as to warrant consideration? Is there probative value in disclosing information about one party to the other party? In most cases the answer is likely to be a resounding "no" as the parties would be asked to provide commentary on specific

information about a person with whom they may no longer maintain sufficient contact to know with any certainty whether the information is accurate. Unreliable commentary on information cannot form the basis of a procedurally fair process.

Disclosures that are made in the *hope* of documentary corroboration or to test credibility and consistency represent a speculative approach to procedural fairness and as such would represent an intrusion upon privacy. Where the personal information of a party is at stake, speculation is not an appropriate or fair use of such information and can hardly be described as "rationally" probative. Unless documentary evidence could reasonably be considered already available to the other party outside the change of assessment process, and which the other party could reasonably be able to present to the decision-maker, the other party is unlikely to be able to provide any advice to the decision-maker that could be considered reliable and devoid of bias or agenda. In current CSP processes no consideration is made of the ability of each party to provide reliable commentary on the information disclosed under section 98G. If hearsay was received from a party, "it may ultimately be given little or no weight if it is thought to be unreliable because it cannot be tested by cross-examination."[73] How can a decision-maker determine the truth of an assertion made by either party (other than by guesswork, or their "personal sense of it") that is in any way robust, transparent or accountable? They cannot. This once again calls into question the existence, or at least the current operation, of section 98G.

For the sake of accountability, a procedurally fair process should rely on verifiable information, not upon hearsay. The CSP has access to a range of data sources on parents. Rather than consideration being given to speculative responses from a party with a financial stake in the result (and therefore a

[73] Aronson & Groves, above n 56, 581.

conflict of interest rendering responses inherently unreliable), the decision-maker could instead use verified data sources to collect the necessary information to corroborate assertions made by a party without the need to pass information on to the other parent. In the interests of "limiting interferences" a search of data sources (perhaps with the consent of the parties) would represent less of an intrusion than does sharing information between parties ill-placed to reliably comment.

(2)b. Consider limitations on disclosure

This leads to discussion of whether a procedure may be devised to enable reasonable limitations upon disclosure while remaining consistent with the requirement to accord procedural fairness to each party. Such consideration is not intended to create a contest between the elements of procedural fairness and privacy in which element one must take absolute dominance over the other (as occurs under current administrative practice).

In procedural fairness terms the matter is one of balance between procedural fairness and privacy, and depends on the circumstances of each case. The courts have taken the view that limitations on procedural fairness could safely be imposed only by "plain words of necessary intendment"[74] within the relevant statutory framework. From this perspective, the wording of the child support Acts would appear to require administrators to place limitations on the collection and disclosure of information under those Acts. Section 4 of the *CSA Act* uses the words "it is the intention of Parliament that this act should be construed, to the greatest extent consistent with the attainment of its objects to limit interferences with the privacy of persons." This wording accords with the requirement for "plain words of necessary intendment" in placing limitations upon the disclosure of information.

[74] *Annetts v McCann (1990)* 170 *CLR* 596

From the words, the salient consideration would be whether such limitations would be "consistent with the attainment of" the objects of the Act. The relevant objects of the Act spelled out in section 4 are the principal object "(1) to ensure that children receive a proper level of financial support from their parents" and the particular object "(2)(a) that the level of financial support to be provided by parents for their children is determined according to their capacity to provide financial support and, in particular, that parents with a like capacity to provide financial support for their children should provide like amounts of financial support."

In making assessments of child support liability in the ordinary course of a child support assessment, the CSP relies in most cases upon official income information provided annually by the ATO. Where circumstances change, and a party seeks reassessment on the basis of those changed circumstances, the CSP may conduct an investigation or inquiry into the circumstances of each party to a child support case. In determining a level of child support to be transferred between the parties, it is reasonable to expect that the information upon which the CSP relies is reliable, verifiable and relevant. As outlined above, if a party cannot aid the decision-maker then there is likely little value to be found in making disclosures to that party as such disclosures would not be in aid of assisting the CSP to ensure that the parties meet their obligations under the Act. Therefore, reasonable limitations upon the disclosure of information would be consistent with the restrictions imposed by section 4 and the objects of the Acts.

In meeting the requirement to "limit interferences" any restriction placed upon disclosure would necessarily need to be made to the least degree possible that is consistent with the intention to limit interference with privacy while at the same time ensuring that procedural fairness is afforded to all parties to the greatest extent consistent with the circumstances of a case.

To the extent that the act of withholding information from a party is taken to be a reduction in procedural fairness such a reduction would be viewed more correctly, with the section 4 imperative in mind, as a limitation on the interference with the privacy of the other party rather than a denial of procedural fairness. Such limitations would trace a direct line from the intentions of Parliament (as expressed in legislation) to procedural conduct. A decision-maker would be required to determine the extent of the limitation, which brings us to discussion of 'total' versus 'sufficient' disclosure.

(2)b. Consider limitations on disclosure:

i. Total versus sufficient disclosure:

In seeking a reasonable balance between the disclosure and "limit interferences" requirements attendant upon a decision-maker in considering the degree of disclosure of confidential information required in a case, it is worth quoting at length from Aronson and Groves regarding the views expressed by the High Court in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] *HCA* 72. While the High Court declined to provide 'all encompassing rules about how administrative decision-makers' should deal with confidential information'[75] the Court 'accepted that the competing values of disclosure and confidence should be "moulded according to the particular circumstances …".'[76] Additionally, 'The Court concluded that fairness, in the form of sufficient disclosure, would be satisfied in the case at hand if the decision-maker disclosed the substance of the allegations and gave an opportunity to respond to them' without necessarily requiring release of source documents.[77] In consideration of the necessity to accord procedural fairness to all parties, 'The Court noted that the balance struck by a statutory

[75] Aronson & Groves, above n 56, 538.
[76] Ibid.
[77] Ibid.

regulation of confidential information "affords to visa applicants a measure of procedural fairness and protection to informants …". Those remarks recognise that statutory restrictions upon disclosure necessarily limit the extent to which fairness can be provided to the party denied full disclosure.'[78]

Current CSP practice appears to have construed the disclosure requirement under section 98G as "total" rather than "sufficient" and, in so doing, ignores the "limit interferences" requirement of section 4. The total disclosure approach also ignores the impact of such disclosures upon a party and instead chooses, in the name of procedural fairness, to give priority to the provision of documents to the other party (who receives information on the applicant but is under no obligation to respond with any information regarding their own circumstances).[79] Sufficient disclosure, rather than total disclosure, in child support matters would accord procedural fairness to both parties, while at the same time respecting the privacy of each party. This limited-disclosure approach would also enable decision-makers to consider all documents relevant to decision-making, by removing the non-disclosure disqualification currently in place, in aid of the attainment of the objects of the Act.[80]

Procedural fairness for one parent should not come at the expense of procedural fairness for the other parent. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] *HCA* 6 the understanding of fairness within the Australian judicial context was expressed by Gleeson CJ via the suggestion that "Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to

[78] Ibid.

[79] In this way, the operation of the change of assessment process could be employed by a party as an inexpensive, efficient and one-sided method of discovery.

[80] Under the current CSP process, if a party refuses to allow disclosure of a document to the other party the decision-maker cannot consider that document regardless of the relevance of the document to the circumstances of the case.

avoid practical injustice."[81] Disclosure of information to a person who cannot aid the decision-maker in any objective sense (especially where the relevance of that information to decision-making has not been determined) would represent a practical injustice. Such injudicious disclosures by government agencies would unreasonably intrude upon the privacy of a party and opens a party to the risk that information will be used for vexatious purposes by the other party (particularly in the context of separation and divorce where a high degree of animosity between separated parents may exist for prolonged periods). As Aronson and Groves point out, "In some circumstances disclosure may have the potential to cause harm to some person or to the public interest. In such cases, disclosure of the substance, but not the detail, of the material will often achieve a satisfactory compromise between the demands of disclosure and confidentiality."[82] The protection of privacy by Commonwealth agencies is increasingly regarded as important[83] as information pertaining to individuals may readily be put to unauthorised and damaging use. With regard to the public interest, the current CSP approach to collection and, particularly, intrusive disclosure of personal information acts as a deterrent to families who might otherwise seek access to the administrative reassessment process afforded by child support legislation. Without effective access to the reassessment process the object of the Act to ensure that the level of financial support provided by parents for their children is determined according to the capacity of the parents to provide financial support is undermined.

[81] Quoted in Aronson & Groves, above n 56, 491, and in speech by Justice Alan Robertson, above n 61, Paragraph 23.

[82] Aronson & Groves, above n 56, 537.

[83] See the 18 May 0217 joint statement by the Department of the Prime Minister and Cabinet and the Office of the Australian Information Commissioner, that an Australian Public Service (APS) Privacy Governance Code will be developed. Office of the Australian Information Commissioner, *Developing an APS-wide Privacy Code*. Accessed at: <https://www.oaic.gov.au/media-and-speeches/statements/developing-an-aps-wide-privacy-code>.

Across the statutory framework surrounding administration of child support, inconsistencies are apparent in the approach taken to the limitations placed upon disclosure of information. If we compare the information protection practices under section 98G and the *FOI Act* this inconsistency becomes apparent.

A party to a child support case might provide a verbal opinion to the CSP about the other party to the case, and that opinion might be recorded in the CSP's internal records pertaining to the first party. If that party seeks a copy of the record of conversation via the *FOI Act*, that same opinion will be withheld from the applicant under section 38 of the *FOI Act* (and with reference to the secrecy provisions of child support legislation) as "protected information" concerning a third party obtained by the CSP for the purposes of the child support Acts. Despite the opinion being just that—an opinion, hearsay—and not a verified fact or a fact provided by the other party, the first party will be denied access to that portion of their own record in which their opinion about the other party is documented. The opinion is not personal information owned by the other party; it is an opinion *about* the other party provided to the CSP by the first party (the term "concerning a party" is taken perhaps too broadly, encompassing the multiple definitions of that word which might also include "about"). The person who can be said to "own" that particular piece of information is the opinion-holder, not the other party to whom the opinion refers (and who may be unaware that such an opinion is held). Therefore, it would follow that the opinion is more properly "protected information" of the party who provided the opinion (and is not "protected information" of the other party as the information "concerns" an opinion held by the first party and is not a fact "concerning" the other party): the opinion of the first party about the other party is rightly

protected from viewing by the other party as release of the opinion to the other party would have the potential to cause a breach of confidence. Accordingly, the information provided by the opinion-holder, and held within that person's records, could reasonably be released to that person under FOI as the opinion is not "protected information" concerning the *other* party. Yet, under the strict rules of FOI, a simple opinion which may not be factual about another party cannot be released to the very same person who provided that opinion if the FOI decision-maker decides to withhold under section 38 that portion of the record containing the opinion.

In contrast, under current disclosure practices employed by the CSP and the AAT, total disclosure of information takes place, whether factual records of a medical or financial nature, or records of conversation between a party and the CSP, inter alia. The statutory context on the one hand (under the *FOI Act*) mandates non-disclosure of information containing even a passing, opinionate reference to another party but on the other hand (under the current interpretation of the CSA and AAT Acts) requires disclosure of that same information. This is at distinct odds with the intention of Parliament to "limit interferences."

Given the sensitivities surrounding transfer of information between separated parents, perhaps the methodology utilised in the administration of FOI requests could be extended in some measure to the processes employed by the CSP, for the protection of privacy. Under the FOI Act, this process may be summarized as:

- Information is gathered and considered by the decision-maker.
- The decision-maker reaches a decision regarding which information must be withheld from the applicant (where the FOI Act requires such withholding).

- The decision-maker informs the applicant of the outcome, providing such documents (or portions thereof) as can be disclosed under the Act, describing the withheld documents where appropriate.

The protections of privacy accorded by the statutory framework surrounding child support require construction of administrative procedures that are both fair and reasonable. In that context limitations upon the disclosure of information would provide a reasonable balance between the requirements to "limit interferences with the privacy of person" and to provide procedural fairness to all parties. In place of the current practice of total disclosure a decision-maker could withhold the source documents provided by one party and, instead of full disclosure, provide a summary to the other party describing the grounds upon which the application relies as expressed in the withheld documents.

(2)b. Consider limitations on disclosure:

ii. Consider the perception that information may adversely affect a person

The deliberations of a judicial decision-maker may require the evaluation of information provided about a party, or a party's conduct, that is negative or incriminating in nature. Given that such information could influence a decision-maker to take a decision with adverse consequences for the party in question the courts have sought to define the rights of parties, including the right to contest information that may adversely affect the interests of a party. Where the seriousness of the effects of a decision[84] may be severe, for example in criminal cases potentially attracting the death penalty, this right can easily be seen to be essential for the avoidance of unjust outcomes. The entitlement to make submissions to a decision maker was addressed in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576*:[85]

[84] Aronson & Groves, above n 56, 406.
[85] Justice Alan Robertson, above n 61, Paragraph 26.

> Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker.

In the administrative decision-making context of child support cases, however (as discussed above), one party may not be capable of providing any rebuttal or qualification to information provided by another party. Additional clarification was provided in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152*:[86]

> What is required by procedural fairness is a fair hearing, not a fair outcome

whereby "the reviewing court is concerned with the fairness of the procedure adopted, not the fairness of the decision produced by that procedure."[87] These considerations have found articulation within the "fair hearing" rule of procedural fairness.

Operational information within the CSP makes the following statement in support of this rule: [88]

> Information must be exchanged with parties to a decision to ensure a customer who may be adversely affected by the information has an opportunity to respond and comment on the information before the decision is made.

Within the context of child support matters distinction must be made between two definition(s) of "adverse"; these distinctions are pertinent to the design of

[86] Ibid, paragraph 8.
[87] Ibid.
[88] Department of Human Services, *Open exchange of information for Child Support customers 277-09190000*. Accessed at:
<http://operational.humanservices.gov.au/public/Pages/separated-parents/277-09190000-03.html>.

fair administrative procedures surrounding exchange of information between parties. Not only is the seriousness of any adversity relevant, the context of that adversity is critical in confining the definition within the boundaries of procedural fairness required by the "limit interferences" intention expressed by Parliament. Two facets of the notion of "adverse" are apparent:

1. *material provided by one party may be "adverse" in its characterisation of the other party; and*

2. *the outcome of a decision for a party may be perceived to be "adverse" based on the material provided by the other party.*

For the sake of procedural fairness in child support matters it is essential to consider whether adversity lies in the material (and whether the material is about a party or about the other party) or in the outcome of a decision based on material relied upon by a decision-maker. For example, a medical report regarding the health of one party cannot be held to be "adverse" with respect to the other party; the detail contained within the report simply documents the diagnosis of a medical practitioner and can be treated as a statement of objective fact. However, the outcome of a decision made on the basis of a medical report may be perceived as "adverse" by the other party, especially where that outcome negatively impacts the financial position of the other party through reassessment of child support.

In the case of the first facet of "adverse", a party might reasonably wish to challenge subjective information provided by one party as that material may contain errors of fact or unsupported assertions designed to sway a decision-maker in their deliberations. Where a party makes an unsubstantiated adverse statement purporting to be factual about the other party the decision-maker should seek evidence from that party in support of the adverse assertions. If the party refuses to provide evidence to the objective satisfaction of the decision-

maker, those assertions should be ignored (for they could not form the basis of accountable decision-making). The decision-maker should also grant the other party (the subject of the adverse assertion) an opportunity to challenge or corroborate those assertions.

However, where a party makes an unsubstantiated statement purporting to be factual about their own circumstance the decision-maker, instead of seeking advice from the other party by disclosing information to that other party, should seek evidence from the party in support of the assertions. If the party refuses to provide evidence to the objective satisfaction of the decision-maker, those assertions should be ignored (for they could not form the basis of accountable decision-making). The responsibility for corroboration of assertions would rest with the party making those assertions. Disclosure of information to the other party would not be required. Information that is actually or potentially adverse in its characterization of a party, insofar as that information could influence a decision-maker in their perception of the facts of a case, would warrant a procedure that ensures the adverse information or material is provided to the party for challenge.

In the case of the second facet of "adverse", an outcome might very well be deemed by a party to be adverse to their interests; however, the requirement to accord procedural fairness is concerned to ensure, per *SZBEL*, that the *process* which leads to that outcome is demonstrably fair. Procedural fairness is not concerned with the perception by any party that the *outcome* is fair. Accordingly, the second question of adversity is defeated and must not influence the design of information exchange processes employed in changes of assessment.

In reaching an outcome in the assessment of child support the CSP employs a mathematical formula provided by the *CSA Act*. This formula, operating as

intended, takes into account all aspects considered relevant by Parliament (by inclusion in the formula). Aspects such as income and the percentage of care attributable to each parent will, through the formula, produce an objective outcome with which both parents are obliged to comply. These aspects can be reduced to points of fact which, during the process of information exchange in a change of assessment, may be verified via objective and independent sources. In the context of the child support formula "adverse" could be taken to include an outcome where a reassessment leads to a reduction in the financial resources available to a party; for example, via reduction in child support received by a payee or an increase in child support paid by a payer. However, such an outcome is not necessarily "adverse" for the purposes of procedural fairness if the outcome was achieved via the proper and fair operation of the child support formula; such an outcome would meet the object of the Acts that the financial capacity of each parent is reflected in the assessment. The distinction lies in "the fairness of the procedure adopted, not the fairness of the decision produced by that procedure." [89]

Before a final decision is made regarding an application for change of assessment section 98C(1)(b)(ii)(A) of the *CSA Act* requires a decision-maker to consider the relative hardship a decision may cause the parents and children under an assessment. This contemplation properly takes place *after* facts have been gathered and considered in a case. Concern for the welfare of either party should not be considered during the information exchange stage of the process as no decision can be reached until all relevant facts are before the decision-maker. Premature characterisation of one party as potentially more adversely affected than the other could introduce a perceptual bias into the cognitions of the decision-maker, risking a failure to adhere to the fundamental rule of procedural fairness that decision-making be free of bias. Information must,

[89] Justice Alan Robertson, above n 61, Paragraph 8.

therefore, not be exchanged on the presumption that an *outcome* may be adverse to either party. Where speculative assertions are made by either party regarding facts pertaining to the other party, a decision-maker must carefully consider whether there is substance to those facts. The potential for a person to experience an adverse outcome from a fair process does not require disclosure of documents during the information exchange stage of the process. The perception that a financially adverse outcome is equivalent to a procedurally adverse outcome is just that: a perception.

Conflation of the distinct notions of *"adverse" due to an unfair procedure* and *"adverse" due to a perception of the impact of the outcome* into a generalised notion of "adverse" could lead an agency to design information disclosure protocols in the name of procedural fairness that are themselves not procedurally fair. Such protocols could see information exchanged for the *sake* of procedural fairness, not *in the service of* procedural fairness.

(2)b. Consider limitations on disclosure:

iii. Legitimate expectations

In considering the boundaries of procedural fairness in changes of assessment, administrators charged with the responsibility of designing information exchange protocols must consider whether the statutory framework creates legitimate expectations regarding the processes that give effect to the statute and whether "the existence of a legitimate expectation may enliven an obligation to extend procedural fairness." [90] The existence of "limit interferences" provisions, and the *Privacy Act 1988*, could be argued to create a legitimate expectation that the procedures used in the administration of change of assessment applications, and other processes involving the collection and disclosure of information in

[90] Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam [2003] HCA 6*, cited in Justice Alan Robertson, above n 61, Paragraph 18.

child support matters, would proactively limit interferences with the privacy of persons subject to child support assessment. Most reasonable parties would expect that sensitive personal information would not be shared with ex-partners without express consent.

When the "what is the harm?" test is applied, the expectation of privacy protection is arguably elevated above the expectation of full disclosure. Consider the risks of disclosure and the uses to which information may be put; information provided to a party unnecessarily could be used by that party against the other party for vexatious or abusive purposes. In contrast, consider the relative harm of withholding material from a person who cannot corroborate or challenge the information contained therein. It is clear that the procedures surrounding exchange of information must preference protection of personal information over unnecessary (but superficially "necessary") disclosure.

(2)c. Nature of the decision-maker and the width of discretion

Where parties have not come to a private arrangement to manage child support matters, participation in the child support system is mediated via the CSP. Parties to a child support assessment have no option other than to appeal to the CSP for a change of assessment when the personal situation of a party is altered. The powers of the CSP and the AAT have the force of law and as such must, therefore, be exercised with restraint and propriety. As a matter of natural justice, procedural fairness thus becomes "prophylactic in character, for which the power of the courts to right a wrong after it has been done is not an adequate substitute,"[91] and provides protection from the government overreach:[92]

[91] McPherson J.A. in *Queensland Police Credit Union Ltd v Criminal Justice Commission [2000] 1* Qd *R 626*. Accesssed at: <http://archive.sclqld.org.au/qjudgment/1998/QCA98-233.pdf>.

[92] Aronson & Groves, above n 56, 407.

> The courts are clearly eager to rely upon the rules of natural justice to impose procedural requirements upon the exercise of statutory and other official powers. That enthusiasm is due partly to the immense power of modern government and the role the courts feel they may play in protecting individuals from government action.

Furthermore, the discretion provided to a decision-maker in a change of assessment process to "act on the basis of the reply (if any) to the application and the documents (if any) accompanying it"[93] must be undertaken with care and consideration given to the reliability of any information thus provided in response to an application. As Gleeson CJ reasoned in relation to the nature of discretionary powers in *Jarratt v Commissioner of Police for NSW* "the very breadth of the statutory power seems to me to be an argument for, rather than against, a conclusion that it was intended to be exercised fairly."[94]

Where decision-making powers are conferred by legislation, procedural fairness requires such powers to be exercised fairly. The statutory imperative placed upon the CSP and the AAT to "limit interferences with the privacy of persons" is a key protection for separated parents yet is not fully-integrated into the administrative practices of the agencies. The question of why this remains the case some 29 years after the *CSRC Act* came into effect may be explained as a consequence of administrative convenience.

(2)d. Avoidance of self-interest of an agency in guiding administrative processes: privacy first

As the preceding discussion has demonstrated, the effective application of procedural fairness to child support matters requires a comprehensive reading of the circumstances and nature of each case. In the exchange of information protocol currently employed by the CSP the shorthand approach to procedural

[93] *CSA Act*, section 98H(1)(a)(ii)
[94] Aronson & Groves, above n 56, 504.

fairness represented by the total-disclosure method may provide a degree of convenience for the decision-maker by disguising the need for evaluation of the particular circumstances of a case and thereby reducing the associated administrative burden; however, that convenience should not take precedence over determination of the full requirements of procedural fairness applicable to each case. The function of a public service agency is not to prioritise delivery of administrative efficiency to the agency itself; rather, the function is to deliver services to the public in the most efficient way consistent with the obligations attendant upon the agency. Delivery of services comes at a financial cost to an agency, and the pressures upon public service agencies to minimise costs is significant. Aronson and Groves highlight a central problem faced by the courts (and public service agencies) in determining "fair and appropriate procedures for all circumstances":[95]

> The courts have obvious expertise in adversarial adjudication but traditionally little experience of other forms of decision-making. The Executive may be better placed to explore the range of non-adjudicative procedures and their benefits, but is hampered by its own "self interest" in minimising the procedures it is required to observe.

In terms of the costs associated with the delivery of procedural fairness in child support matters, the avoidance of the requirement to provide administrative processes that "limit interferences with the privacy of persons" to the greatest extent could be seen to be operating in the "self interest" of the CSP. However, paraphrasing Aronson and Groves, it would be undesirable for public sector agencies to prioritise the economic costs of the procedures they are required to employ without also having regard to the economic, moral and social costs of not imposing such procedures.[96] In child support matters greater regard for the

[95] Ibid 405.
[96] Ibid 505.

full range of processes and limitations articulated by Parliament would lead to improved outcomes for the community.

V CONCLUSION

This article has demonstrated that the processes currently employed by the various Commonwealth agencies charged with the administration of child support are not informed by a full reading of the statutory context. The intentions of Parliament with regard to privacy are not adequately reflected in practice; nor are the sophisticated and well-documented requirements for procedural fairness as articulated by the courts.

The modern facility with which information can be turned to ill use, and the desire of separated parents to move peaceably on with their lives *for the benefit of their children*, requires the elevation of privacy in child support administration to a higher level of regard than is currently the case.

Effective administration of child support would be improved by (1) a *comprehensive* review of policy and procedures surrounding the protection, collection and disclosure of personal information and (2) the institution of measures to ensure the compliance of all information collection and disclosure practices with section 4 of the *Child Support (Assessment) Act 1989* and section 3 of the *Child Support (Registration and Collection) Act 1988*. The provisional framework for establishing the boundaries of procedural fairness in child support matters proposed in section four above may be of assistance to such an endeavour. These steps would improve the privacy protections afforded to Australian families and the administration of child support.

The adoption of a "privacy first" approach, as per the intentions of Parliament expressed in child support legislation, would not only facilitate greater attainment of the objects of the child support Acts; such consideration in line

with community expectations would also increase the standing of the Child Support Program and the important position the organization holds within the fabric of Australian society.