

New Zealand Law Society

SUPPORTING CHILDREN - A GOVERNMENT DISCUSSION DOCUMENT ON UPDATING THE CHILD SUPPORT SCHEME

Introduction

1. The New Zealand Law Society (the Society) appreciates the opportunity to comment on the Government's discussion document, "*Supporting Children*" (the document). The Society's Family Law Section (Section) has prepared this submission on behalf of the Society. The Section has existed as a group with voluntary membership since 1997 and represents the interests of approximately 850 family lawyers.
2. A child support system must put the welfare and best interests of children first and be simple, efficient, flexible, transparent and equitable for both children and their parents. The current system is outdated and lacks flexibility because it fails to reflect the changes in New Zealand since it was introduced nearly 20 years ago, both in the way the courts now approach day-to-day care and contact issues, and in the way families operate. The Society encourages the Government to use this review as an opportunity to consider all aspects of the current child support system and to propose comprehensive legislative reform to create an improved, fair and efficient system to reflect these changes.
3. This submission comments on the suggested proposals in the document and in broad terms supports the direction that the document takes. In particular, the Society agrees with a move towards the Australian system, which, among other things, will harmonise the law with Australia for enforcement purposes.
4. The submission also contains matters not addressed in the document but which, in the Society's view, the Government should consider if it is to ensure that a new child support system is fair to parents and gives primacy to the welfare and best interests of the child. One of the most significant recommendations is that agreements be treated as binding.

Objects of the Child Support Act 1991

(a) Welfare and best interests of the child

5. The objects of the Child Support Act 1991 (the Act) are set out in s4. While there is reference to the child's right to be maintained, the welfare and best interests of the child are notably and regrettably absent. This means that the Act is in breach of Article 3 of the United Nations Convention on the Rights of the Child (UNCROC), which states that "In all actions concerning

children ... the best interests of the child shall be a primary consideration". One of the principal recommendations of the Trapski Report¹ was along these lines.

6. The document provides a list of objectives of a child support scheme in paragraph 2.1, with the third objective being "encouraging parents to work together in the best interests of their children". This is not further elaborated on within the document and does not satisfy the requirements of UNCROC. It is also unclear whether the document intends that its objectives replace the objects as found in s4 of the Act.
7. In Australia, s114 of the Child Support (Assessment) Act 1989 (the Australian legislation) includes particular objects, including:
 - "(a) that children have their proper needs met from reasonable and adequate shares in the income, earning capacity, property and financial resources of both of their parents; and*
 - (b) that parents share equitably in the support of their children."*
8. The philosophy of the Australian legislation seems to be that children are entitled to continue to benefit from the wealth of both their parents notwithstanding that their parents separate. Object (a) above encapsulates that notion.
9. The Society recommends that the welfare and best interests of the child be included in the objects of the Act, together with the objects noted above from the Australian legislation. The Act is about children and must be seen in the context of other child-related legislation such as the Care of Children Act 2004 (COCA) and the Children, Young Persons, and Their Families Act 1989 (CYPTF Act). However, as it stands the Act is very adult-focused. A change to the objects will signify a much-needed change in perspective. While the inclusion of the welfare and best interest of the child will not as such affect the child support formula and basic assessment process, it may be a significant consideration in relation to the many powers and discretions contained in the Act.

Recommendation

10. That the welfare and best interests of the child, together with the objects from the Australian legislation, be included in the objects of the Act.

¹ *Child Support Review 1994 Report of the Working Party* (November 1994).

(b) A Māori perspective

11. A Māori perspective is entirely missing from both the Act and the document. Both COCA and the CYPTF Act refer to the child's whānau, hapū and iwi. Section 13 of the CYPTF Act gives the primary role in caring for and protecting a child to the family, whānau, hapū, iwi and family group. As the care of the child inevitably includes financial support, the objects of the Act should more appropriately reflect the provisions of other family law legislation.
12. As with the welfare and best interests of the child, the inclusion of the child's whānau, hapū and iwi will not as such affect the child support formula and basic assessment process, but it will be relevant in relation to the many powers and discretions in the Act. It might be important in relation to questions such as who may claim child support, especially if the proposal to narrow the categories is accepted, as proposed in paragraph 9.2. For example, would someone with a whāngai child be eligible to apply for child support?

Recommendation

13. That the Māori perspective be taken into account and included in the objects of the Act.

COMMENT ON THE DISCUSSION DOCUMENT**CHAPTER 3 – Expenditure of raising children**

14. The Society supports the proposal that child support is calculated in direct relationship to the actual costs of raising children. In child maintenance hearing days, before the current child support system, child maintenance was calculated directly on actual evidence in respect to particular children. In the ideal world, that exercise, whether done by a court, a Review Officer or otherwise, must still be the fairest consideration for each family.
15. The current formula assessment dictates a set percentage per child and provides certainty, but the actual dollar support to the custodial parent is related directly to the income of the liable parent without regard to the actual cost incurred by the custodial parent. The effect is that the custodial parent carries the full burden and risk and only in a very small percentage of cases does the custodial parent make a 'windfall' gain.
16. The key issue is whether the formula can be made more accurate for particular circumstances.
17. Paragraph 3.8 identifies the challenges in finding a successful method of calculating actual expenditure to raise children. The considerations of the Australian studies and the application to New Zealand reinforce the assumption that this is a difficult exercise. The conclusion that

families with greater income spend more on their children supports the present position of assessing child support on the percentage of income of the liable parent, but at each end of the scale a one-off set figure will diverge from reality.

18. The Society submits that the opportunity is available for a more sophisticated formula to be calculated taking into account actual costs together with the number and age of the children and the income category of the families involved.
19. Nevertheless, a formula assessment more attuned to the actual cost of raising children in the particular family circumstances will still be imperfect in comparison with an actual assessment of child maintenance. Thus, the review process enables either party, if they require it, to have a court or tribunal determine actual costs in respect of the children and their circumstances.

Recommendation

20. That the proposal to take the actual cost of raising individual children into account be adopted.

CHAPTER 4 – Shared care

Whether the single threshold for shared care should be retained, but lowered?

21. The summary of shared cared concerns at paragraphs 4.8 to 4.12 recognises the “cliff effect”, noting two disincentives. A further and more often expressed desire, by an otherwise liable parent, is to seek shared care when this has little to do with the best interests of the child but is desired to ensure the liable parent’s financial commitment is minimised, if not neutralised. The single threshold for shared care could be lowered, as per the two options set out in the document, but is a blunt tool and would not resolve the issues referred to at paragraphs 4.19 to 4.21. In the Society’s view, a single threshold, even if it were lowered, would only serve to continue the inequities and accordingly is not recommended.

Recommendation

22. That the single threshold for shared care be repealed.

Whether a tiered system of shared care should be introduced and, if so, what tiers would achieve the desired result in determining child support liability?

23. Reaching the threshold for shared cared for child support has little correlation to what is in the child’s best interests. In situations where IRD assessment processes are relied on to resolve financial support, there is little, if any, consensus between the parties. A tiered system would

address a liable parent's sense of grievance; would more accurately reflect both parents' relative costs; and should recognise that care arrangements change over time.

24. A tiered system, along the lines of that adopted in both Australia and the United Kingdom, reduces the "cliff effect" referred to above. The level of the tiers of care determines how much the "cliff effect" is reduced. So while a two-tier system will reduce inequities, a system with a greater number of tiers will ensure a greater level of equity is achieved between the sharing of care and costs.
25. The UK system contemplates a gradual increase in costs of care with an increase in the number of nights. By contrast the Australian system is posited on there being high set-up costs. The challenge is balancing the increasing costs, whatever they might be, to the paying parent with on-going costs to the receiving parent.
26. The compromise contemplated in the document adopts the gradual increase of the UK system with the ability to accommodate increasing nights progressively. It does not appear to take into account set-up costs. Any formula will always be imperfect and not take into account the specific circumstances of each family. Accordingly a formula which has the ability to accommodate incremental increases provides greater correlation to the parents' actual costs.

Recommendation

27. That option 2, a tiered set of thresholds such as that proposed in paragraph 4.28, be introduced.

Additional costs arising from shared care

28. That there are additional costs arising from increasing levels of care is not currently reflected in the single threshold for shared care. How additional costs arising from regular care should be split between the parties is an issue. "Costs" need to be defined as those solely for the benefit of the child. Accordingly costs of holidays, travel and similar expenses do not represent care solely for the child. Historically, the costs of care do not take into account one-off costs that occur throughout a year (for example, expensive dental work or a school trip). In many circumstances, these one-off costs present each time as a source of renewed conflict or increased enmity between parties. They need to be brought into account in the same manner, as any additional costs arising from shared care should be borne by both parties (see further "Prescribed Payments" at paragraphs 82-87 below).

29. In summary, shared care reflects the change in emphasis in the legislation from the Guardianship Act 1968 to the current COCA legislation. Increasingly, children have the right to have two parents involved in their care. Thus, a much more nuanced system is essential.

Recommendations

30. That one-off additional costs, that relate solely to the benefit of the child, be included in the assessment.

Should IRD take into account parenting orders or agreements?

31. The Society agrees that IRD should be able to use parenting orders or agreements as a tool to assist in determining a parent's share of care for child support purposes. However, there may be some limitations with this approach. COCA requires that before the court is able to make a parenting order, consideration must be given to contact. Increasingly, courts are making orders that record days of care between two parents without noting any form of contact. In addition, care arrangements between parents who agree, contemplate more variables including accommodating the working arrangements of each parent. Such variables cannot always be captured in an agreement, hence the words often used "and at such other times as the parties agree".
32. If IRD takes parenting orders and agreements into account when assessing the level of shared care, this may increase the number of applications to the court when there is no agreement in place, or where circumstances change and parties are not able to agree. As orders and/or agreements are frequently not complied with, any non-compliance should be subject to the review procedure.
33. If parenting orders or agreements are to provide a new departure ground for administrative review, the Society believes the onus of proof should be on the balance of probabilities and would rest with the parent making the challenge to show the order or agreement was not being adhered to.

Recommendations

34. That IRD be able to use parenting orders or agreements as a tool to assist in determining a parent's share of care for child support purposes.
35. That if parenting orders or agreements are to provide a new departure ground, the onus of proof should be on the balance of probabilities and should rest with the parent making the challenge to show the order or agreement was not being adhered to.

CHAPTER 5 - Taking both parents' income into account

36. The Society agrees that as a matter of fairness to the child, both parents' income should be taken into account when assessing child support.
37. Taking both parents' income into account is possible now under the present regime, by cross-applications (paragraph 5.6 of the document) and by either party lodging a departure application. However, this would be avoided if both incomes were included in the formula. Adopting both incomes may help to facilitate an improved parental relationship. The difficulty remains for the children whose custodial parent is on a benefit. Those children continue to be substantially disadvantaged, and so income from a benefit should not be included. Consideration should therefore be given to allowing a minimum amount of income to be exempt from the process (compare s43 of the Australian legislation).

Recommendation

38. That both parents' income be taken into account when assessing child support, with consideration given to setting a minimum amount of income that is exempt.

Widening the definition of "income"

39. The definition of "income" is discussed in paragraphs 5.12 to 5.14 of the document. While the base may be widened slightly from declared income as a result of Budget 2010, the bigger issue of the income of self-employed persons and the ability to minimise assessable income is not examined. The issue also arises in relation to those with companies drawing a salary decided by the paying parent, when property is transferred to trusts, and where property is transferred to current spouses/partners. At present, the administrative review process is relied on for income splitting, trust income and similar situations.
40. This matter is especially important for custodial parents and their children, as the formula produces a child support figure often far less than the liable parent can in reality afford. The definition of "income" becomes all the more significant if both parties' incomes are to be taken into account.
41. A real challenge is to establish, for child support purposes, a simplified way of determining income in these sorts of circumstances, as the formula will otherwise continue to cause

problems and unfairness for children. The Trapski Report recommended that various tax deductions not be allowed in the calculation of the formula.²

42. The Society submits that consideration be given to widening the income base further than is proposed in the document, by taking into account depreciation, losses brought forward from previous years, and tax incentive deductions, among others. There may be instances where a self-employed person suffers genuine losses and the formula creates some hardship. However, at present the hardship falls on the child and custodial parent, forcing the custodial parent to seek a departure. The Society believes that the burden should shift to the liable parent to obtain relief under the departure provisions.

Recommendations

43. That consideration be given to widening the income base further by taking into account depreciation, losses brought forward from previous years, tax incentive deductions, the role of trusts and other considerations.
44. That the burden should shift to the liable parent to obtain relief under the departure provisions where the formula creates hardship.

CHAPTER 6 – A revised formula for improving the child support system

45. The document sets out two options for reform:
- (1) comprehensive change; and
 - (2) component change (i.e. one or some of the elements of the existing formula are amended).
46. The Act was passed nearly 20 years ago at a time when circumstances were rather different. The Society recognises that there have been changes in New Zealand life, in particular modified employment patterns and a much greater trend towards shared parenting after separation. Practitioners with experience in the child support area are aware that the present system is no longer flexible enough to produce fair outcomes. While it is not possible to create a perfect system that meets the needs of parties in all cases, the Society is nevertheless of the view that the recently enacted Australian formula broadly speaking offers a better solution than the existing New Zealand one. Comprehensive reform rather than tinkering is called for. Therefore, the Society supports option 1.

² *Child Support Review 1994 Report of the Working Party* (November 1994) at 28.

47. The questions raised in this chapter and the discussion of a new formula are addressed. In some instances, the Society's position and reasons have already been set out.

Recommendation

48. That option 1, comprehensive reform, be adopted.

Should contributions just cover basic costs or rise with income?

49. The Society agrees that contributions should be linked to income and should not be determined on a flat-rate basis. Payments should at least in part be geared to the liable parent's ability to pay, which a flat-rate ignores.

Recommendation

50. That contributions should be linked to income and not determined on a flat-rate basis.

Should there still be an income cap?

51. The tax regime in New Zealand should be contrasted with the tax regime in Australia. In Australia, those on the highest level incomes have a significantly higher tax regime applied to them than in New Zealand. The Society submits that the income category of a family is relevant. While an income cap works to ensure that the assessment on income does not exceed actual child costs, it can equally result in the children from formerly higher income families having an assessment of income made on a level that does not accord with their history.
52. The Society submits that a cap should be maintained on income, and consideration given to how that cap is calculated and annually reviewed. A review process should also be available on the grounds that the paying parent continues to be in receipt of income above that used for the purposes of the formula assessment.

Recommendations

53. That a cap be maintained on income and consideration given to how that cap is calculated and annually reviewed.
54. That a ground for departure be expressly provided for where the paying parent continues to be in receipt of income in excess of the cap.

Should the child's age be taken into consideration?

55. The Society supports the proposal to take the child's age into account for the reasons set out in the document and above at paragraph 18. Table 10 shows how this can be managed without too much difficulty. While such an approach is not perfect, the departure review process enables unusual cases to be catered for.

Recommendation

56. That the formula be amended to take into account the child's age.

A possible revised formula – option 1 – comprehensive change

57. As mentioned, the Society supports option 1, a comprehensive revision of the formula for improving child support, subject to the following points:
- (a) The income of both parents should comprise part of the formula. See comments at paragraphs 36-38.
 - (b) The Society agrees that the position of the liable parent's dependent children should be taken into account. This reflects the reality that liable parents will often have new partners and commitments to other children. To exclude them from consideration would ignore the reality of how relationships and parenting arrangements are re-fashioned in today's world. The approach set out in paragraph 6.23 of the document, using the income of both parents and the age of the child, is more sophisticated than at present but should still be manageable given developments in computer technology. The Society considers it to be more appropriate than the present formula.
 - (c) Child support ought to be based on a more flexible scheme for recognising shared care. See comments at paragraphs 21-35.

Recommendation

58. That option 1, comprehensive reform, should be adopted, including the following points:
- (a) contributions should be linked to income and not determined on a flat-rate basis;
 - (b) the child's age should be taken into account when assessing child support;
 - (c) the income cap should be maintained and the current cap increased;
 - (d) the income of both parents comprise part of the formula;
 - (e) the liable parent's dependent children should be taken into account; and
 - (f) child support should be based on a more flexible scheme for recognising shared care.

CHAPTER 7 - Automatic deduction of child support payments from salary and wages

At present, child support is only deducted from wages where parents default on their payments.

59. The Society supports the automatic deduction of child support from the wages of the employed, along the lines of PAYE and KiwiSaver. An automatic deduction would:
- (a) give more certainty to the collection and payment of child support by ensuring that more parents meet their obligations;
 - (b) ensure that liable parents are meeting their obligations where they do not do so voluntarily, whether through general personal disorganisation and unintentional lack of setting up direct debits or by taking umbrage that they are not being given the contact with the child that they desire and stopping payments as a direct result; and
 - (c) prevent liable parents from falling behind in their payments and incurring penalties, which add to the burden of meeting their financial commitment.
60. Whilst it is understandable that some people may wish to retain a level of personal privacy such that their employers do not learn of their child support obligations, in the Society's view this is outweighed by the advantages outlined above.

Recommendation

61. That child support be automatically deducted from the wages of the employed, along the lines of PAYE and KiwiSaver.

It is often the case that where liable parents are sequestered to pay child support, after Court examination, for example, that shortly thereafter they rearrange their employment affairs to work on a self-employed or contract basis (or even flee overseas), thus reducing their income per se and avoiding their financial obligations in terms of child support.

62. Enforcement procedures should be quick and robust. Where possible, lump sum payments should be sought from liable parents and applied more robustly where finance is available, through recourse to the financial personal records available to IRD, if appropriate. This may prevent wealthier individuals hiding behind mechanisms such as trusts, transference of assets to current spouses and self-employment.
63. Enforcement methods could follow the Canadian model, where state enforcement agencies such as the British Columbia Family Maintenance Enforcement Programme will contact the payer if payments are not made, and may take enforcement action and/or sanctions such as:
- (a) notice of attachment (garnishment for wages, bank accounts, etc);
 - (b) lien against real estate or personal property;
 - (c) reporting to debt collection agencies, for example, Baycorp; and

- (d) withholding a person's drivers licence and/or passport.
64. Where the liable parent is self-employed or a company director and wages are taken in the form of self-determined drawings:
 - (a) an additional component to GST might be useful whereby GST is 'x' amount, recovery of outstanding child support at 'y' per week, giving a total payable of 'z' amount;
 - (b) a higher tax rate may be imposed; and
 - (c) a government audit system should robustly examine the financial affairs of a business or company to ensure that funds are not siphoned off by tax avoidance means to minimise income.
 65. The Society also notes that currently, child support obligations can be enforced privately. This should continue.

Recommendation

66. That enforcement procedures be quick and robust, and consideration be given to adopting the Canadian model.
67. That specific enforcement measures be adopted where the liable parent is self-employed or a company director and wages are taken in the form of self-determined drawings.
68. That child support obligations should continue to be able to be enforced privately.

CHAPTER 8 - Child support payment, penalties and debt

69. Paragraph 8.9 of the document notes that as at 30 June 2010, total child support debt stood at \$1.944 billion, with over 70% of this aggregate debt (or nearly \$1.368 billion) now consisting of accumulated child support penalties. This indicates the extent to which the present child support system has failed.
70. The current penalty system should be removed and replaced by more robust collection and enforcement procedures, through automatic wage deductions and other means as described in the comments in chapter 7.
71. The penalty system does nothing for children and, if anything, increases the financial and psychological burden of the liable parent to a point where realistic repayment of arrears is impossible and a sense of resentment is fostered. It also decreases the likelihood that liable

parents will have extra money available to contribute directly to their children's expenses, such as swimming, dancing lessons, special treats and trips out during contact visits. The children lose out.

72. One solution to resolve the existing situation might be to establish an amnesty process, widely advertised via the media, inviting liable parents with large penalty and child support arrears to contact IRD with a reasonable repayment proposal. In return, a significant proportion of their penalties and arrears could be written off. This may result in a significant and expeditious recovery of child support debt, although the extent of the write-offs, balanced against recovery, is something that may not be able to be gauged in advance. Positive benefits may include:
- (a) an early and significant recovery of outstanding child support;
 - (b) an opportunity for liable parents to meet their obligations and improve their financial position in respect of child support; and
 - (c) a wide and positive acknowledgement of Government compromise and support to liable parents prepared to address their position.

Recommendation

73. That the current penalty system be removed and replaced by more robust collection and enforcement procedures.
74. That an amnesty process be introduced for existing defaulters before introducing more robust collection and enforcement procedures.

CHAPTER 9 - Other issues for future consideration

Determining who can claim child support

Should a test be introduced restricting who can claim child support?

75. The expectation that children will be cared for primarily by their parents is becoming less automatic in New Zealand society. There are many children who are not cared for primarily by their parents, including those in state care. Wider family members are often involved, particularly with Māori and Pacific Island families.
76. There has been some media coverage relating to older children who for various reasons choose not to live with either of their parents but with someone else. The financial support around those care arrangements can be contentious for parents.

77. There is a clear sense that parents want to be involved in decisions regarding where their children live and the financial obligations that flow from that. However, this needs to be contrasted with the perhaps more common scenarios where parents agree that a child should be cared for by a family member or some other person or where there are care and protection concerns that mean a child cannot safely be in the care of either parent. There will also be situations where one parent dies and a child or children are cared for by wider family rather than the other parent. In these situations it makes sense that the person caring for a child should be able to claim child support.
78. The Society therefore does not see any merit in restricting the categories of people who can claim child support. In particular, those non-parents who care for a child and carers in whāngai situations should automatically be entitled to apply.

Recommendation

79. That the class of persons who can claim child support not be narrowed.

Child applicants

80. A child cannot claim child support.³ While this may arise only rarely, it is ironic that a child is denied any right to apply under the Act, especially as s4(a) affirms “the right of children to be maintained by their parents”. If, for example, the Act were to be extended to tertiary students, as proposed at paragraph 9.20, the issue could become much more of a practical one but it also arises where the child is estranged from both parents. In the Society’s view, serious consideration should be given to allowing children to apply in specified circumstances.

Recommendation

81. That serious consideration be given to allowing children to apply for child support in specified circumstances.

Prescribed payments

Should paying parents be able to receive “credits” against their child support liability by directly meeting significant costs of raising the child?

82. One of the common perceptions of liable parents is that their child support payments are used for the benefit of the custodial parent rather than for the child it is intended for. A system of “credits” where there are payments clearly made for the benefit of a particular child, as listed in paragraph 9.8 of the document, would assist with this.

83. Conversely, the custodial parent may perceive an element of “control” where the liable parent is, for example, funding the vehicle used for the children or assisting with their mortgage loan or rental payments.
84. There could also be tension regarding what is perceived as “necessary”. A liable parent with a higher income could choose to fund the higher costs of a private education, while the other parent, who may be on a lower income, struggles to meet the basic living expenses for the child. Some dental work could also be seen as being elective rather than as being strictly necessary.
85. Equally, if there is a particular child with particular medical needs, the costs of raising that child may simply be greater than the costs of raising a child without those medical needs. An example might be a child with autism who requires speech and behavioural therapy. While some of this necessary therapy is government funded, not all is and the parent may choose to pay privately while going on the waiting list for public treatment.
86. The basic needs of a child would need to be a priority before the “luxury” or exceptional expenses can be claimed as credits. However, if parents agree, there should be a way of claiming credit for payments made on behalf of the child.
87. Parents who are able to co-operate to an extent where they agree to fund necessary expenses for a child directly are also parents who are likely to have some sort of shared care arrangement. The Society notes that if a system of “credits” is only available to parents who do not have a shared care arrangement, then it is unlikely to apply to the majority of parents. There may be little point in introducing a reform that has such a narrow application.

Recommendation

88. That paying parents be able to receive “credits” against their child support liability by directly meeting significant costs of raising a child.

³ *Hyde v CIR* [2000] NZFLR 385

Recognising re-establishment costs through exempting some income

Should re-establishment costs be taken into account in establishing income for child support purposes in certain circumstances?

89. Sometimes re-establishment costs are taken into account as part of a separation process. For example, claims for post-separation contributions such as mortgage repayments can be taken into account as part of a wider division of property under s18B of the Property (Relationships) Act 1976.
90. However, the provision in the Australian child support scheme seems to make sense where parents are taking on extra work immediately following separation. The reality is that both parents will be faced with costs associated with establishing two separate households and parents should be able to apply for their assessment to be amended to take into account re-establishment costs.

Recommendation

91. That re-establishment costs be made a ground for an administrative review on a similar basis to that adopted in Australia.

Qualifying age of children

Should child support payments automatically cease when the child turns 18, unless the child is still in full-time secondary education, in which case payments would cease when the child leaves school?

92. The Society agrees that the Act should be amended to provide that child support payments should automatically cease when the child turns 18 unless the child is still in full-time secondary education, in which case payments would cease when the child leaves school. The Society is aware that there is sometimes a sense of injustice among liable parents when an older child is studying at a tertiary level and receiving student loans yet the liable parents are still making child support payments. There is an element of double recovery in that.
93. With the current level of student loans and allowances, perhaps funding the living costs and other expenses associated with tertiary education should be something that parents can choose whether or not they want to assist with.

Recommendation

94. That child support payments should automatically cease when the child turns 18 unless the child is still in full-time secondary education, in which case payments would cease when the child leaves school.

Passing on child support payments to the receiving parent (“pass-on”)

Should child support payments be passed on to parents who are also receiving a Government-provided welfare benefit?

95. Family law practitioners are well aware of the perception of many liable parents, that it is unfair or unnecessary for them to be making child support payments when those payments are absorbed into a benefit that would be paid to the custodial parent in any event, and therefore the payments are not seen as benefiting the child.

96. While it makes sense financially from the taxpayer’s point of view to offset the cost of paying the welfare benefit, it often does not sit well with the liable parent. This may be one of the reasons why the level of unpaid child support is so high.

97. There are many liable parents who disregard their child support liability in those circumstances and some who choose instead to make “under the table” payments to the custodial parent. There is virtually no incentive for the custodial parent to tell the authorities about the real income and property resources of the liable parent if there is no benefit to the custodial parent. The reverse is also true.

98. If there was a financial benefit, there would be an incentive to notify the IRD about the real income and property resources of the liable parent.

99. Positive consequences of a “pass on” system include:
 - (a) The more child support paid by the liable parent, the greater the incentive for the custodial parent to go off the benefit, if the custodial parent receives a portion of what the liable parent pays. In New Zealand, a custodial parent on a benefit, whose ex-spouse/partner pays the minimum or a very low amount of child support, is trapped on the benefit.
 - (b) A liable parent who knows that, even though the custodial parent is on a benefit, some of the money paid will result in extra money on top of the benefit for their child’s household. In New Zealand, the opposite applies – a liable parent knows no matter how much they pay, the child will not get any more because the custodial parent is on a benefit.
 - (c) The transition from the benefit to part-time or full-time work for many custodial parents is facilitated when a reasonable level of child support is available. This means significant savings for the taxpayer.

Recommendation

100. That a portion of child support payments be passed on to parents who are also receiving a Government-provided welfare benefit.

Is it a flaw in the present system that child support goes in its entirety to the government where the custodial parent is on a benefit?

101. In the Society's view, it is a flaw in the present system that child support goes in its entirety to the government where the custodial parent is on a benefit.
102. As noted above, the present system is of no benefit to the welfare of the child, as it makes no difference to the child whether the liable parent pays the minimum or a higher amount. It offers no incentive for the custodial parent to notify the IRD about the real income and property resources of the liable parent so that additional child support can be clawed back.
103. There should be a system where the custodial parent on a benefit can reap, over and above their benefit, a portion of the additional child support where they divulge full details of the liable parent's real income and property resources to Work & Income New Zealand or IRD, or where the liable parent pays over the assessed amount.
104. Payment of a fixed weekly sum of say \$20.00 per week would follow the UK system where an additional payment is made to the custodial parent of £10.00. However, a much greater number of liable parents may be reported if a portion of the additional child support, rather than a fixed sum, was paid directly to the custodial parent.
105. New Zealand should consider adopting the Australian claw-back system, where a portion of the child support goes directly to the custodial parent, that portion increasing if the liable parent pays more. A real incentive provided to custodial parents on a benefit to increase their income might result in far greater transparency and much-increased revenue from liable parents.
106. A motivated ex-spouse or ex-partner is the best placed source of information about the circumstances of the liable parent. This is a vast untapped market under the present system where child support is simply offset against a benefit.

Recommendation

107. That New Zealand should consider adopting the Australian claw-back system, where a portion of the child support goes directly to the custodial parent, that portion increasing if the liable parent pays more.

MATTERS NOT ADDRESSED IN THE DOCUMENT

Terminology

108. The Act retains the old language of the repealed Guardianship Act 1968, rather than the language expressed in COCA. For instance, the Act uses the phrases “custodian” and shared and split “custody”. Section 105 refers to “access” rather than “contact”. In general, the document avoids the old language and uses “paying parents”, “receiving parents” and “shared care”. However, the document does not expressly propose that the terminology in the Act be updated. The Society submits that any new legislation should use language that is consistent with COCA.

Recommendation

109. That any new legislation uses language that is consistent with COCA.

Agreements

110. The document states at paragraph 1.16 that the desirability of private agreements cannot “be emphasised too strongly”. However, it does not discuss the point further.
111. The position of voluntary agreements under the Act is very weak. They can be upset merely by one party’s successful application for an assessment. The failure to bind anyone privately is a real problem in practice and, while the Society understands that there are fiscal reasons for the current law (for example, a recipient of child support may later receive a domestic purposes benefit), this could be accommodated in the private agreement structure. The limited ability to enter into a private agreement currently makes the process of no value as, even if the Commissioner of Inland Revenue approves it, a new formula assessment can override such an agreement pursuant to ss55 and 65 of the Act.
112. The issue can often arise in the context of the settlement of relationship property matters. The settlement under Part 6 of the Property (Relationships) Act 1976 may include reference to the payment of child support, which a few months later can be overturned. In contrast, the property aspects of the agreement are binding. It is essential that the discrepancy be addressed.
113. Furthermore, the financial support should not be seen in isolation of arrangements for the care of children. COCA processes developed under that legislation and by the Principal Family Court Judge promote mediation. The parties often agree to a childcare regime, and then address a financial regime. Providing a framework that extends the mediation process from resolution of care issues to financial issues would serve children by reducing opportunities for conflict between parents.

114. A Colmar Brunton poll in August 2009, prepared for the Families Commission, found higher levels of satisfaction and improved outcomes for children's care and financial arrangements when the parties agreed these, as opposed to seeking assistance from IRD or, in the case of care only, the court. The document does not explore resolution processes beyond those that currently exist. In the same poll, Colmar Brunton noted that the assistance of a third party depended largely on knowledge of what is available to parents. Hence there is a high and inappropriate reliance on the "formula" as being an assessment independent of the other issues that parents need to address. The poll further recorded dissatisfaction with those care and financial arrangements where child support is paid or received by an arrangement through the IRD.
115. The law on voluntary agreements requires redrafting so that, where the recipient is not a beneficiary, the agreement is binding (just like a relationship property agreement) until the parties or the Family Court agrees to vary it. If the recipient becomes a beneficiary, the formula assessment should then be calculated. If the assessment is less than the agreement, the agreement should stand. If it is more, then the agreement should be suspended and the assessment become payable.
116. As a further option, consideration should be given to adopting the two-tiered approach in ss80C and 80E of the Australian legislation. These provide for "a binding child support agreement", where each party has received independent legal advice, and "a limited child support agreement", which is more flexible and designed for parties not ready to make a long-term commitment.

Recommendation

117. That the legislation be redrafted to make voluntary agreements binding as suggested above.
118. That consideration be given to adopting the two-tiered approach in ss80C and 80E of the Australian legislation.

Departures: form of application – s96E

119. There is no requirement for the application for a departure to be in any particular form. This is meant to assist parents to apply but in practice the form used and the questions asked are of vital importance. Careful drafting of the application, cross-application and reply forms, coupled with a requirement that they be used, will make the system efficient and user-friendly. The forms need to be carefully designed to elicit relevant information, disregard irrelevancies

and narrow the issues for the benefit of the parties and the Review Officer. The administrative savings and efficiency generated by such a system would be significant. Specially designed forms are provided for in s98E of the Australian legislation, and the Society recommends that the New Zealand legislation adopts similar forms.

Recommendation

120. That the New Zealand legislation adopts specifically designed forms such as those prescribed in the Australian legislation.
121. That s96E(a) be amended to include that an application must be in writing on the prescribed form.

Departures: both parties always need to be informed – sections 96F; 96G; 96H; and 96L

122. Every case where either party applies for a departure from the assessment is of interest to the other parent. These sections in the Act provide that only one or other party needs to be told of a decision about an application.
123. Good communication with parents is vital. The cost of a duplicate letter going to the other party, whose name and address details are already on the computer, will be minor. The result will be that both parents will be informed and there will be less misunderstanding and time spent by IRD dealing with parents who have not been informed of the situation. It is of real interest and significance for a custodial parent to know that the liable parent has tried unsuccessfully to lessen the amount of child support they are paying, or for the liable parent to find that the custodial parent has applied unsuccessfully to increase the amount the liable parent pays for child support. Privacy considerations, while relevant, need to take second place in this instance, just as they do in a court case where both parties need to know all that the court hears.

Recommendation

124. That both parties be informed of the Commissioner's decision made under sections 96F, 96G, 96H and 96L.

Departure rules

125. The document discusses departures in the context of an administrative review. However, there is only passing discussion of the grounds in s105, which governs departures whether by way of administrative review or by the Family Court.

126. The Court of Appeal described s105 as “of a formidable complexity”.⁴ Members of the legal profession readily agree with this description and the implication that the degree of complexity is unnecessary.
127. The departure rules require various hurdles to be crossed. There is a complicated list of grounds; in all cases there must be “special circumstances” which the courts have regarded as a “narrow gate”; a departure must be “just and equitable”, taking into account a wide range of factors; and it must be “otherwise proper”, a phrase left undefined.
128. The document suggests adding to the grounds: challenging the use of parenting orders and agreements to establish shared care (paragraph 4.47) and re-establishment costs (paragraph 9.15). In the Society’s view, s105 requires substantial amendment.
129. Frequent resort is made to the administrative review departure process for a number of circumstances. For example, a custodial parent often seeks an upward departure when the liable parent is self-employed and has been able to minimise assessable income. The Society is aware that departures are often granted in this situation, although the law as set out by the Court of Appeal in *Andrews v Andrews*⁵ states that most deductions are legitimate and the implication is that such departures ought not to be common. This situation is unfair.
130. Another situation that merits attention is where a liable parent is cut out of the child’s life, for instance by wrongful child abduction overseas.⁶ This situation breaches the second of the document’s objectives set out in paragraph 2.1, which refers to both parents being actively engaged in the child’s life.
131. In the Society’s view, s105 requires substantial amendment. There should be one list of grounds for departure, rather than grounds being contained in s105(1) to (6) with an additional ground of “extraordinary circumstances that make the formula assessment clearly unjust”. The words “special circumstances” and “otherwise proper” should be removed. In determining whether or not a departure is to be made, the Review Officer or court must consider the departure to be just, taking into account a range of specified factors, including the objects of the Act and the interests of the taxpayer.

Recommendation

⁴ *Lyon v Wilcox* [1994] 3 NZLR 422 at 426.

⁵ *Andrews v Andrews* [1995] NZFLR 769.

⁶ *C v L [Child abduction]* [2008] NZFLR 960.

132. That s105 be amended as suggested above and to allow departures to be backdated without the existing restrictions (see comments on lump sums and backdating, at paragraphs 135-139 below; see also paragraph 62 above).

Departures: form of orders

133. Section 106 of the Act unnecessarily restricts the type of orders that can be made by the court and the Review Officers. Orders must usually relate directly to the various components of the formula rather than allowing the court or Review Officer simply to determine what the amount of child support ought to be. It is, in practice, difficult to work with and unnecessarily complicates matters for the judiciary and the Review Officers. The type of order that results from a hearing is often likely to be wrong or ineffectual simply because of this unnecessary complication. Section 98D of the Australian legislation has no such restriction, and the Society submits that this wording should be adopted.

Recommendation

134. That s106 of the Act be amended to adopt the wording of s98D of the Australian legislation.

Lump sums and backdating

135. The document does not mention the rules on lump sums. Unlike the previous law, the court is constrained in what it can award. In addition, there is the vexed issue of backdating, which the courts have struggled with (see a more liberal approach in *IPD v KME [Departure order]* [2008] NZFLR 659 per Gendall J). Awards are tied to child support assessments, which means that amounts can be small unless a departure from the formula is also obtained. These rules are not in the best interests of the child nor of the custodial parent.
136. The Society recommends that ss108 – 111 be redrafted to give the court greater flexibility to award lump sums. The court should not be tied to the formula assessment especially where special needs for the child are identified that can be satisfied by a capital payment and also where the liable parent has failed to support the child in the past. It should be made clear that lump sums can be backdated irrespective of when an application for child support assessment has been made.

Recommendation

137. That ss108 – 111 be redrafted to give the court greater flexibility to award lumps sums and to backdate these irrespective of when an application for child support assessment has been made.

Payment

138. One of the issues raised by liable parents is that payment goes to the custodial parent rather than directly to pay for the child's needs. Consideration should be given to a more flexible approach, for example, the payment being made into a trust fund for the child, as sometimes happened under the old law. This would not apply where the parent with primary care is a beneficiary. Such a procedure may be valuable where lump sums are ordered but also in other situations where payment is made as part of a property relationship settlement or where there has been friction between the parties over financial support.

Recommendation

139. That consideration be given to a more flexible approach regarding payments made by the liable parent so that payments can be made to pay directly for the child's needs.

Conclusion

140. The Society's submission has been prepared with assistance from its Family Law Section. If you have any questions regarding the submission, please contact Ms Kath Moran, the Manager of the Society's Family Law Section (ph 04 463 2996, kath.moran@lawsociety.org.nz), in the first instance.

A handwritten signature in black ink, appearing to read 'J Temm', with a large, stylized flourish at the end.

Jonathan Temm

President

Date: 9th of November 2010