

# Parental poverty and 'fairness' in the operation of the Australian child support system

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# A fresh round of reform

In 2013 Federal MP George Christensen, a long time supporter of fathers' rights groups, began his political career with an impassioned speech emphasising the plight of fathers, who he said needed to be saved, by a 'fairer' system, from lying manipulative mothers who will do or say anything to get more money, and who are supported by the Child Support System in doing so. Thus began our latest round of child support reform....

# Reform and 'fairness'

- \* Cook, Graycar and others have highlighted that family law reform in general, and child support reform in particular, is driven by anecdote, dominated by fathers' rights discourse and formulated regardless of, not in response to, good evidence (the 'surveys')
- \* As a result, both relatively simple reforms which might alleviate real and obvious unfairness (and which could thereby alleviate poverty) and any major rethink about the 'system' are ignored in favour of policies of appeasement

# Parental poverty, child support and 'fairness'

## Three key points

- \* The impact of the 'gender war' being fought out in family law generally, and most particularly in child support, inhibits sensible reforms that could ameliorate parental poverty and make for a fairer system
- \* Australia's formula for the calculation of child support has built in policy choices that deliberately ignore issues of poverty and fairness (conflicting goals)
- \* Increasing (free) individualised assessment, which would be (just) one way to look at individual cases of unfairness and poverty, is unpalatable due to cost implications – no political will for any fundamental shift in how we achieve the goals to which CS system directed (including state guaranteed payment)

# Overview of Australian system

- \* Formula based assessment delivered and enforced by C'th Dept
- \* Key features of formula:
  - \* Notional cost of children derived from combined parental taxable income and age and number of children
  - \* Parents pay share of costs according to their proportion of combined income taking account of levels of care
  - \* Third party incomes/support obligations (other than legal children) excluded from consideration

# Departures

- \* Internal review process, objection, AAT, court on a point of law
- \* Limited and narrow grounds for review
- \* Must establish one of 10 grounds THEN matter determined based on individualised assessment using traditional child maintenance criteria (ie in theory not constrained by formula assessment rates)

# The Formula – inbuilt unfairness

## 1) Differential treatment of former and current spouse (payer unfairness)

- \* Formula ignores payer's new spouse whereas Centrelink assumes dependency by her on him
- \* Payer's only option departures and general position to ignore unless new spouse unable to work for medical reasons or no work available – new spouse's EC assumed even if they have young children together whereas reverse for former spouse (see later)
- \* Remedy would require fundamental rethink about state responsibility for support of children

# The Formula – inbuilt ‘unfairness’

## 2) The use of ‘estimates’ (payee disadvantage)

- Parents can opt for current rather than historical income where current at least 15% less than income being used
- Once estimate in place must adjust if income goes up BUT only reconciled against last estimate
- Cannot in first instance estimate up
- Redundancy payments ignored
- (Lower) tax return overrides (higher) estimate
- Flipping out high income years; the self-employed crayfisherman – encourages strategic use to detriment of payee



# The Formula – inbuilt unfairness

Fixing estimate problems (simple)

- Estimate up; obligation to advise of higher income?
- Forward redundancy cases to Dept'l departures process or factor correctly into estimate process
- Reconcile against actual throughout (all done manually)

Query the fairness of a system where the Gov't knows a parent's income (payer or payee) is too low, but is not permitted to pass that information to the other party (privacy a key goal -> adverse decisions in departures)

# The Formula – inbuilt unfairness

## **3) Support of adult children (payee/payer)**

- \* No explicit account for over 18s completing education
- \* Departures – ‘Reason 9’ – while applicable internal decision makers exclude payees and reluctant even for payers; can only use while another child in the system
- \* Despite demographics, leaves parents to resort to expensive court proceedings
- \* Simple solution to include specific reference in Act, as part of departures, tying it to the Family Law Act provisions

# The Gender War – a case in point

## Earning Capacity (Reason 8B)

Since 2008 can only assess on EC where a parent has changed their work situation/hours, or is not working full-time, *and they* cannot prove that manipulating child support was a major motivation. Therefore, if motivation is NOT child support, then cannot assess on EC. Thus

- \* Parents with *any* actual reason for under earning other than avoiding child support, immune eg no history of work and do not want/'need' to; want to take a long holiday
- \* Almost impossible to assess parents on EC, ***in particular payees***

# Individual v formulaic assessment

## **The requirement for 'special circumstances'**

- \* 10 'grounds' for departure
- \* Intention they be narrow
- \* Virtually no case law and vaguely worded
- \* Must show 'special circumstance' falls within 10 grounds -> then determination of actual rate as for child maintenance ie takes account of range of matters including hardship
- \* Hardship NOT a factor per se in determining if a special circumstance exists

# Individual v formulaic assessment cont'd...

- \* Once ground established, internal decision makers rely on formula without full consideration of parties' circumstances -> most cases stay internal and resources don't permit a proper evaluation of a fair outcome in many cases
- \* Conversely, judicial officers have (even explicitly, if mistakenly) ignored the narrow requirements for the special circumstance to fall within 10 grounds, thus opening up cases based on general unfairness of the operation of the formula

# Individual v formulaic assessment cont'd...

- \* Either you have narrow grounds, and work to the fairer operation of the formula

OR

- \* You expand and clarify your grounds for departure

BUT

- \* As we know, individualised assessment is slow and costly and a return to the past (though note Christensen did suggest there was some scope for consideration of this in the current reform process)

# My reflections

- \* As formulaic systems go, and compared to judicial determination, Australian CSS fairly successful
- \* Further positive reform unlikely in the current climate ie the gender war and the failure to premise reform on debates informed by good evidence
- \* In the meantime, it is possible to make some simple legislative changes that would address unfairness but by and large, again, it is the gender war that is hampering such reforms (as the easier reforms tend to favour mothers, though not exclusively eg earning capacity)
- \* However, in the end, reforming child support laws can only be a band aid in terms of dealing with poverty and unfairness as to a large extent the structural inequalities of traditional family life create the conditions which lead to the present problems