

Letter 5 Government response to report of House of Representatives Inquiry into Child Custody Arrangements in the Event of Family Separation

Following release of the House of Representatives report *Every Picture Tells a Story* in December 2003, the Council was invited to provide comments to the Government. Although the Council offered its expertise should the Government decide to proceed with the report's proposal for a new Families Tribunal, the main portion of the Council's letter concerned review of Child Support Agency decisions. The Council made a number of comments on matters that would need to be taken into account if the review process were to be reformed.

17 February 2004

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Dear Ms Power

Government response to report of House of Representatives Inquiry into Child Custody Arrangements in the Event of Family Separation

Thank you for your letter of 21 January 2004 indicating that a government response is being prepared to the House of Representatives Standing Committee on Family and Community Affairs Report *Every Picture Tells a Story* and inviting comments from the Administrative Review Council on the report.

Recommendations in the report for the establishment of a Families Tribunal (recommendation 12) and for the external review of decisions of the Child Support Agency by the proposed Families Tribunal, the Social Security Appeals Tribunal or any other appropriate tribunal (recommendation 29) are of particular interest to the Council.

1. Families Tribunal

By way of preliminary comment, the Council notes that, rather than seeking to establish alternatives to the Family Court, it may be that consideration could aptly be given to seeking to rectify perceived shortcomings in the operation of that court.

In the event, however, that the Government elects to proceed with the proposal, the Council would be pleased to lend its expertise to a detailed

consideration of the most appropriate tribunal model to be adopted and related issues such as representation before the tribunal, concurrent court jurisdiction and the appropriate review and appeal mechanisms.

As reflected in the report, there would be many Constitutional and other issues to be considered in the establishment of a Families Tribunal, among them the fundamental issue, consistently recognised by the High Court, that only a court constituted in accordance with the Constitution can exercise Commonwealth judicial power.¹

2. *Child support matters*

Introduction

The Council notes that apart from a brief reference in paragraph 6.133 to the need for a 'proper external review process' for change of assessment decisions, the report contains no other discussion relevant to the recommendation to confer review jurisdiction for CSA decisions on a tribunal.

It is unclear whether the report is advocating external review for all CSA decisions or only for the change of assessment decisions mentioned in paragraph 6.133. Additionally, the report does not seek to identify problems with the present internal review (objection) process for CSA decisions and it is unclear whether the Committee is advocating the removal and replacement or the supplementation of this process.

If it is proposed to retain internal review, there is an issue whether, as presently, it should continue to be a substantially mandatory stage in the review and appeal process. The implications of the recommendation for current court-based redress in relation to CSA decisions are also unclear. Would recourse to the courts be available after review by the tribunal, or would it be available concurrently or not at all?

Although in view of these uncertainties the Council does not propose to address recommendation 29 in specific terms, there are a number of general issues arising from the recommendation to which the Council considers that it might usefully respond.

External review of CSA decisions

The first issue relates to the appropriateness of instituting external review for CSA decisions. The Council notes that, while internal review of such decisions is undertaken on a de novo merits review basis, the process is one which contemplates the involvement of both parties to a child support arrangement or assessment. In this sense, although it has investigatory elements, the process is also an adversarial one.

Although there is provision in the *Child Support (Registration and Collection) Act 1988* and the *Child Support (Assessment) Act 1989* for review by the Administrative Appeals Tribunal of a small number of internal

¹ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

review objection decisions, redress in the vast majority of cases is by way of the courts. Decisions reviewable by the AAT include decisions to grant or refuse to grant an extension of time to lodge an application for internal review and decisions to revoke or not revoke a departure prohibition order. Ostensibly, these decisions are more administrative in character than those in which redress is by way of access to the courts.

In most cases, rather than seeking AAT review, someone dissatisfied with an internal review decision can apply to a court (for example, for a change to the child support assessment) or may lodge an appeal with the court (for example, if they consider that there is a mistake in the particulars of the assessment). The relevant courts include the Family Court, the Federal Magistrates Court, state and territory Magistrates Courts and the Family Court of Western Australia. The parties to the application or appeal in the court are generally the payer and payee, unless the CSA intervenes.

In many CSA cases the court is essentially making a new determination as to the rights of the parties. Accordingly, there would seem to be little to distinguish between the potential outcomes of an external merits review or a court-based process. The Council notes that the report of the Standing Committee does not canvass the possibility of reforms to existing court processes to address any concerns that there might be as to their operation in relation to CSA cases.

Additionally, the Council notes that it may be that merits review tribunal proceedings can be more expensive than those in a court.² For instance, there are no filing fees associated with making an application to the Federal Magistrates Court. Moreover, the objects of that court, to operate as informally as possible, to use streamlined processes and to encourage the use of a range of appropriate dispute resolution processes, appear well suited to the handling of child support proceedings.³

These considerations and the essentially party/party nature of the process and its related adversarial character would seem to suggest that in a number of respects, the courts represent an appropriate avenue for redress in CSA matters.

At the same time, the Council notes the reference in the report to the use of state and territory guardianship and management of property tribunals which also involve party/party matters in the context often of disputes between family members. These tribunals appear to be working satisfactorily throughout Australia.

² See Australian Law Reform Commission Report No. 89, January 2000, *Managing Justice: a review of the federal civil justice system*, in which details are provided of a major empirical study showing that, on average, AAT cases cost almost as much as and take as long as cases in the Federal Court.

³ Section 3, *Federal Magistrates Court Act 1999*.

If a tribunal, which tribunal?

If the decision were taken to proceed to confer jurisdiction with respect to the broad range of CSA decisions on a tribunal, an issue arises as to which tribunal.

In the Council's view, having regard to the essentially hybrid nature of any merits review process in relation to the majority of CSA decisions, recourse to a tribunal such as the AAT, with its more formal processes and its capacity to invoke adversarial as well as inquisitorial styles, would be preferable to recourse to the SSAT which is more informal and is conducted on the basis of only one party, the applicant, being present at the hearing.

The Council considers that until a decision is made on the establishment of the Families Tribunal, and detailed consideration is given to the form that it should assume, it is too early to comment on whether or not the tribunal should have jurisdiction in relation to CSA matters.

However, the Council notes that in recommendation 25 of its report, the Committee suggests amendment to the Child Support (Assessment) Act to 'eliminate any direct link between the amount of child support payments and the time children spend with each parent'. To confer jurisdiction upon the Families Tribunal to undertake the review of CSA decisions would appear in the Council's view to be inconsistent with this recommendation.

In relation to the suggestion in the report that legal representation should be totally excluded for parties involved in a Families Tribunal application⁴, the Council notes that there is empirical evidence questioning the wisdom of excluding lawyers from proceedings in the interests of efficiency.⁵

Internal review

The final issue relates to internal review. From the report, it is possible to conclude that the Committee considers there to be certain problems associated with the CSA internal review objection process.

The Council considers that internal review processes have the potential to provide a quick and efficient form of merits review for many people, at least some of whom might otherwise be unlikely to seek any other form of external review. For agencies, internal review can represent a useful quality control mechanism, particularly in high-volume decision making areas.⁶

To be effective, internal review processes need to be timely, decisions need to be and to be seen to be made independently from those of the

⁴ Paragraph 4.115 of the report.

⁵ See Executive Summary, Australian Law Reform Commission Report No. 89, 22.

⁶ For a full discussion of internal review, see the Council's Report No. 44, *Internal Review of Agency Decision Making*, 2000.

original decision maker and, as at all levels of administrative decision making, decision makers need to be provided with adequate training to allow them to understand both the legislation they administer and the procedures they should adopt in the making of their decisions.

Once identified, shortcomings in agency internal review processes can in most cases be appropriately addressed. If there are perceived problems with present CSA internal review objection process, it may be that it should be sought to address them before attempting more radical changes.

Concluding comments

In summary, the Council considers that in addition to considering conferring jurisdiction on a tribunal to review CSA decisions, consideration should equally be given to streamlining and simplifying access to the courts and overcoming such defects as may be thought to exist with the current internal review objection process for decisions of the Child Support Agency.

Thankyou once again for inviting the Council's comments on the report. We hope that that these comments will be of assistance. Should you wish to discuss any of the matters raised in this letter you should not hesitate to contact the Council's Executive Director, Margaret Harrison-Smith. The Council would appreciate being kept informed of any further developments in the consideration of the report.

Yours sincerely

A handwritten signature in black ink that reads "Wayne Martin". The signature is written in a cursive style and is positioned above a horizontal line.

Wayne Martin QC
President