MARIA DELIGIANNIS

A CRITICAL ANALYSIS OF THE CHILD SUPPORT SYSTEM IN NEW ZEALAND

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LAW FACULTY

VICTORIA UNIVERSITY OF WELLINGTON

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CONTENTS

ABSTRACT

The object of this paper is to critically analysis the operation of the child support system in New Zealand. The question of whose responsibility it is to provide financial support to children from broken families will be examined and revisited throughout the paper. Two of the more major recommendations made by the Trapski Working Party will be examined in close detail. Finally, various overseas child support systems will also be examined. The paper concludes with a view towards the future and what could potentially be in store for families living apart in New Zealand.

The text of this paper (excluding contents page, footnotes, and bibliography) comprises approximately 15,000 words.

INTRODUCTION

All references in this paper are to the Child Support Act 1991, unless expressly stated otherwise.

The question of whose obligation it is to support children has been around since at least the Elizabethan era.

The common law did not provide a duty on parents to maintain their children. Specifically, the common law failed to impose on the father a civil obligation to support his child, although the English "poor laws" allowed support to be charged for a "bastard". [1]

Moral duties towards children have existed, probably, since the beginning of mankind. The legal enforcement of these moral duties, through private law, is, however, a comparatively modern development.

As late as 1953 the Supreme Court of New Jersey had difficulty finding a legally enforceable support obligation running from the father to his child. The need was as basic as medical care and the case was resolved by reference to "natural law".[2]

Radical social theory might seek to displace the parental obligation entirely, substituting an obligation on the community at large. Children, after all, do form the human investment of any community. It has, therefore, been argued that that the community as a whole owes to all its children an obligation of support.[3]

A quick glance at the makeup of most Western societies social security systems and the benefits that are available for children would indicate that such an argument has been accepted to a certain extent, at a political level. It is also clear, however, that in most Western societies state provisions are seen to be a measure of last resort rather than the norm.

What remains true is that, with **both** the family that remains intact and with the family that has separated, the child does take his or her standard of living primarily from that of his or her parents. This follows from the organisational basis of child rearing in Western societies.

Basically, children are raised in families. The family is, therefore, the agency through which the community's children receive the primary economic support that they require. When a child's parents separate that child will suffer from economic deprivation. This is the reality that all social planners, past and present, are faced with.

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[1] 'An Act for Setting the Poor on Work", 1576, 18 Eliz, 1,c.3 & 7.
[2] *Greenspan v Slate*, 12 N.J. 426, 3 97 A2d 390 (1953).
[3] "Family Policy" Margaret Lynn, (1972).

This brings us back to the question of whose responsibility / obligation it then becomes to support that child and to bring the child's living standard back to that which he or she was accustomed to when his or her family unit was intake.

A common fact is that one major income earner is seldom able to support two establishments at a reasonable standard, unless of course we are talking about a real **major** income earner.[4]

Does it not therefore make sense that the child whose family has been broken should have prima facie recourse against the community to supply the standard of living which that community owes to its children?

It all makes perfect sense yet most Western countries have retained the ideology that a child should have recourse, in the first instance, not against the community, but against his or her parents for the retention of his or her living standards. This ideology remains firm even after the breakdown of the family unit.

New Zealand's Position:

The position is no different in New Zealand at the present moment. The National Government of today has argued that the state should provide no more than a 'modest safety net' for those unable to meet their own needs.[5]

The long term aim of the National Government appears to be to transfer to the nucleus family and to voluntary agencies some of the state's responsibilities for providing care and financial support to those in need. This is whether those in need are children, the aged, the sick, or the unemployed.

This has not always been the case in New Zealand. In fact one can confidently state that New Zealand does possess a proud social security history comparable to any other social system in the western world.

The 1972 Royal Commission on Social Security in New Zealand stated that:[6]

"... from the early years of European settlement there was a movement away from conventional British approaches to welfare problems. Sheer need and differences between the old and new countries forced changes in thought and action."

There were no wealthy class established in New Zealand to make donations for charitable purposes. The community and the state thus took over in providing hospitals, education and welfare.

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[4] "Maintenance after Divorce" John Eekelar and Mavis Maclean, page 109.
[5] "Redesigning New Zealand's Welfare State" Jonathan Boston, page 1.
[6] "New Zealand Social Security Law" W R Atkin.

The beginning of the 'welfare state' in New Zealand can be traced back to the Liberal Government who had power in the 1890's. They enacted the Old Age Pensions Act 1898, which provided that pensions be paid to persons aged 65 and over, subject to a means test and residence test. Along with this Act came other educational and health related legislation.

Over the next few years even more new benefits were introduced covering widows, miners, invalids. In 1926, the Family Allowances Act was passed which provided a means tested weekly allowance for each child in excess of two and under 15 years of age.

The biggest landmark in New Zealand's Social Security history is probably the passing of the Social Security Act 1938 by the Labour Government. This Act can be seen as an acceptance of the role of the State in providing financial and welfare assistance to those in need.

Moving along from that was the introduction in 1946 of a universal family benefit which was paid to all children, irrespective of their parents' financial circumstances.

The 1972 Royal Commission report provided a statement of the aims of New Zealand's social security system:

"(i) First, to enable everyone to sustain life and health;
(ii) Second, to ensure, within limitations which may be imposed by physical or other disabilities, that everyone is able to enjoy a standard of living much like that of the rest of the community, and thus is able to feel a sense of participation in and belonging to the community;
(iii)Third, where income maintenance alone is insufficient (for example, for the physically disabled person), to improve by other means, and as far as possible, the quality of life available."

The social system that the 1972 Royal Commission was analysing was certainly not perfect and anomalies did exist, but at least responsibility had been accepted by the state that it had a major role to play in the provision of social assistance to those in need.

Unfortunately the early 1990's have produced a major ideological attack on the welfare state and the concept of individual responsibility has crept back into fashion. It appears as if New Zealand is heading for a full cycle in regards to the role the state wishes to play when dealing with the welfare of its people.

Despite the wishes of the present Government, the state is still a major provider of social services and income maintenance. Indeed if it was not for the state many families and individuals would be living well below the bread line.

Provisions for the Maintenance of Children:

Like many other western countries, New Zealand has struggled with the concept of child support and whose responsibility it is to provide that support in the result of the breakdown of a family. Over a decade ago, the Family Proceedings Act 1980 and the Social Security Amendment Act 1980 replaced the Domestic Proceedings Act 1968 and led the way in the development of child support in New Zealand.

This was, largely, as the result of the make up of the New Zealand family changing significantly over the last two decades. The concept of a family nucleus consisting of a mother, father and 2.2 children is no longer the norm. Over the period of 1976-1991 the number of sole parent families has increased by an average of 6% per year. In 1991, one in every five families was a one parent family supported by an income-tested benefit. The cost to taxpayers of supporting this number of sole parent benefits had risen to $1160 million by 1993.[7]

Research showed that increasingly more parents who were not living with their children were not continuing to provide financial support for those children. The responsibility to provide financially for these children has since shifted to the taxpayer through the Domestic Purposes Benefit ("DPB").

These trends together with the escalating figures provided the impetus for the introduction of the Child Support Act 1991 ("the Act") the majority of which came into force on 18 December 1991. [8]

Since its introduction the Act has created a storm of protest and encountered a lot of criticism from parents on both sides, the public in general, and notable academic commentators. [9] Protest Groups have been set up such as Paul Ireland's "The Child Support Act 1991 Action Support Group" and "Families Apart Require Equality (FARE)". [10]

Even the courts have encountered difficulties with the scheme. The Act has already been referred to as a "draconian piece of legislation" by one Court of Appeal Judge.[11]

The Act had barely been in operation for two years when retired Judge Peter Trapski was invited by the National Government, in February 1994, to establish a Child Support Review Working Party in order to examine and consider the Child

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[7] "Child Support Review 1994 - a Consultative Document" page 5

[8] Parts XI and XV came into force on 1 July 1992.

[9] W R Atkin, "Departure Orders - a benefit match for lawyers", *Family Law Bulletin* vol 3 part 8, July 1992.

[10] Rod West "Child's Play - a critical look at the Child Support Act 1991" October 1993. page 19.

[11] Oral statement of Casey J in *Lyon v Wilcox* [1994] NZLR 422.

Support Act 1991, and the operation of the child support scheme, and to recommend any necessary amendments.[12]

This research paper will continue to examine the question of whose responsibility it is to provide financial support to children from broken families. The paper will also analyse two of the major recommendations made in the Trapski Report, it will also examine other child support schemes in overseas countries. Finally, the research paper will look at future developments and what could potentially be in store for families living apart in New Zealand.

PREVIOUS CHILD SUPPORT SYSTEMS

Prior to the introduction of the Child Support Act, the Department of Social Welfare ("DSW") was responsible for administering what was known as the Liable Parent Contribution Scheme. This scheme affected people who were on a benefit. Working along side this system was a court based child and spousal maintenance system for those not on benefits.

The Liable Parent Contribution Scheme was introduced in 1981 and its aim was to recover some of the money paid to beneficiary custodians by collecting it from liable parents.

The amount payable by liable parents was calculated according to a schedule of the Social Security Act 1964. There was an objection procedure by which liable parents could object to DSW about the amount they had to pay. Liable parents were also able to apply for a reduction of payment on the basis of hardship.

Parents could make their own child support arrangements if the custodian was not a beneficiary. These arrangements were often registered with a Court in order to be enforced.

If there was no agreement between the parents then the custodian would usually apply to the Court for maintenance under the Family Proceedings Act 1980.

MAJOR PROBLEMS IDENTIFIED

There were a number of major problems associated with the above systems:

The main problem appeared to be that of collection rates. Arrears under the Liable Parent Contribution Scheme totalled more than the amounts being collected. As at 1 July 1992, $387 million of unpaid liable parent contributions were in arrears and awaiting collection.[13]

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[12] "Child Support Review 1994 - Report of the Working Party" 8 November 1994.
[13] Above n 1, 9.

Another problem was the extensive use, by liable parents, of the review procedures that existed. The results were that many parents were assessed to pay a nil amount or a very low amount which did not reflect the real cost of supporting a child.

The decisions regarding a review of a liable parents level of payment also tended to be ad hoc and varied from region to region. Often the final assessment did not equate to the actual financial capacity of the liable parent to provide support.

Non beneficiary custodians also faced difficulties in having to apply to the Court to obtain a maintenance order or to have an order updated. This often resulted in long delays and high legal costs for the custodian.

For those beneficiary custodians who wished to relinquish the DPB, there was no incentive provided by the system because it meant having to go through the court process in order to ensure the continuation of obtaining child support payments.

To counter these problems an Officials' Working Party, containing officials from Inland Revenue, DSW, Treasury, State Services Commission, Department of Justice, Ministry of Women's Affairs, and Manatu Maori, was set up by the government in 1989. It's terms of reference were to develop a replacement child support system.

The result was a decision to rationalise the systems that existed into a single unified child support system whereby both beneficiaries and non beneficiaries would be included. The actual structure developed was closely modelled on the Australian approach and provided for administrative assessments of child support liabilities using a formula assessment.

The Child Support Bill was introduced into the House in August 1991 and was passed by Parliament in December 1991. It effectively came into operation on 1 July 1992 and it replaced the Liable Parent Contribution Scheme. Maintenance agreements and court orders that existed as at 1 July 1992 remained in force but the Child Support Act gave the right to either parent to apply to have the agreement or order replaced by a formula assessment. [14] Therefore, its practical effect was to override many existing child support agreements and court orders that had been previously made, much to the dismay of thousands of affected people.[15]

The Child Support Act is declared to be an Inland Revenue Act within the meaning of the Inland Revenue Department Act 1974.[16] Therefore the responsibility of administering the Act lies with the Inland Revenue Department. Having the Inland Revenue involved was seen by the State to be an important consideration as the Department can utilise far greater resources and enforcement's than were available to DSW.[17]

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[14] Sections 8,10 Child Support Act 1991.
[15] Above n 4, 10
[16] section 1(2) .
[17] Trapski's Family Law Volume 5 "Introduction to the Child Support Act 1991" 2 - 5.

PRINCIPLES

The fundamental social policy principles that form the basis of the present child support system are that:

1. Children have a right to expect financial support from their parents whether they are living with them or not.

2. The community has an interest in ensuring that caregivers of children receive adequate support.

OBJECTS

The objects of the Act are set out in section 4. They are as follows:

(a) To affirm the right of children to be maintained by their parents

(b) To affirm the obligation of parents to maintain their children

(c) To affirm the right of caregivers of children to receive financial support in respect of those children from non-custodial parents of the children

(d) To provide that the level of financial support to be provided by parents for their children is to be determined according to their capacity to provide financial support.

(e) To ensure that parents with a like capacity to provide financial support for their children should provide like amounts of financial support.

(f) To provide legislatively fixed standards in accordance with which the level of financial support to be provided by parents for their children should be determined.

(g) To enable caregivers of children to receive support in respect of those children from parents without the need to resort to Court proceedings.

(h) To ensure that equity exists between custodial and non custodial parents, in respect of the costs of supporting children.

(i) To ensure that obligations to birth and adopted children are not extinguished by obligations to stepchildren.

(j) To ensure that the costs to the State of providing an adequate level of financial support for children and their custodians is offset by the collection of a fair contribution from non-custodial parents.

(k) To provide a system whereby child support and spousal maintenance payments can be collected by the Crown, and paid by the Crown to those entitled to the money.

OVERVIEW OF THE PRESENT CHILD SUPPORT SYSTEM

What follows is a brief overview of how the Child Support Act operates in practice:[18]

Application

The first stage involves lodging a child support application with the Child Support Agency which is formally part of the Inland Revenue Department (now referred to as Inland Revenue Child Support). A child support application can be made by the custodian or the liable parent.[19]

Each child support application involves:

- a custodian
- a liable parent
- one or more eligible child(ren)

Applications must be made by custodians who receive the following benefits at a sole parent rate: [20]

- domestic purposes benefit
- unsupported child's benefit
- widow's benefit
- invalid's benefit
- sickness benefit
- unemployment benefit

Each child support application must meet the criteria of a "properly made application" before it will be accepted by the Child Support Agency.[21] Some of the details which make up a "properly made application" are:

- the custodian's name and current address
- the custodian's bank account number (for payment of entitlement)
- the liable parent's name and current address
- each eligible child's name and date of birth
- proof of each eligible child's parentage.

Child Support liability

Liability to pay child support begins on the date that the Child Support Agency accepts the properly made application.[22]

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[18] The writer was employed by the Child Support Agency for 2 years. The overview is based on the writer's own knowledge of how the system operates.
[19] Above n 9.
[20] section 9
[21] section 14

Formula assessment

The assessment of child support liability by the Child Support Agency is determined by a formula. The formula is made up of 3 components:

- taxable income
- a living allowance
- a child support percentage

The basic formula used for calculating the annual rate of child support payable is[23]:

(A-B)*C

Where -

A = the liable parent's child support income amount for that child support year.

B = the amount of the living allowance to which the liable parent is entitled for the child support year.

C = the child support percentage for the liable parent.

The child support income amount is defined as being the lesser of:

- the taxable income derived by the liable parent in the last relevant income year (which means the taxable income derived in the year which was current two years before any given child support year)

or

- an amount equal to twice the yearly equivalent of the relevant average weekly earnings amount for the last relevant income year, inflated by the inflation percentage for the child support year (this is the highest taxable income amount that can be used to calculate liability. In the 1996 financial year, this figure came to $58,606.00).[24]

The liable parent's living allowance depends on the liable parent's living circumstances. Living allowance amounts are based on Social Welfare invalid's benefit and unemployment benefit amounts, and can alter from one year to the next.[25]

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[22] section 18
[23] section 29
[24] Child Support Booklet "A Child Support Assessment".
[25] section 30

The child support percentages are determined by legislation. The percentage which is used in a liable parent's formula assessment depends on:

- the number of children for whom the liable parent must make formula assessed child support payments, and

- whether the liable parent shares the custody of the child(ren) with the custodian.[26]

The child support percentages are currently set as follows:

0.5 child = 12%
1.0 child = 18%
1.5 children = 21%
2.0 children = 24%
2.5 children = 25.5%
3.0 children = 27%
3.5 children = 28.5%
4.0 or more = 30%

The minimum annual rate

The minimum annual rate of child support is:

a) $520 in respect of all the children for whom a parent is liable to pay child support under a formula assessment ($10 per week).[27]

b) $520 in respect of a custodian, for one or more children where a voluntary agreement applies ($10 per week). [28]

This is to ensure that all liable parents meet the obligation to provide some support for their children. The fact that a liable parent is a beneficiary is irrelevant to their obligation under the Act. It is compulsory for a beneficiary liable parent to have $10.00 automatically deducted from their benefit each week to cover their child support liability. [29]

Modifications to the formula

There can be modifications to the formula where specific circumstances occur:

1. Custody arrangements - the formula is modified where parents have "shared" or "split" custody of their children.[30]

2. Estimates of current income - If a liable person expects that their income for the current year will be 15% below the taxable income used in the formula

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[26] section 35
[27] section 29
[28] section 49
[29] Section 131 Child Support Act 1991
[30] section 35

assessment then the liable person may estimate the taxable income they expect to earn in the current year. [31] There are severe penalties for those who underestimate their income.[32]

3. Alterations to the Formula by the Family Court - a liable person or a custodian may apply to an administrative review officer or the Family Court for an order to depart from the formula assessment if "special circumstances" exist. It must also be just and equitable for a departure order to be made. [33]

Objections

Any person who receives a notice of assessment or is affected by an administrative decision of the Commissioner of Inland Revenue may object to the Commissioner.[34]

An objector has 28 days from the date on the notice of assessment or decision to lodge an objection. If a liable parent lodges an objection he or she is still required to pay child support as assessed, unless the objection relates to paternity.

Exemptions

Exemptions from paying child support do exist but they are extremely limited. The only circumstances in which a liable person can be granted exemption from the payment of child support is where the person is a prisoner or a hospital patient and the person's only income for the year is from investment income totalling less than $520.[35]

The Working Party has recommended that the current exempt categories be expanded to include liable parents in residential care (both hospital and long stay geriatric) and psychiatric patients on maximised benefits. These people receive only $24 per week personal allowance and payment of child support from that leaves them with very little.[36]

Voluntary maintenance agreements

A voluntary child support agreement can be entered into by both the liable parent and the custodian. In these types of cases the Child Support Agency is not usually involved unless either parent elects to have the Agency collect the agreed amount from the liable parent and pay it on to the custodian.

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[31] section 40
[32] section 45
[33] section 105
[34] sections 90 - 96
[35] section 73
[36] Above n 6, 78.

In situations where the custodian is on a sole parent rate of benefit, the amount of a voluntary agreement must at least equal the amount that would be payable under a formula assessment.[37]

Collection

The Child Support Act contains extensive collection powers. The money payable can be collected from sources such as directly from a benefit payable to a liable person, wages payable to a liable person, deposits held in a bank, and debts owing by trade debtors.[38]

Debt Collection

The Act also provides the Child Support Agency with strong powers to collect outstanding debts. For example, child support debts are not discharged by bankruptcy. The child support debts are instead prioritised as set out in the Insolvency Act where they are classified as preferential debts (this does not include the child support debts of a self employed person).[39]

A charging order may also be placed by the Court, on the application of the Agency, over an asset of the defaulting liable parent. If that asset is subsequently sold the child support debts are paid from any proceeds. [40]

WORKING PARTY RECOMMENDATIONS:

The Working Party, who were charged to review the operation of the Child Support Act 1992, presented their report on 8 November 1994.

They made a series of recommendations that in total amount to a radical overhaul of the Child Support scheme. The Working Party reported that "the Act and its operation are in need of fundamental change." [41]

Statistics

The reading of statistics would have had a major impact on the thinking of the Working Party and the final recommendations made:[42]

* 15.8% of all liable parents have not paid any of their child support.

* 58% of all liable parents pay only the $10 per week minimum.

* The average liable parent assessment is approximately $30 per week.

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[37] section 50
[38] sections 154 - 160
[39] Above n 1, 14.
[40] section 169
[41] Above n.12, para 4.9.
[42] Above n 12, para 4.9

* As the average liable parent is responsible for 2.2 children, the average payment per child is less than $15.00 per week.

* 91,000 of the 120,000 custodial parents (76%) are welfare beneficiaries, the overwhelming majority of them Domestic Purposes Beneficiaries.

* Only about 800 of these beneficiary custodians receive any of the liable parent's contributions. In all other cases, the child support contribution made by the liable parent is less than the benefit figure. It is therefore retained by the Crown to offset against benefit payments.

* 72% of all liable parents earn less than $20,000 per annum.

* 36% of all liable parents are welfare beneficiaries.

The Working Party concluded that:

♦ There was an overriding requirement for the scheme to provide simplicity and clarity. They felt the present scheme did not provide this.[43]

♦ The scheme would have a much greater chance of acceptance, not only by liable and custodial parents, but also by the wider public, if the scheme was made transparent, so that the rights and obligations of persons under the scheme are immediately apparent, even to outsiders.[44]

♦ The present formula for assessing child support liability was too complex. It provided neither simplicity nor transparency.[45]

The living allowances contained in the formula are illogical and unrealistic.[46]

♦ Many liable parents are not being adequately assessed for child support, because the formula for assessment is based on "taxable income", as taken from the income tax return, and many liable parents are (legitimately) able to minimise their income for tax purposes. This can create unjust results as far as child support is concerned.[47]

♦ Where the custodial parent is in receipt of a government benefit (as 80% of all custodians are), there is no incentive for the liable parent to pay child support, because all the liable parent's payments are captured by the Crown to offset the cost of providing the benefit to the custodian. Some

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[43] Above n 12, para 4.4
[44] Above n 12, para 4.4
[45] Above n 12, para 4.5
[46] Above n 12, para 4.5
[47] Above n 12, para 6.1

of the liable parent's payment of child support should be "passed-on" to the custodian for the benefit of the children.[48]

It is now proposed to examine, in close detail, a couple of the more major recommendations made by the Working Party.

ENSURING A PROPER BASE FOR THE ASSESSMENT

Background:

The Working Party thought that making sure that the child support assessment is based on the right figures is a fundamental concept that should be got right in any successful child support system.[49]

At page 30 of the Report they stated that:

"The failure.... to take account of the true financial circumstances of some liable parents is a major weakness which erodes the credibility and integrity of the scheme."

Operation of the Formula

The child support formula assessment is based on taxable income; i.e., the income declared for tax purposes. The use of taxable income has the advantage of simplicity for parents and for the administration of the scheme. Its use also reduces administrative costs. The income figure from the most recent tax assessment is readily available to the Commissioner, is generally not subject to dispute, and requires no further work before the formula can be applied.[50]

The ability to access the latest income information available to the Inland Revenue Department at the commencement of any child support year, was integral to Government's decision to locate child support within IRD.

When a liable parent is assessed for child support, the assessment is based on that parent's income tax return from two years prior. Many liable parents are, however, legitimately able to reduce their income for tax purposes. Their "real" income can in some cases be larger than the figure on their tax return.

The taxable income definition is generally considered to be a satisfactory measure of parents' ability to provide support for their children. However, Government recognised that taxable income would not always be an appropriate measure, for example, where trusts are employed and for some self employed people. To counter this problem the grounds for departure from the formula

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[48] Above n 12, para 6.3
[49] Above n 12, page 30
[50] The writer has several years experience working within the New Zealand Tax System.

assessment, specifically section 105(2)(c)(i), are intended to cater for cases where custodians are disadvantaged by the taxable income base of assessment.[51]

Working Party Views:

The Working party concluded that the universal use of taxable income as the basis of child support liability is unsatisfactory, and that it is vital to the integrity of the scheme that liability should be assessed as far as practicable on the basis of actual capacity to pay.[52]

While the normal or first basis for making the assessment would be the taxable income, the Working Party stated that the Commissioner should be empowered to look beyond that base to the "income, earning capacity, property and financial resources" as per the wording of section 105(2)(c)(i) of the Act.

The Working Party recognised that establishing an accurate picture of liable parents' capacity to pay may add to their trauma and will be at some administrative cost, but firmly asserts this is "not only justified in order to establish equity between parents and to enhance the welfare of the child, but that it is also necessary if the scheme is to maintain any degree of integrity and fairness".[53]

The Working Party's main concerns expressed in the report were that:

* the Commissioner should have the overall responsibility to assess the capacity of the liable parent to provide.

* ascertaining the income base should be an integral part of the assessment process, and should not be resolved through the departure process; and

* the Commissioner should make enquiry and go beyond taxable income for the assessment where information that taxable income is inappropriate is available; liable parents would retain the right to object to the assessment. [54]

  A further concern is that there is no accountability of liable parents where the custodians are beneficiaries. Beneficiaries receive the full benefit payable, irrespective of the liable parent's contribution and do not have a vested interest in ensuring that the levels of payments made by liable parents are appropriate. [55]

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[51] Internal Report - Child Support Agency - November 1995.
[52] Above n 12, page 27
[53] Above n 12, page 30
[54] Custodial parents would have the right to apply for a departure order if they felt that the assessment did not reflect the "true" income of the non custodial parent.
[55] A discussion of passing-on payments made by non custodial parents to sole parent beneficiaries follows below.

Working Party Recommendations:

The Working Party recommended that:

* liability for child support be assessed on the liable parent's ability to pay;

* the Commissioner be empowered to include in the income base to which the formula is applied at least a list of items which are deductible for income tax purposes;

* anti-avoidance provisions, similar to section 99 of the Income Tax Act 1976, be included in the Child Support Act;

* Social Welfare beneficiaries be required to disclose, as part of receiving the benefit, known financial circumstances of liable parents so the information can be passed on to the Child Support Agency. [56]

Widening the Income Base to reflect the Capacity to Provide:

It is well established that some liable parents have been required to pay less child support than appropriate when measured by the lifestyle that they enjoy. [57]

Due to the way in which the Income Tax Act allows costs to be deducted from gross income to arrive at the taxable income, child support liabilities are minimised for some liable parents. Some child support can be avoided through liable parents arranging their tax affairs, legally, so that income is reduced by:

* investing in areas where increases in asset values are not reflected in their taxable income, for example, property purchasing; etc. and

* creating other legal entities, such as private companies, and diverting income to that entity.

Widening the tax base in line with the Working Party's recommendations could have the effect of enhancing the credibility and integrity of the child support scheme. It should increase the equity between liable and custodial parents, and, if thought out and planned carefully, it could contribute to the welfare of the child.

It could, however, as acknowledged by the Working Party, create some difficulties both for liable parents affected and for the administration of child support. Depending on the final method chosen by the Government to achieve the Working Party's aims, the difficulties may well be seen to outweigh the advantages to be gained.

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[56] A discussion of the case law on this subject follows below.

[57] Oral and written submissions received for the 1994 Child Support Review.

Options to Achieve the main aim of the Working party:

The Working Party recommended that the Commissioner of Inland Revenue be given the ability to include in the income base to which the formula is applied at least:[58]

* depreciation
* losses brought forward from previous years
* tax incentive deductions
* tax credits
* income equalisation scheme deposits
* loss-attributing qualifying companies
* developmental farming expenditure
* livestock adjustments
* income spreading
* private use portion of any employer provided fringe benefit; and/or
* income received from any trust or company which is "tax free" in the hands of the liable parent.

The idea is that as taxable income would be adequate in the majority of non custodial parent cases, any changes to the income base would be the exception rather than the norm.

It is worth noting at this stage that the Working Party did not mention capital gains and how they should be treated in assessing the "true" income of a non custodial parent.

The Working Party stated:[59]

"The Commissioner should only make an enquiry and determination beyond taxable income where he concludes, on the basis of any other information available, that to rely on taxable income would be inappropriate."

Potential Problems:

A question which automatically arises is should the Commissioner be "proactive" in obtaining "any other information available" and if so, to what extent? At present there is a large move on at the Inland Revenue Department to keep compliance costs down for taxpayers in order to further encourage voluntary compliance.

Our tax system at present runs on the basis that, generally, taxpayers will voluntary comply with their tax obligations. It is the aim of the Inland Revenue

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[58] Above n 12, page 30.
[59] Above n 12, page 29.

to minimise collection and enforcement costs so that more time can be spent on achieving technical excellence. [60]

If the Working Party's approach for determining the "true" income of the non custodial parent is adopted, the Commissioner will need to provide further resources to Child Support to enable them to be "proactive" in obtaining additional information. If more resourcing was not made available and the Commissioner simply left it up to custodial parents to alert Child Support of possible additional income then the situation would probably not be in any better state than it is currently.

A further question that arises is the appropriateness of assessing non custodial parents on a basis that is selected at the Commissioner's discretion. The efficiency, certainty and simplicity of the tax system rely on blanket provisions. Notwithstanding section 105(2)(c)(i), to fix a liability through investigation of a liable parent's "true financial circumstances" may possibly be a dangerous precedent.

At present, child support liabilities are based on information provided in the annual tax return filed by non custodial parents. There is no need to request separate information from non custodial parents each year in order to calculate their annual liability for child support. An amended income base for child support purposes will almost certainly require the calculation and / or calculation of additional data. In requiring extra documentation to be completed on an annual basis, all non custodial parents would be affected not just the groups that the change would be aimed as, such as the self employed.

An amended income base would be very difficult to implement administratively, with increased compliance costs for all parties concerned, including employers of liable parents. Employers could be affected in that they may be required to complete additional documentation outlining, for example, any fringe benefits that the employee receives.

Another problem would be that a separate definition of income for child support purposes would be inconsistent with any other definitions used by the Department of Social Welfare or Inland Revenue.

Any change to the basis of income for child support under these alternatives would result in a more complex and labour intensive process.

There is also the danger that a direct incentive would be provided to non custodial parents to minimise their child support payments through either evasion or avoidance techniques. If the number of income tax amendments over the years are anything to go by, it is doubtful that any amended workable definition would cover all possible avenues of minimisation, legal or otherwise, available to non custodial parents.

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[60] See the 'Taxpayers Compliance and Penalties Document" issued for Public consultation in 1995.

The issue of non custodial parents who have substantial assets but minimal income would still remain. Any attempt to address this issue through methods such as increases in value of assets would amount to assessing child support on unrealised capital gains, yet there is currently no capital gains tax. There would also be practical difficulties in obtaining information about assets owned by liable parents.

Further the cost of compliance would increase for both non custodial and custodial parents. Non custodial parents because they would be required to advise the department of any items included in the amended definition of income for child support purposes. This may increase the susceptibility by the non custodial parent to object to the increased liability. A subsequent increase in litigation action would be likely with liable parents seeking either to appeal the assessment itself or obtain a departure from the formula.

The cost of compliance for custodial parents would also increase if they are required to provide extra information to initiate a broader assessment. There may also be further delays for the custodial parent in receiving any financial support whilst the liable parent is challenging the assessment. The expansion of the definition of taxable income may provide a disincentive for custodial parents to enter into voluntary agreements with non custodial parents.

Departure Order provisions

A possible remedy for problems created by the use of taxable income may already exist through the provisions to depart from the formula assessment.

Custodians who consider they are significantly disadvantaged through liable parents having arranged their affairs so that taxable income is reduced, can apply for an administrative review through the Inland Revenue Department or for a departure order through the Family Court.

Currently, Review Officers and the Court are able to determine liabilities on a case by case basis. A custodian may apply for an administrative review on the ground that the formula assessment produces an unfair result because of the income, earning capacity, property or financial resources of the non custodial parent (section 105(2)(c)(i)).

It is possible that section 105 as it currently stands may already provide sufficient remedy for custodians.

Statistics

The following statistics are taken from a survey conducted by the Child Support Agency in November 1994:

* To 30 June 1994, out of a sample of 435 applications for departure made to the **Family Court**, 23 or 5.3% were made by custodial parents. All

23 or 100% applied using section 105(2)(c)(i). There were 15 successful applications, producing a success rate of 65%.

* From 1 July 1994 (when the administrative review process came into effect), approximately 29% of all applications received for an **administrative review** have been from custodial parents. Of these, approximately 77% have applied using section 105(2)(c)(i). Of the cases that had been heard at the time the survey was conducted, the success rate was approximately 40%.

The above statistics help to illustrate that with the implementation of the administrative review process there has been a significant increase in the use by custodial parents of the process for seeking a departure from the formula assessment.

It is clear that the majority of the barriers which were preventing custodial parents from using the court system have virtually been eliminated with the introduction of the administrative review process. The departure process is now more accessible for custodians who want to apply for a variation of the liability because of the income, earning capacity, property or financial resources of the liable parent.

The statistics also show, however, that there has been a decrease in the success rate of section 105(2)(c)(i) for custodial parents.

This difficulty can be explained in part by the onerous task that a custodial parent has in satisfying the first hurdle of the departure order test by proving that "special circumstances" are present in the case.

Special Circumstances

The phrase "special circumstances" has been the subject of various Family Court, High Court and Court of Appeal decisions. It has been held that the special circumstances must be such as to take the case "out of the ordinary" (*Lyons v Wilcox*).[61] Special circumstances must be "facts peculiar to the particular case which set it apart from other cases" (*Re M*).[62]

There have been a number of cases to date which have examined whether or not the fact that a liable person is self employed, or someone who is able to arrange his or her tax affairs so that income is legally reduced, per se can be regarded as "special circumstances".

The most recent Court of Appeal case on the subject, *Andrews v Andrews*[63], upheld the decision of Hammond J in the High Court.[64]

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[61] High Court - [1994] NZFLR 634, see also Tipping J's judgment in *Wilcox v Lyons* (1993) 11 NZFLR 716.
[62] High Court - [1993] NZFLR 74.
[63] CA [1995] NZFLR 769
[64] *Andrews v Andrews* [1994] NZFLR 39.

Hammond J held that in keeping with the statutory scheme of the Child Support Act, where the deductions made in a business situation can be seen to have been reasonably and fairly incurred for legitimate purposes then they should be respected. But if it is apparent that unfair or inappropriate devices have been adopted to diminish liability (often to avoid liability under the Child Support Act) that is to be regarded as "special circumstances" entitling the Court to have regard to the "real" income of the assessed person.

Hammond J stated:

"I should perhaps also say that if this approach is correct, the power of a Court to interfere is relatively limited, because the adjustments sought to be interfered with have already had to pass the scrutiny of the Commissioner of Inland Revenue.

It follows that a Trial Judge would have to exhibit real caution in interfering with the assessment, but at the same time be astute to see that devices have not in fact been employed and that other circumstances which would give rise to "special circumstances" have not come into play."

Gault J in the Court of Appeal judgment upheld Hammond J's approach. It can however be said that the Court of Appeal went a little further than Hammond J was prepared to go.

In regards to Hammond J's approach, Gault J stated the following:[65]

"If that was intended as an exhaustive statement of the circumstances in which it would be appropriate to go behind financial accounts to find the true income for the purposes of the formula assessment, we think it is too narrowly stated. That that was not the intention of the Judge is indicated by his further references to devices "and other circumstances" that would give rise to special circumstances. Plainly each case will need to be considered on its own facts ...."

With respect, the Court of Appeal judgment is not particularly helpful in an analysis of to what extent section 105(2)(c)(i) can help custodial parents uncover the "real" income of non custodial parents. Despite the added words of Gault J, it still remains the case that "special circumstances" in this context, must be something separate to the fact that the non custodial parent is self employed or someone who can arrange his or her tax affairs to legally reduce income.

This may prove to be an impediment to a custodial parent applying for an administrative review on the ground that the formula assessment produces an unfair result because of the income, earning capacity, property or financial resources of the liable parent.

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[65] Above, n 41, page 771.

A further factor which may act to limit applications for an increased liability is that, in some circumstances, custodial parents will often be unaware that the liable parent is self employed or able to arrange his or her tax affairs to reduce income.

A possible solution could be a more active role played by Inland Revenue Child Support in promoting the use and benefits of the administrative review process and greater resources being provided by the Government to help educate custodial parents on what is exactly required to satisfy the requirements of section 105(2)(c)(i)).

There is also the possibility that section 105(2)(c)(i) could be amended to reflect the wishes of the Working Party, but instead of the Commissioner doing the extra work to determine the "true income" it could be the court's role to be the investigator and final determiner. [66]

It is interesting to note that the Working Party did not recommend an alteration to any of the departure grounds. They did, however, recommend that section 105 be redrafted to make the departure order provisions shorter, less repetitious and simpler to understand, and that 'otherwise proper' should be clarified.[67]

In the writer's opinion what is required is not only a redrafting of section 105 but also some clear direction from the High Court and the Court of Appeal as to how the departure order provisions are to be interpreted by the Family Courts and more importantly, Administrative Review Officers, particularly now there is guidance as to policy considerations following the Trapski Review.[68]

PASS ON TO BENEFICIARY CUSTODIANS

As at 31 March 1995, 97,136 of the 113,578 liable parents (85.5%) were assessed at less than $60.00 per week.[69]

Currently there are no undisputed figures as to how much it actually costs to raise a child. What is undisputed is that there are very considerable variations between families.

The Unemployment Benefit for a single person with no children was $138.46 per week in the year ended 31 March 1995. In that same year the Unemployment benefit for a single person with one child was $198.31 per week. The Domestic Purposes Benefit figure was the same. Using these figures it is thus possible to put a figure on the cost of one child, i.e. $59.85 per week.[70]

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[66] The idea of establishing specially dedicated child support courts or divisions of courts is appealing. See below under the heading "United States" for further discussion on the subject.
[67] Working party Final report, page 49.
[68] See the Court of Appeal case *C of IR v Alcan New Zealand Limited* (1994) 16 NZTC 11,175, dealing with the interpretation of tax legislation.
[69] Child Support Financial Report - Year Ended 1995, Child Support Agency.
[70] Income Support Pamphlet on Benefit Rates 1995.

Given that 85.5% of liable parents were assessed to pay less than $60.00 per week the support of their children is being subsidised by the state and, therefore, the taxpayer.

Given also that currently where a custodial parent is a sole parent beneficiary, child support payments up to the level of the benefit are retained by the state, the majority of custodial parents never receive a cent of the money paid for the support of their child or children by the non custodial parent. [71]

The Working Party strongly believed that a system of pass-on would make the consequences of the child support scheme more obvious and improve its accountability. In their view, a pass-on would encourage a greater degree of compliance on the part of liable parents who would see their contributions directly benefiting their own children. They also recognised, however, that the potential loss of revenue to the state is a strong factor which mitigates against the acceptance of a pass-on system.[72]

The Working Party recommended that there should be future monitoring and review of the issue of pass-on, with a view to eventually establishing such a system in New Zealand.

The system that was favoured by the Working Party was one whereby the amount of child support paid, up to a set figure (a free zone), is passed on to the beneficiary without abating the benefit and thereafter there is an abatement of the custodial parent's benefit. [73]

Problems with passing on the Payments

The idea of passing on directly to beneficiary custodians, rather than through the Domestic Purposes Benefit, at least some of the child support that is collected is very appealing - at least at first glance.

The benefits could be substantial. Firstly, custodial parents and their children would get an immediate cash "rise". Secondly, non custodial parents would see some of their payments going directly to the benefit of their children and, hopefully, would get the credit for those payment from their children.

The passing-on of payments could certainly help to put the child support scheme back on track as far as public acceptance is concerned.

There are, however, some major problems that have been identified:[74]

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[71] At the time of the Review there were about 775 cases where child support payments exceeded the amount of the custodial parent's net benefit and where the surplus was passed on - Working Party Final Report.

[72] Working Party Final Report - page 35.

[73] Working Party Final Report - page 33.

[74] Child Support Officials Report - March 1995.

1. Loss of revenue for the state - the government budgets each year to receive non custodial parent contributions to offset the cost of the Domestic Purposes Benefit. If those contributions are diverted to a pass-on then the government will need to find alternative sources.

2. Considerable administrative problems for DSW - an estimation of how much it would cost DSW to administer a pass-on system is between $3.5 - $5.5 million per year. It could require DSW to make thousands of abatements fortnightly to benefits, which would be required to match fortnightly benefit payments to custodial parents to monthly child support payments by non custodial parents. Administratively the costs are high.

3. Discouragement for some custodians from rejoining the work force - it is an unfortunate but acceptable fact that not every sole parent beneficiary is able to command a high paid job. Even though most custodial parents want to go back to work, if the benefit and the pass-on together equal approximately the same as a low paid job, the custodial parent may choose to stay at home with the children instead of returning to the work force.

4. Is it worth it? - the Working Party's idea, that a pass-on would re-establish a direct link between the non custodial parent's payment and his or her children thus helping to bind the absent parent closer to their children, might be shattered when realisation hits that not all of the non custodial payment can be passed on. Depending on the level of the assessment, there is quite a large chance that most custodians will receive only modest amounts while others will not receive anything at all. Given that a pass-on system will be difficult enough to administer resulting in inevitable delays and complications the question does have to be asked "is it worth it?".

It is the writer's opinion that a pass-on system could be of great benefit to our child support system, especially in the area of acceptance of the scheme by non custodial parents. There are certainly, however, major problems that must be worked on further before a comprehensible pass-on system can be introduced.

Passing-on part of the payments paid by non custodial parents to custodial parents on welfare seems to be working well in Australia.[75] Perhaps this is yet another area where we can benefit from the wisdom of our closest neighbours.

OVERSEAS CHILD SUPPORT SYSTEMS:

This next section will examine the approach taken by Australia, the United Kingdom ("UK") and the United States ("US") with child support, focusing more on the child support system currently operating in neighbouring Australia.

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[75] Joint Committee Report - November 1994.

It should be pointed out initially that in all three countries, as well as in New Zealand, the emphasis continues to be on the absent parent and the primary responsibility that he or she has to take for his or her children.

United States of America

The major impetus for the child support reforms in Australia, and therefore, New Zealand, came from the US experience with child support.

Obviously, the sheer volume of single parent families residing in the US meant that the problems were greater than those encountered, for example, in Australia and New Zealand.

The problems which led to the development of the current child support system in the US are:[76]

- low levels of maintenance ordered through the courts;
- chronic non-payment and non-enforcement;
- rapid increase in the number of single parent families living in poverty resulting in an increase in welfare payments.

As an illustration of the sheer volumes involved, in 1989 the US agencies had over 2 million cases and collected more than $(US) billion in child support.

A major difference between the New Zealand and the US system is that, in the US, family law is a state by state matter and its administration can vary from county to county within a state. In addition, welfare, although largely funded by the Federal Government, is administered on a state basis, and taxes are collected at both a federal and state level.

Another problem that the US has to counter, which is, at least at present, fortunately not a major problem in New Zealand , is the high level of ex-nuptial births, which makes the establishing of paternity and the location of the father and enforcement of child support orders extremely difficult.

Even though the current system has its origins in the establishment of the Aid to Families with Dependent Children (AFDC) program in the mid 1930s and some Congressional legislation in the intervening period, a major step was the enactment by Congress in 1975 of the Child Support Enforcement (CSE) Program, Title IVD of the Social Security Act.

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[76] The following overview of the US system is adapted from "Child Support in Australia - Final report of the Evaluation of the Child Support Scheme. - Vol 1 - Main Report.

This piece of legislation required each state to establish a child support collection agency, largely reimbursed by the Federal Government.

In 1984 further federal legislation required the states to:

- establish numeric (formula) guidelines for assessing child support;
- legislate for automatic withholding from salary or wages where the payment was in arrears for one month;
- establish an 'expedited procedure' for the hearing of child support cases; and
- allow non-welfare custodial parents to use the Federal Parent Locator Service to locate non-custodial parents.

In 1988 the Federal Family Support Act provided:

- automatic wage withholding for IVD clients and by 1994 for non-IVD clients;
- performance standards for paternity establishment;
- mandatory use of a formula or numeric guideline;
- enactment of general performance standards to be followed by the states; and
- the requirement that the states provide automatic periodic updating each three years by 1993.

The child support enforcement program is an inter-governmental operation involving all of the states and the Federal Government. The Office of Child Support Enforcement (OCSE), in the Federal Family Support Administration of the US Department of Health and Human Services, assists the states to develop, manage and operate their programs effectively and according to federal law.

The financing of the program is shared by Federal and State Governments with the Federal Government shouldering the majority of the costs involved.

In its 1989 annual report to the Congress, the OCSE stated that the mandate of the program was that it:

"... helps to strengthen families and reduce welfare dependency by placing the responsibility for supporting children where it belongs: on the parents."

The federal legislation does not insist upon any particular formula but strict guidelines must be adhered to. The formula must be a quantitative formula and not a list of subjective factors to be considered on a discretionary basis.

All states now have child support formulas in place which, with some variations, fit into one of three approaches:

The major approach is the "Income Shares Model" largely devised through Dr Robert Williams who has been very prominent in the development of child support guidelines in the US.

The "income shares model" seeks to establish a child support award equivalent to that which would have been expended on the child had the household remained intact. The guidelines rely upon tables showing the amount of child related expenditure in households with varying combinations of income levels of both parents. Each parent contributes to the estimated level of child expenditure in proportions to his or her income. This model has been adopted, with variations, by thirty one states.

The second major formula approach is the Garfinkel / Wisconsin "Percentage of Income Standard". This approach is what the Australian child support system is largely based on and has been adopted by sixteen states. It is based on a percentage of the non-custodial parent's gross or net income with percentages varying in accordance with the number of children and the income base which is used.

The third formula model is the Melson / Delaware child support formula. It's basic principles are that:

* parents are entitled to keep sufficient income for their basic needs;

* until the basic needs of the children are met the parents should not be entitled to retain any more income than is required to provide for their basic needs; and

* where the income is sufficient to cover these basic needs, the children are entitled to share in any additional income so that they can benefit from the absent parent's higher standard of living.

The way that this formula works is as follows:

1. A prescribed support allowance is subtracted from each parent's income;

2. The primary support amount for each dependent child is computed, this being a minimum amount calculated to maintain the child at a subsistence level. Child care expenses and other expenses are added. This amount is then apportioned between the parents based on their available net incomes; and

3. A percentage of the remaining income (if any) is allocated as additional child support called the "Standard of Living Allowance".

Only three states have adopted the Delaware approach.

On a federal basis, custodial parents receiving welfare payments get the first $50.00 of any current child support collected per month. The balance is retained to offset the welfare payments. Those not on welfare receive the amount collected by the Agency less, in some states, an administrative charge.

Federal legislation allows the states to apply the formula judicially or administratively. The majority of the states do so by an expedited court-based procedure which has been specifically legislated for federally. Most of the states have specifically dedicated courts or divisions of courts which hear child support applications and enforcements by an expedited process.

The courts can deviate from the formula in certain circumstances but, just like in New Zealand, the courts have generally adopted a strict approach to the application of the formula.

As to the success or otherwise of the various systems operating in the US it is useful to examine the collection rate. When one compares the US collection rate to Australian standards one finds that the US collection rates are very low - approximately 40 - 50%.[77]

As stated above, the reason for this is interrelated with the high number of ex-nuptial cases, the high number of cases where location of the payer is difficult or impossible and a further reason is the application of the formula to persons on low or no income.

The area of enforcement in the US is also interesting to compare. In the US a lot of effort has been put into devising effect methods of enforcement of child support. Therefore, there appears to be a clash between the methods of enforcement and the rights to privacy in the child support area. The result is that in this particular area the rights of the non custodial parent to privacy have very much given way to the rights of the child to be supported.

Enforcement methods include:

* automatic wage withholding;
* property liens and seizure and sale of property;
* interception of tax returns
* interception of lottery winnings - which are taxable in the US;
* attachments of bank accounts;
* reporting to credit bureaus and obtaining information from credit bureaus;

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[77] Above n 76, page 102.

* the reporting to a variety of professional, trade and social organisations of arrears with the requirement that the state authority consider whether the license or right should continue - only in some states;
* publication from time to time of a "most wanted" list, and
* contempt proceedings followed by imprisonment.

Many of the above enforcement proceedings should appear very familiar to New Zealand child support experts given that they are very much present in our own child support legislation, e.g. automatic wage withholding, property liens and seizure and sale of property, attachment of bank accounts, obtaining information from various agencies, and possible imprisonment for failure to pay.

One criticism of the New Zealand Child Support Agency is its under utilisation of the above enforcement mechanisms. To be fair, however, this is more a resourcing problem rather than a failing of the child support system.

Having examined the various US systems currently in operation and compared them to our own system it would be fair to say that the ideological thinking of both countries is extremely similar as far as whose responsibility it may be to provide financial support to children of broken families. New Zealand, however, has not gone down the same track, as yet, when it comes to completely displacing the right of privacy of non custodial parents for the right of the child to be supported.

Regardless, the writer would not be in the least bit surprised if the publication of a "most wanted" list from time to time became vogue in New Zealand in the not so distant future.

United Kingdom

Returning to the theme of parental responsibility versus state responsibility, the UK Child Support Act 1991 is seen by some commentators as the third plank in a programme of legislation promoted by the UK government to stress the importance of parents' responsibilities to and for their children, especially when the parents' own relationship has broken down.[78]

The first was the Children Act 1989, which enacted the concept of "parental responsibility" and defined it to mean "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property" (section 3(1)).

The second emphasis on parental responsibility can be found in sections 56 - 58 of the Criminal Justice Act 1991, which extend the courts' powers to impose sanctions on those with parental responsibility for the delinquent behaviour of their children.

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[78] Child Support: The Legislation 1993 - commentary by Edward Jacobs and Gillian Douglas, page 1.

The UK Child Support Act is structurally similar to the New Zealand and Australian systems as it establishes a Child Support Agency which assess child support liability according to a formula and enforces collection of arrears.

There is a standard way of calculating the amount of maintenance needed for the support of a child or children. The ability of both parents to provide that support is calculated by looking at the income available to each parent after they have met their own every day expenses. The allowances used in the formula are based on the amounts of allowances and premiums under the Income Support System.

The main difference between the systems is that the UK formula has been criticised for containing to many variables in an ill fated attempt to cater for every possible situation that might arise. Experience in the UK has shown that such a complex formula is unacceptably difficult to administer and creates immense problems. [79]

The UK Child Support Agency has over 2 million clients and makes over 3 million assessments per year. News reports from across the world indicate that the public acceptance of the system, let alone the acceptance of custodial and non custodial parents, has been dismal and the entire child support system is in complete shambles and in danger of collapse.[80]

In recent times, the UK Child Support Agency has sent delegations over to New Zealand and Australia in order to study our child support systems with a hope of resurrecting their own.[81]

Australia

In Australia, the Child Support Assessment Act 1989 is proving to be very successful not only from the point of view of revenue collection but also from the point of view of public acceptance.[82]

Prior to the introduction of this scheme only approximately 30% of non custodial parents paid any maintenance. By 1992, 71% of all liabilities registered with the agency were paid. The average level of court orders per child per week has increased from $27.00 in April 1988 to $39.00 in July 1990. The average amount of assessment per child per week has increased to $49.00 in 1990/91.[83]

These figures have continued to improve as the child support scheme has gotten older. [84]

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[79] Above n 12,, page 23.

[80] Dominion , April 1994.
[81] Visit of UK Child Support Agency officials to NZ Child Support Agency, October 1994
[82] Above n 76.
[83] NZ Law Society Seminar - Child support Act 1991, Tony Walsh, March 1992)
[84] Above n 76.

The introduction of a Child Support System in Australia was generally seen as a major and controversial social reform which could take up to a decade to become accepted and to achieve change in social attitudes to the financial responsibilities of parents.[85]

It appears that Australia's long sighted vision is at a more advanced stage than ours here in New Zealand. It was recognised by the Australian government at an early stage that a child support system would involve government intervention at one of the most sensitive and traumatic points of the life cycle of some families. Given the bitterness which generally surrounds family breakdowns, any child support scheme would inevitably become a 'lightning rod' for the dissatisfaction, grief and/or anger of individuals in relation to their separation and loss of family life and children.

Having the vision to recognise the above, the Australian government decided to proceed on a cautious and extended process of policy development coupled with wide community consultation.

In the writer's opinion this approach is probably one of the main reasons why the Australian child support system is so much more successful than our own child support system.

Outline

The Australian Child Support Act was established on 1 June 1988 as a division within the Australian Taxation Office ("ATO").

The child support scheme was established in response to concerns about the adequacy of court ordered child maintenance and the difficulties which existed in the enforcement and collection of maintenance in Australia.

The scheme was introduced in two stages:

Stage 1, which commenced in June 1988, set up the Child Support Agency to collect maintenance set under existing court orders or court registered agreements.

Stage 2, which commenced on 1 October 1989, was restricted to those children whose parents were separated on or after 1 October 1989, or who were born on or after that day or having a sibling born on or after that day.

Stage 2 enabled the Child Support Agency to assess and collect child support payments based on a formula assessment applied against the non custodial parent's relevant taxable income which is reduced where the custodial parent's taxable income is in excess of average weekly earnings plus a child care component.

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[85] The Parliament of the Commonwealth of Australia Child Support Scheme - an examination of the operation and effectiveness of the scheme - Nov. 1994, page 11 Vol. 1.

Stage 2 parents are able to apply to the Child Support Agency for a no cost review of their child support formula assessment while stage 1 parents must go back to court to have their maintenance amount amended.

A Joint Committee on Certain Family Law Issues, who was established to review the Australian child support system, presented its report to the Australian government in November 1994.

In its report, the Joint Committee considered that the operation and effectiveness of the child support scheme must be measured against the objectives of the scheme.

The objectives of the Australian child support scheme are that:

1. non custodial parents share in the cost of supporting their children according to their capacity to pay;

2. adequate support is available to all children not living with both parents;

3. Commonwealth expenditure is limited to the minimum necessary for ensuring these needs are met;

4. work incentives to participate in the Labour force are not impaired; and

5. the overall arrangements are non intrusive to personal privacy and are simple, flexible and efficient.[86]

The Joint Committee also considered the Program Performance Statements 1993 - 1994 for the Social Security portfolio, which state that the key performance indicators for the child support scheme are:

1. For Financial Support considerations: the number and proportion of social security recipients declaring maintenance and the amounts of maintenance received.

2. For Take up and Compliance considerations: the number of sole parent pensioners and other recipients of additional Family Payment with a child from a previous relationship taking reasonable maintenance action; and

3. For Reductions in Outlays considerations: the amount of savings in social security payments achieved through increased levels of maintenance income of clients.[87]

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[86] "Cabinet Sub-Committee on Maintenance, Child Support. A discussion paper on child maintenance, October 1986.

[87] Program Performance Statements 1993 -94, Social security Portfolio, page 264 -5.

The Joint Committee considered that according to each of the above performance indicators of the scheme , the child support scheme in Australia has been a qualified success.

The Joint Committee considered, and the writer would have to agree, that one of the most successful aspects of the scheme has been the shift in community attitude that has been engineered through enforcing the collection of child support.

The scheme has ensured that parents are aware that the Australian government considers **them** primarily responsible for the support of their children.

It is acknowledged, however, by the Joint Committee that the scheme is by no means perfect and that it can be improved.

Recommendations for Change

Some of the major recommendations made by the Joint Committee in the 1994 review are outlined as follows:

1. There was concern expressed that a high proportion of custodial parents are not receiving child support and the lack of reliable detailed information in respect of how this has come about. There is little reliable information on the proportion of custodial parents, both inside and outside the scheme, who receive little or no child support under each type of collection arrangement.

   The Joint Committee recommended that the government commission a study to determine why these custodians are receiving no child support and / or have no child support arrangements.

2. It was considered that a more transparent approach to resolving conflicts between the objectives of the scheme is necessary in order to make these judgements both understandable and accountable as well as to improve public confidence in the scheme. The Joint Committee considers that this can be achieved by attributing a clear priority to each of the scheme's objectives so that when conflict arises between them it can be dealt with in a consistent and transparent manner.

   The Joint Committee, therefore, recommended that the government adopts the following order of priorities in respect of the child support scheme:

   Priority 1: adequate support is available to all children not living with both parents.

   Priority 2: non custodial parents share in the cost of child support according to their capacity to pay.

Priority 3: Commonwealth expenditure is limited to the minimum necessary to ensure the adequacy of child support to all children not living with both parents.

3. There was also concern that the objective that non custodial parents parents share in the cost of supporting their children according to their capacity to pay may, as presently expressed encourage the perception that the scheme is biased against non custodial parents as it focuses solely on the contribution and capacity to pay of the non custodial parent without mentioning the custodial parent's role in the support of the children.

   This perception is contrary to the principal object of both the Child Support (Assessment) Act 1989 and Division 6 of Part VII of the Family Law Act 1975, which is to ensure that children receive a proper level of financial support from both their parents.

   The Joint Committee recommended that this perception of bias could be overcome by simply amending the objective of the scheme referring to non custodial parents sharing in the cost of supporting their children according to their capacity to pay so that it refers to the contribution and respective capacity to pay of both parents.

It is the writer's opinion that there is much that can be taken out of the above three recommendations to help the progress of the New Zealand child support scheme, especially in the area of public relations.

Firstly, a wider consultative process perhaps should have been undertaken by the New Zealand government when the Child Support Act was introduced. A more cautious approach was probably required. Regardless of what happened in the past, more consultation can still occur during the present time as our child support system is currently going through a growing and "healing" period.

Secondly, it is the writer's opinion that a strong perception of bias against the non custodial parent also exists in New Zealand. The term "liable parent" does nothing to remove this perception and really must go. The term "non custodial parent" is adequate, in the writer's opinion, to achieve the aims and objects of the Child Support Act. More work could be done in this area in order to help non custodial parents accept the current child support system.

While it is useful to compare the developments of the Australian child support system it does have to be noted that unlike Australia, New Zealand has only one child support scheme.

A large number of parents and children in Australia remain permanently outside stage 2 and the Child Support Assessment Act, despite recommendations to the contrary by the Joint Committee.

The Child Support Assessment Act does not cover:

- Children applying for maintenance on their own behalf.

- A person applying for maintenance for a step-child.

- A person applying for maintenance for a step-child.

- A person applying for maintenance for a child over the age of 18 years.

- Children born before 1 October 1989 to parents who separate before 1 October 1989.

Still. given the amount of success our neighbours have had in an extremely difficult area of family law and policy, any guidance that can be gained from their past failings and experience should be gratefully accepted.

It is interesting to note that talks have recently restarted between the two countries regarding a reciprocal agreement being entered into.[88]

Any steps towards achieving this agreement can only be taken as positive.

CONCLUSION

It is the writer's view that the future of child support is considerably brighter than it was in December 1991 when the Child Support Act 1991 was first introduced in New Zealand.

Our child support system has undergone two reviews since its introduction[89] and there have been a significant amount of anomalies rectified and investigated as a result of these reviews.

For example, the Child Support Amendment Act 1994 introduced Administrative Reviews in order to break down the barriers of access to the Family Court for parents seeking departure orders. As discussed earlier in the paper, more parents appear to be taking advantage of the use of departure orders now that they do not have to go through the court system.[90] From all accounts the administrative review process is working out well and is a huge improvement from the situation that existed prior to its introduction.

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[88] Conversation with a NZ child support delegate September 1996.

[89] Officials from Inland Revenue, Social Welfare, Justice and Treasury were set up to review the Child Support Act's operations and procedures on 22 March 1993. The group reported back to government on 26 July 1993 in the first instance.

[90] See discussion under "Departure Ordes".

The Child Support Amendment Act 1994 also dealt with parents receiving Unsupported Child Benefit when fostering an unrelated child and cross payments where one parent is a beneficiary.[91]

The Trapski Review was a major step in the small history of the Child Support Act and there was a lot of work undertaken by the Child Support Agency after the Working Party reported to government in November 1995. There was a considerable amount of work done in the area of ensuring a proper base for assessment and in the area of pass-on.

There was a period during 1995 when nothing appeared to be happening with the recommendations made by the Working Party but it seems that this situation has changed somewhat with a new Minister of Revenue being very keen to progress the issues raised by the Working Party.[92]

As stated earlier in the paper, there are a number of good pointers that can be taken out of the whole process undertaken by the Australian government in its dealing with child support.[93] The major ones being using a wide consultative process with the public when dealing with any policy or operational changes to the Child Support Act 1991; and in order to promote the feeling of equal responsibility between parents, removing terms such as "**liable** parent" and replacing it with "non custodial parent". This may help non custodial parents accept the consequences of the Child Support Act better if they do not feel that they are being held solely liable for the financial welfare of their children.

It is clear that, for at least the present time, responsibility for providing financial support to children from broken families has fallen, in the first instance, to the parents of those children. The state is there to assist but is only promoting itself as a last resort.

The changing face of society, and the make up of families, has meant that some sort of child support system is a necessity in the majority of Western countries to ensure that the relative governments can recoup some of the costs of providing assistance to those families that have not remained intact.

Given that a child support system is a reality that is here to stay, everybody should be working together towards making the child support system that is currently in place the best that it can be taking into account equity, fairness and social issues aswell as issues concerning what it is all about in the first place - the welfare of children.

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[91] See sections 3,8 and 9 of the Child Support Amendment Act 1994.
[92] Dominion , August 1996.
[93] See discussion under "Australia".

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