

Child Support Amendment Bill

Commentary on the Bill

Hon David Cunliffe
Associate Minister of Revenue

First published in August 2005 by the Policy Advice Division of the Inland Revenue Department,
P O Box 2198, Wellington.

Child Support Amendment Bill; Commentary on the Bill.
ISBN 0-478-27128-X

CONTENTS

Overview	1
Write-off of penalty debt	2
Exemptions from liability	5
Determinations initiated by Inland Revenue	9
Appeal rights following an administrative determination	11
Acceptance of overseas birth documents	13
Remedial issues	15
Continuity of administrative determinations	17
Offsetting rules	18
Order of payment application	19
Credit transfers	20
Powers in relation to reciprocal agreements	21
Drafting issues	22

OVERVIEW

Under the major change proposed in the Child Support Amendment Bill, the government will forgo the collection of some penalties to provide an incentive for non-payers to begin making payments of financial support again. If they do, and if they maintain their payments of both current financial support and an agreed amount of their arrears for a specified period, some of their accumulated penalty debt will be written off.

“Financial support” consists of child support and spousal maintenance. Similarly, the term “liable person”, as used here and in the legislation, includes those responsible for paying either form of financial support. The term “liable parent” is used when child support is the only form of financial support involved.

Child support is payable to custodians of children or to the Crown when custodians are social welfare beneficiaries, to offset the cost of providing income maintenance. Spousal maintenance is payable to former marriage, civil union and de facto partners. Penalties are payable to the Crown.

Also proposed in the bill is a change that will allow Inland Revenue itself, not just custodial parents, to initiate reviews of liable parents’ financial affairs when it suspects they are paying less child support than they should. The change is intended to counter the practice of liable parents structuring their affairs to minimise the child support they have to pay.

Two new exemptions from liability for child support are the subject of further amendments. The Child Support Act 1991 already provides an exemption for long-term hospital patients and prisoners, who are not able to earn income. The bill extends the exemption to young people under 16, who are in a similar position, although the exemption will not apply if they undertake part-time or casual employment. The bill also introduces a new, permanent exemption for victims of sex offences.

Other significant changes will allow respondents to a child support administrative review the right to appeal to the Family Court if they are dissatisfied with the outcome, and allow Inland Revenue to accept documentation from other countries as proof of parentage.

The remaining changes are remedial in nature. They are intended to make the child support scheme work better for all who are involved in it.

WRITE-OFF OF PENALTY DEBT

(Clause 32)

Summary of proposed changes

The proposed changes are intended to bring non-payers back into the payment system. When liable persons enter an agreement with Inland Revenue to maintain payments of their current liability and pay off their financial support arrears, their incremental penalties accrued before the date of the agreement will be written off at six-monthly review points if they maintain payments under the agreement. The write-offs are to be based on a pro rata percentage of the core financial support arrears, including 10% penalties that have been paid.

For liable persons who default on their payment agreement there is to be no write-off at the next review point. They will have to negotiate and comply with a new agreement before they again qualify for a write-off.

Liable persons who are already complying with a payment arrangement for their arrears will also benefit from the changes in respect of payments they make from the time the legislation comes into effect.

About 3,000 liable persons currently owe penalty debt only. For them and others who reach that position, Inland Revenue is to have discretion to take a case-by-case approach, with the objective of achieving maximum possible recovery. The exercise of the discretion will involve consideration of whether hardship exists or whether continued attempts at recovery would represent an inefficient use of resources.

Application date

The amendments will apply to new arrangements entered into from enactment and to payments made on existing arrangements after enactment.

Key features

The existing provisions relating to penalties have been rewritten to provide a consistent form for the granting of relief from them.

The new provisions for relief from penalties are contained in sections 135G, 135J, 135K and 135L.

When a liable person has no current or future liability for financial support, all initial 10% penalties have been paid, and all that remain are incremental penalties, section 135G gives the Commissioner of Inland Revenue the discretion to consider writing off those incremental penalties.

When there is continuing liability, or arrears still to pay, the write-off of accrued incremental penalties is to be mandatory if the terms of a payment agreement have been complied with. Section 135J provides a formula for the calculation of the amount that is to be written off at 26-weekly review points for new agreements.

Background

Unpaid financial support penalties exceed outstanding core liabilities, and over half of all liable persons have some arrears of liability to pay. When they fail to pay in full on time, an initial penalty of 10% of the shortfall is imposed, with further incremental penalties of 2% for each month that the amount remains outstanding. Each unpaid monthly instalment compounds at the rate of 36.8% in the first year and thereafter at 26.8% per year. The penalty debt acts as a disincentive to re-enter the child support payment system.

The Child Support Act contains provisions for the write-off of the initial late payment penalty when specified conditions are met and of ongoing incremental penalties when payment arrangements are adhered to. However, there is currently no flexibility in respect of the accumulated incremental penalties.

Detailed analysis

Sections 135 and 135B of the Act are to be repealed and replaced by new sections 135 to 135O, which will incorporate the existing provisions relating to write-off of late payment penalties.

Key terms in the new sections are defined in section 135, while section 135A describes the manner in which Inland Revenue may grant relief from penalties.

Sections 135B to 135F describe the existing discretionary power available to Inland Revenue to grant relief from penalties, while section 135G introduces the new discretion in relation to residual penalty debt. This new power will be exercised when there is no current or future liability for financial support, all initial 10% penalties have paid, and all that remain are incremental penalties. Inland Revenue must have regard to whether recovery is an inefficient use of resources or whether it would place the liable person in serious hardship as defined in the section.

The provisions for mandatory relief in respect of the initial late payment penalty that are currently in section 135A are to be located in new sections 135H and 135I.

New section 135J provides for mandatory relief from incremental penalties that were incurred before a payment agreement made between Inland Revenue and the liable person to pay the full current liability, together with an amount towards the recovery of arrears. The relief will be granted when the payment agreement has been complied with for 26 weeks, and at the end of each following 26-week period until the arrears, including related initial late payment penalties, have been paid in full. The proportion of total incremental penalties that will be written off at the end of each period will be equal to the proportion of total arrears that have been repaid in that period.

The formula is modified in section 135K in respect of arrangements that are already in place, while section 135L gives Inland Revenue the discretion to disregard failures to make a payment under an agreement in specified circumstances.

The mandatory relief from continuing incremental penalties currently in subsection 135(3) will be in new sections 135M and 135N.

New section 135O provides for refunds to be made out of a Crown Bank Account and for the new provisions to apply to penalties that are imposed before or after the new legislation comes into force.

EXEMPTIONS FROM LIABILITY

(Clauses 8, 12,13,14,15, 16 17, 18, 25, 27, 28, 29, 30, 31, 35, 37, 38, 45, 46, 47, 52 & 53)

Summary of proposed changes

The bill introduces two new exemptions from liability for child support:

- a permanent exemption for victims of sex offences; and
- a temporary exemption for liable parents under the age of 16 years.

Victims of sexual crimes should not be further victimised by being required to pay child support for a child born as a result of the crime, particularly if the payments are to be made to the offender. The new provision will let victims off any child support obligations permanently once offenders have been convicted.

Some young people become liable to pay child support when their attendance at school is compulsory and their primary focus should be on educational achievements rather than on earning an income in order to pay child support.

These young people are in a somewhat similar position to prisoners and hospital patients in that their ability to earn an income is limited by matters beyond their control, so they are also to be exempt from liability. If, however, they choose to undertake part-time or casual employment they should make a contribution towards the support of their child, so they will lose the exemption.

These new exemptions are incorporated in a new Part 5A. It also restructures the current provisions relating to exemptions, makes some remedial changes to them and includes new provisions for determinations that exemptions be set aside on application from the payee.

Application date

The amendments will apply from enactment.

Key features

Victims of sex offences

Subpart 4 of new Part 5A provides for exemption of the victim from liability for child support for a child born as a result of an offence under the relevant sections of the Crimes Act 1961. New section 89Z requires Inland Revenue to grant a permanent exemption when satisfied that the requirements for the exemption have been met.

Section 89ZA provides for the exemption to be withdrawn if a conviction is overturned on appeal, but allows a new application for exemption in the event of a new conviction at re-trial.

Liable parents under age 16

Young people are to be exempt from child support liability until they reach age 16 years, in accordance with new section 89E, subject to the same income criteria that apply to hospital patients and prisoners. That means they cannot have earned income, but they can receive investment income, such as interest on a bank account, up to the level of the current minimum amount of child support. They have three months after they reach age 16 years to apply for an exemption.

Remedial changes

Hospital patients are to have three months after discharge to apply for an exemption.

When an exemption has retrospective effect Inland Revenue will not refund any payments made by the liable person. Such payments will be applied to past or future liability.

Background

Recent changes to provisions relating to sexual crimes in the Crimes Act 1961 highlighted the potential for victims of sexual crimes to become liable for child support when a child is born as a result.

The two most likely scenarios are:

- A male who is the victim of abuse by an older female fathers a child as a result of the sexual act.
- A female victim of abuse gives birth to a child as a result of the sexual act. She later has the child placed in foster care and becomes a liable parent in relation to the child.

In both cases the obligation to pay child support would be likely to add to the trauma already experienced by the victim.

Consideration of that specific issue also raised concerns about the consequences for young people in general of becoming liable for child support at a time when their earning ability is limited through compulsory requirements for attendance at school. The reality is that if their parents do not help them to meet their obligations, they are likely to accumulate a debt that could ultimately act as a barrier to their successful transition into the workforce.

Allowing an exemption for young people does create some conflict with the rights of their children to receive financial support, particularly if the custodian is also under the age of 16 and consequently not eligible for income assistance. However, the exemption is only for a limited period and is probably in the long-term interests of both young parents and their children.

The exemptions will not preclude voluntary payments, nor will it be compulsory to apply for them.

Because there are differences in the qualifying criteria, the new Part 5A provides separately for each category of exemption.

Detailed analysis

The existing sections 73 to 76, relating to exemptions from liability, are to be repealed and a new Part 5A is being inserted.

Section 89A outlines the content as a guide to the general scheme and effect of the new part, while definitions specific to the new part are contained in section 89B.

In Subpart 2, sections 89C and 89D contain the criteria for the existing exemptions for hospital patients and prisoners.

Section 89E provides that a liable person under 16 years may apply for an exemption if his or her income during the period of the exemption will be nil unless it is solely from investments, in which case it must be less than the minimum rate of child support that is current at the time of the exemption. These are the same income criteria that apply to the exemptions for prisoners.

The provisions for cessation of an exemption are contained in section 89F, which sets out the rules that apply when the income criteria are not met at any time during a child support year in which an exemption would otherwise be available, and in section 89G.

Section 89H sets out the requirements for an application for an exemption that must be met before the Commissioner can give effect to an exemption in accordance with section 89I.

Section 89J prevents persons who have been granted an exemption from receiving a refund of any payments they may have made during the entitlement period and contains rules for the allocation of any such payments.

Section 89K in subpart 3 allows for determinations to be made by the Commissioner that an exemption does not apply and, in the case of child support payable under a formula assessment, for a departure from the formula.

The requirements of an application for a determination under this subpart are set out in section 89L.

Section 89M allows the Commissioner to make a determination that an exemption does not apply or ceases to apply so that the amount payable before the granting of the exemption is reinstated, or to confirm that an exemption is to continue.

In the case of child support payable under a formula assessment, the Commissioner may, in accordance with section 89N, make a determination to depart from the provisions of the Act in relation to a child.

In making these determinations the Commissioner must have regard to the income, earning capacity, property and financial resources of the liable person. The procedural arrangements are set out in sections 89O to 89X.

The provisions for the new permanent exemption for victims of sexual offences are contained in subpart 4. Section 89Y sets out the application requirements.

In accordance with section 89Z, Inland Revenue must be satisfied that the parent had become liable to pay child support as a result of being the victim of a sex offence under the Crimes Act 1961, and the offender must have been convicted of that offence or the case proven if heard in the Youth Court. In order to minimise the trauma for victims, the section also provides for Inland Revenue to carry out all necessary enquiries of the New Zealand Police or the Ministry of Justice, before granting an exemption.

Section 89ZA provides for the exemption to be void if the conviction is quashed or the finding is reversed or set aside, but allows a new application if there is a new conviction at re-trial.

The miscellaneous provisions that apply generally to exemptions are contained in subpart 5, sections 89ZB to 89ZD, together with the new provision in section 89ZE that allows an agent to apply for an exemption on behalf of a liable person.

A consequential amendment to section 90(1)(i) of the Act allows objections against any decision not to grant an exemption under the new Part 5A.

The rules for allocation of payments made during a period when there is entitlement to an exemption may create a repayment requirement for a custodian who is not a beneficiary. Section 152A requires Inland Revenue to write off the whole of a debt that arises in this situation. In a similar manner, an exempted person is prevented from recovering from a payee any amount paid in respect of any exempt period through a provision in new section 89J and an amendment to section 207.

DETERMINATIONS INITIATED BY INLAND REVENUE

(Clauses 8, 12, 13, 14, 16, 19, 23, 24, 25, 26, 27, 28, 29, 30 & 31)

Summary of proposed amendments

The proposed changes will allow Inland Revenue to initiate the administrative review process if it considers that the amount of child support payable by a liable parent does not accurately reflect that parent's ability to provide financial assistance for his or her child(ren).

Application date

The amendments will apply from enactment.

Key features

New Part 6B will allow the Commissioner to initiate an administrative review, using the existing administrative review process, if investigation into liable parents' financial affairs establishes that their child support liability does not accurately reflect their ability to provide financial assistance to their child(ren).

Custodians will be able to ask Inland Revenue to discontinue the review if they are (or were) not in receipt of a social security benefit during the period under review.

Inland Revenue will supply a statement of what it considers a liable parent's financial position to be but will not appear before the Review Officer. Inland Revenue will not be able to lodge an appeal against any decision made.

Background

The child support formula is based on taxable income, which provides an incentive for liable parents who wish to minimise their child support liability to reduce their taxable income. Most liable parents receive a salary, wages or a benefit and thus – apart from exchanging salary for a fringe benefit, such as a car, or employer superannuation contributions, or deliberately giving up or reducing their employment – have limited opportunity to manipulate their income in order to minimise their child support liability. However, the way in which other liable parents, such as business people and those with investment income, can structure their financial affairs means that the amount of child support they pay may not reflect their capacity to pay. The structures they use may be legal for income tax purposes and may have been adopted for legitimate reasons, such as separating business and private assets. Equally, they may have been adopted to minimise child support liabilities. Whatever the reason for the way in which liable parents structure their financial affairs, if they have the effect of reducing their taxable income, and thus their child support liability, the intent of the Child Support Act that parents contribute to their children's support according to their capacity to pay is defeated.

Custodians can already deal with this problem by seeking a departure from an assessment if they consider that special circumstances exist that make the amount payable by the liable parent unfair. The administrative review process is a low-cost, informal process which is carried out by independent people, experienced in law and contracted to Inland Revenue, who follow precedents set by past court cases. However, for a variety of reasons, including a lack of knowledge of the liable parent's current financial position, custodians may fail to seek a departure.

Detailed analysis

The new Part allows the Commissioner to initiate a process, in accordance with section 96S, that may lead to a determination that the provisions of the Act be departed from in relation to a child.

Section 96Q provides for the Commissioner to make determinations under the new Part and sets out who are the parties to the proceedings.

Before making a determination, the Commissioner must be satisfied, in accordance with section 96R, that there are special circumstances that would make it unjust and inequitable not to depart from the Act's provisions. This will involve consideration of the income, earning capacity, property and financial resources of either parent or the child.

Sections 96T to 96ZA set out procedural requirements.

The determinations that may be made are set out in section 96ZB, but the Commissioner may refuse to make a determination in accordance with section 96ZC.

APPEAL RIGHTS FOLLOWING AN ADMINISTRATIVE DETERMINATION

(Clauses 25 & 49)

Summary of proposed changes

The introduction of a new appeal right is intended to provide greater fairness between applicants and respondents following an administrative review. Under current law, unsuccessful applicants can have their case reconsidered by the Family Court, but dissatisfied respondents following a successful administrative review have recourse only through judicial review in the High Court. The new appeal right will allow respondents also to have their case reconsidered in the Family Court.

Appeal rights are also needed in respect of the new provisions for determinations in subpart 3 of Part 5A and Part 6B.

Application date

The amendments will apply from enactment.

Key features

The provisions in section 103B are intended to produce outcomes for respondents similar to those that are possible for applicants for administrative reviews, who can subsequently pursue an application for departure order in the Family Court. The new rights of appeal under sections 103A and 103C will be available to both applicants and respondents.

There will be a two-month time limit on appeals under these new provisions but the Family Court may allow an extension of time.

Background

The administrative review process that was introduced into the child support scheme in 1994 was intended to give the Commissioner of Inland Revenue the power to make determinations on the same basis as the Family Court. It was also intended that either party to a review, if unhappy with the outcome of an administrative review hearing, would have the right to apply to the Family Court for a departure order.

Despite that intention, a respondent to a successful application for an administrative determination is unable to take an application to the Family Court for a departure order without proving his or her own “special circumstances”. The fact of the administrative determination itself is not considered by the Court to be a special circumstance. The respondent, therefore, is at a greater disadvantage before the Court than is an unsuccessful applicant for a determination, who can apply for a departure order and rely on the same grounds that were rejected by the Commissioner.

Detailed analysis

New section 103A allows either a payee or a liable person to appeal to a Family Court against a determination made under subpart 3 of Part 5A, while section 103C allows a qualifying custodian or a liable parent to appeal against a determination under new Part 6B.

New section 103B allows a right of appeal to the Family Court to respondents (custodians or liable parents) when the outcome of an administrative review has been a determination which departs from the formula assessment (that is, when the determination results in a change to the formula assessment).

Section 103D sets out the powers of the Family Court on appeal, while the actions Inland Revenue must take following an order are set out in section 103E.

ACCEPTANCE OF OVERSEAS BIRTH DOCUMENTS

(Clauses 5, 6, 7 & 44)

Summary of proposed changes

The proposed changes will allow all countries outside New Zealand to be recognised for the purpose of accepting proof of parentage documents (such as birth certificates) to establish child support liability. Under current law, each overseas country whose documentation Inland Revenue wishes to accept must be individually recognised as a “specified overseas jurisdiction” by an Order in Council.

To maintain the integrity of the system, Inland Revenue will have the discretion to decline to accept overseas documentation on a case-by-case basis when its authenticity is in doubt.

Application date

The amendments will apply from enactment.

Key features

A definition of “overseas jurisdiction” will be inserted into subsection 2(1). An overseas jurisdiction will include a country, state, territory, province or other part of a country outside New Zealand, and will include the Cook Islands, Niue and Tokelau.

Section 7 defines “parent” for the purposes of the Act. The omission of the word “specified” wherever it occurs, together with the repeal of subsection (5) and subsections 1(a), 1(b) and (2) of section 235, will have the effect of removing the requirement to obtain an Order in Council to recognise each individual country from which documentation is to be accepted.

New section 7A will allow the Commissioner the discretion to decline to accept documentation on a case-by-case basis when its authenticity is in doubt.

Background

The current requirement to recognise countries outside New Zealand by Order in Council before proof of parentage documentation can be accepted is regarded as unnecessarily stringent.

If a decision is sought to recognise an additional country, the Order in Council process is such that it may take months for this outcome to be achieved. Similarly, if a country is listed in the regulations and the country’s record-keeping systems are no longer considered to be robust, Inland Revenue would have to keep accepting documentation until the regulations are amended.

The recognition of all countries outside New Zealand is a pragmatic response to these problems. Allowing Inland Revenue the discretion to decline to accept documentation on a case-by-case basis when its authenticity is in doubt will ensure the integrity of the system is maintained. Administrative guidelines will be developed to assist delegated staff to determine when documentation is not authentic.

Remedial issues

CONTINUITY OF ADMINISTRATIVE DETERMINATIONS

(Clause 20)

The administrative review process that was introduced into the child support scheme in 1994 was intended to give Inland Revenue the power to make determinations on the same basis as the Family Court. However, the provisions for administrative determinations do not allow for the continuation of a determination beyond the period of liability. This means that after a temporary break in liability the assessment reverts to the standard formula, even though the circumstances that gave rise to the original administrative determination may still exist. A new application for administrative review must be made.

The proposed amendment to section 96D(1) will extend to the Commissioner the powers relating to cessation of orders that are currently available only to the Court. It is to apply from enactment and will allow administrative determinations to continue in force after a temporary break in liability, when the circumstances that gave rise to the original administrative determination are unchanged and the term of the determination has not expired.

OFFSETTING RULES

(Clauses 10 & 11)

The Act provides that when care of a child or children is split or shared between two liable parents, the annual rate of child support payable by one parent may be reduced (offset) by the amount which would be payable by the other parent. Since 1994, offsetting has been available when one parent is a beneficiary, but the non-beneficiary parent must apply for it in writing.

When offsetting has been in place and one parent goes on a benefit the automatic offsetting ceases but the non-beneficiary parent is not aware of this until he or she receives a statement showing a higher amount to pay. About a third of non-beneficiary parents do not notice; they pay their usual amount and incur a debt and associated penalty.

Under the amendments to sections 34 and 35 that are to apply from enactment Inland Revenue will continue the offsetting of liabilities when one party goes onto a benefit unless the party still entitled to the offset requests that it cease.

ORDER OF PAYMENT APPLICATION

(Clauses 33 & 34)

The Act sets out the rules for how payments are to be allocated to the amounts due from a liable person. The priority order is based on both the type of financial support due and the period the amount applies to.

The rules are beneficial to liable parents because they reduce the rate at which penalties accrue on outstanding amounts. However, they mean that custodians sometimes have to wait for payments they are entitled to receive until after payments due to the Crown have been made.

Under the proposed amendments to sections 142 and 143, to apply from 1 April 2006, priority is to be given to payments of child support owed to custodians for periods when they were not in receipt of a benefit over payments owed to the Crown. There will be no change to how payments are allocated in the liable parent's account because to do so would carry a risk that that the liable parent would be confused by statement changes or deduce the beneficiary status of the custodian.

CREDIT TRANSFERS

(Clauses 41 & 42)

Since the Taxation (Relief, Refunds and Miscellaneous Provisions) Act 2002 came into force, on 2 October 2002, it has not been possible to transfer credits of financial support to one's own tax liability. The limitations have caused problems for liable persons and staff.

Under the proposed new sections 216B to 216D, to apply from enactment, it will again be possible for liable persons to transfer credits to meet their own tax liability. They will have the added flexibility, however, of being able to request that the available credit be transferred to meet another person's tax or financial support liability.

It will be possible to transfer the full amount of a credit when a liable person does not have a liability to make further payments of financial support, or, if there is a future liability, the transfer will be limited to the amount that has not been paid to the payee. Once transferred, the amount will be treated as a payment into the account to which it has been credited, and a refund to the person who authorised the transfer.

POWERS IN RELATION TO RECIPROCAL AGREEMENTS

(Clause 39)

A recent report by the Regulations Review Committee found that a number of statutory provisions authorise regulations to override primary legislation for the purposes of implementing international treaties. Following that report, the government decided to amend section 215 of the Act so that it authorises regulations to override only the Child Support Act 1991. The change will apply from enactment.

DRAFTING ISSUES

(Clauses 9 & 36)

The proposed amendments to section 30 arise from the Taxation (Working for Families) Act 2004. They will:

- correct a mismatch between the date that amendments made to the Child Support Act 1991 and the Social Security Act 1964 in the Taxation (Working for Families Act) 2004 come into effect; and
- correct a minor drafting error relating to the indexation of a liable person's living allowance.

The proposed amendment to section 156 will correct a drafting inconsistency that affects the relationship between the requirements in the Child Support Act for giving copies of deduction notices to liable persons and the provisions in the Tax Administration Act 1994 relating to deemed receipt of notices.

As currently drafted, the law requires copies of deduction notices to be issued to payers of child support but not to payers of spousal maintenance. The change of wording from "liable parent" to "liable person" will reflect the administrative practice of issuing copies of deduction notices to all liable persons, and will apply from enactment.