EXTERNAL REVIEW OF CHILD SUPPORT AGENCY DECISIONS: THE CASE FOR A TRIBUNAL

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Introduction

The current family law system and the Child Support Scheme have been the subject of intense debate ever since their inception, respectively in 1975 and 1988. This is entirely understandable, given the emotive nature of family separation and the number of adults and children affected by the Child Support Scheme.[1]

Most recently, the Parliament's Senate Standing Committee on Family and Community Affairs released its report, *Every picture tells a story: report on the inquiry into child custody arrangements in the event of separation*.[2] In response to the report and its recommendations[3], the Government announced that a Ministerial Taskforce and Reference Group would be set up to review aspects of the operation of the Child Support Scheme.[4]

The Committee recommended that the Taskforce undertake a broad examination of the Child Support Scheme, including the operation of the current child support formula.[5] The Committee also made a number of recommendations for immediate reforms to the Scheme, including that decisions made by the Child Support Agency (CSA) be reviewable by an external tribunal.[6] However, the Government has excluded consideration of this last recommendation from the terms of reference for the Taskforce and Reference Group.[7]

The lack of a tribunal to review decisions made by the CSA seems to be anomalous in the context of modern administrative law practice. This article considers both the need for external review of CSA decisions and how such a process could be practically implemented.

The Child Support Scheme

Prior to the introduction of the Child Support Scheme in 1988, separating parents made an arrangement for the payment of child support, or could be ordered to do so by the Family Court of Australia (FCA). This could be a costly and time consuming process, could create greater tensions between parents who were often already in dispute over other matters, lacked consistency from case to case, and could be difficult to enforce.[8] Where orders were made, they were generally for insignificant amounts (an average of $26 per week),[9] and were considered by the FCA to be 'top-ups' to government funded family assistance entitlements, rather than for substantive support.[10] Only about thirty per cent of the court ordered amounts were actually being paid.[11]

The Child Support Scheme was designed to transfer the primary responsibility of financial support of children to their parents, with additional family assistance available on a needs basis.[12] When the Scheme was established, from 1 June 1988, it allowed for existing court orders and court registered maintenance agreements to be registered with the newly created Child Support Agency (Stage 1 cases).[13] From 1 October 1989, the CSA was able to use a

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formula to assess child support, obviating the need for court orders in new cases, except in special circumstances (Stage 2 cases).[14]

The CSA was created as part of the Australian Tax Office (ATO), both to ensure the Agency's access to income and employment information and so that child support assessments could be enforced through the mechanisms available to the ATO. Where paying parents were in employment, the CSA was required to collect payments by applying employer withholding to their wages or salaries.[15] Policy responsibility for the CSA was with the then Department of Social Security (now the Department of Family and Community Services).[16]

A formula approach is used to determine the amount of child support to be paid, calculated on the taxable incomes of parents and the number of children each parent is required to support, with the intention that parents should support their children according to their capacity to do so.[17] To calculate an assessment, the CSA establishes the taxable income of the non-resident parent[18] (the 'payer'), and deducts an amount available for self-support, called the 'exempt income'.[19] The exempt income is derived from social security pension rates and is increased in cases where the payer has other natural or adopted children to support.[20]

The CSA also considers the taxable income of the resident parent (the 'payee'). If the taxable income exceeds the 'disregarded income' allowed in the formula, which is based on a measure of average weekly earnings, it will have the effect of reducing the assessment.[21]

Child support is calculated on the income remaining to the payer, after adjustments to allow for the exempt income and the payee's disregarded income have been made. The percentage that is applied depends on the number of child support children, and varies from 18 per cent for one child and 36 per cent for five or more children.[22] There is a maximum income (the 'cap') above which child support is not paid on the excess[23] and a minimum amount of child support ($260 per year) that is assessed for low income payers.[24]

Where a parent has substantial contact or shared care of the children, for between 30 and 70 per cent of nights in the year, the formula is calculated treating the income of both parents as the payer, and the respective liabilities are offset against each other to arrive at the assessed amount.[25]

The CSA has wide powers of enforcement:

> If a parent refuses to negotiate payment or fails to comply with negotiated payment arrangements, the CSA has the right to take administrative action to achieve payment without going to court.
>
> In general, this consists of:
>
> - having payments deducted from the parent's pay;
> - intercepting the parent's tax refund;
> - taking the money due from the parent's bank or credit union account; or
> - collecting the money owing to the parent from a third party.[26]

Where enforcement through administrative mechanism is unsuccessful, the CSA may take court action to recover outstanding debts.[27]

While the formula approach may seem to simplify arrangements for child support between parents, the Scheme is extremely complex because of the many different, and often changing, circumstances of individual parents,[28] which may include changes in income or financial arrangements, changes in levels of care and contact between parents and their

children and/or changes in family structure (for example, additional children from another relationship).

The complexity of the Child Support Scheme

The complex legislation contained in the *Child Support (Registration and Collection) Act 1988* (Cth), the *Child Support (Assessment) Act 1989* (Cth) and the *Child Support (Adoption of Laws) Act 1990* (WA)[29] means that CSA administrative officers make many difficult decisions based on the individual circumstances of each case. In addition, decisions made by the FCA, in accordance with Division 7 of the *Family Law Act 1975* (Cth) (relating to maintenance), are also considered by CSA decision-makers. Examples of the legislative complexities of the Child Support Scheme include:

- how to derive the income of a parent to assess child support in circumstances where taxable income is not known, that is where a tax return has not been lodged for the relevant period;[30]
- the circumstances in which a parent may lodge an estimate of income and how that income is reconciled with their taxable income at the end of the child support period;[31]
- when a child support agreement entered into by the parents may be accepted by the CSA and how an agreement may be changed or ended;[32]
- the imposition of late payment penalties in cases where the payer has arrears of child support;[33] and
- the treatment of payments made by child support payers directly to the other parent (in cases registered for collection by the CSA) or to third parties, rather than to the CSA.[34]

Further, much of the operation of other aspects of the Child Support Scheme is detailed in CSA internal guidelines and can be the subject of dispute between the CSA and its clients, particularly as it relates to enforcement of arrears of child support. Examples include: the circumstances in which a paying parent's tax refund may be intercepted and applied to outstanding child support arrears;[35] and the application of Departure Prohibition Orders, preventing a child support payer from leaving Australia without making an arrangement to pay outstanding arrears.[36]

As well as the complexity of the legislation, case law and guidelines that affect decision-making by the CSA, each decision has an impact on at least two parties (the parents), who are often in dispute. These disputes often extend to matters that can change the calculation or collection of child support, for example, the amount of care or contact a child has with each parent; the income of one or both parents; and whether reasonable action is, or has been, taken to collect outstanding child support.

Parents who do not agree that the formula operates fairly in their particular circumstances can apply to the CSA for a change of assessment.[37] This can occur, for example, in cases where a paying parent has high costs associated with contact or access to their children or where a parent could reduce taxable income through the use of company structures. Where a parent spends larger amounts than would be considered usual in exercising contact with their children, such as in cases where long distance travel is required, the CSA may reduce the child support assessment to reflect the extra cost. Likewise, if a payer has a low taxable income because of the operation of a business, company or trust, the CSA may increase the child support assessment to more accurately reflect the resources available to the payer.[38]

Other reasons for changing assessments centre around the needs and interests of the child, for example, where costs of support are higher because of costs associated with a child's disability or medical/dental needs, or where the parents have agreed that a child should be enrolled at a private school or be involved in specific extra-curricular activities. [39]

Most commonly, applications for a Change of Assessment are made for the reason that the assessment is unfair because of the income, earning capacity, property or financial resources of one of the parents.[40] Decisions are made on an individual basis and are highly discretionary.

This option has been available since 1992 and expanded between 1994 and 2002, so that there are currently ten prescribed reasons for making a Change of Assessment.[41]. Previously, parents who did not agree with the assessment had to apply to the FCA (or another court with family law jurisdiction) for a change in arrangements, but few parents pursued this course:[42]

The unique nature of child support administration

There are three elements of child support matters that set its administration apart from all other government agencies. The first is that the CSA, in a unique relationship with its clients, acts to transfer money from one person to another. Each case managed by the Agency has two clients, one who is paying money and the other who is receiving the money paid. This means that any decision made by the CSA that has a positive effect on one of its clients is likely, by its nature, to have a detrimental impact on another of its clients. Further, when the CSA reverses a decision to correct an earlier mistake, it may well resolve the problem for the parent that was previously adversely affected, but may create a problem for the other parent.

The second unique element of the CSA is that it operates in the emotively charged family law environment, in which the parents of child support children may have no contact with each other, may have very strained relations or there may be outright hostility and an intention by one or both parents to control or 'punish' the other. Parents also often have very different perspectives on issues around separation, re-establishing themselves after separation and providing financial and other support for their children. For example, some paying fathers (around 90 per cent of paying parents are men)[43] may feel that it is unfair that the CSA is able to enforce the payment of child support when there is no agency that is able to enforce arrangements permitting them contact with their children. They feel that withholding child support is the only leverage they have to see their children. On the other hand, some payee mothers claim that fathers disappoint the children by not turning up for contact and believe that they do not have to support their children if they forego contact.[44]

The third unique feature of child support matters is that, as with other family law issues, they are subject to widespread community debate, advocacy by groups supporting mothers and fathers, payees and payers, men and women, and are subject to continual scrutiny by the Parliament and the community. The reasons for this include:

- the number of families affected by separation and child support (the CSA has approximately 1.3 million clients, covering more than one million children);[45] and
- the inclusion of issues that concern the wellbeing of children and the impact on the financial resources of parents and the community (the CSA transferred nearly $2 billion dollars between parents in 2002-2003,[46] with around $844 million dollars in debt remaining[47] and total savings to government outlays of almost $434 million)[48].

Existing forms of review

Review mechanisms have been introduced into the Child Support Scheme in an incremental way. This has been due, in part, to general public interest in the Scheme and the activities of the CSA, as reflected in the number of times the Scheme has been scrutinised by parliamentary committees and been subject to new government measures and proposals. As a result, when looked at holistically, the appeal procedures within the CSA do not conform to principles of administrative law to the same extent as many other comparable areas of decision-making.

In the initial design of the Scheme, the Child Support Consultative Committee did not deal with the need for internal review of CSA decisions, but instead concentrated on the need to ensure that the formula could be altered in cases where it would not provide a fair outcome to parents and children. The Committee recommended that the courts retain the ability to depart from the formula in appropriate cases.[49]

The Change of Assessment process, originally introduced in 1992 as the 'Child Support Review Office', was seen as a mechanism for administrative review of CSA decisions:

> There was considerable anecdotal evidence that many cases of hardship existed and, concerned that this reluctance might be due to the perceived costs and general difficulty of going to court, authorities decided that just as child support was now determined administratively so there should also be an avenue of administrative appeal which was independent, operated relatively informally and did not involve any cost to parents.[50]

The Child Support Review Office changed its title to the 'Change of Assessment' process in 2000. At the same time, its decision-makers, known as 'Child Support Review Officers', were renamed 'Senior Case Officers'. Around 90 per cent of these decision-makers are employed on contract to the CSA, and are mainly family law practitioners,[51] giving impetus to the view that the process provides a semi-external review of CSA administrative decisions.

However, the Change of Assessment process is really designed to provide a review of the formula assessment in cases where there are special circumstances that would mean that the child support assessment does not operate fairly. It is not a review mechanism for other types of decisions made by the CSA.[52]

A further internal review mechanism was introduced, from 1 July 1999, which allowed parents to lodge an 'objection' to most decisions made by the CSA, including Change of Assessment decisions.[53] There are three problems with the objection process, as it relates to internal review of Change of Assessment decisions.

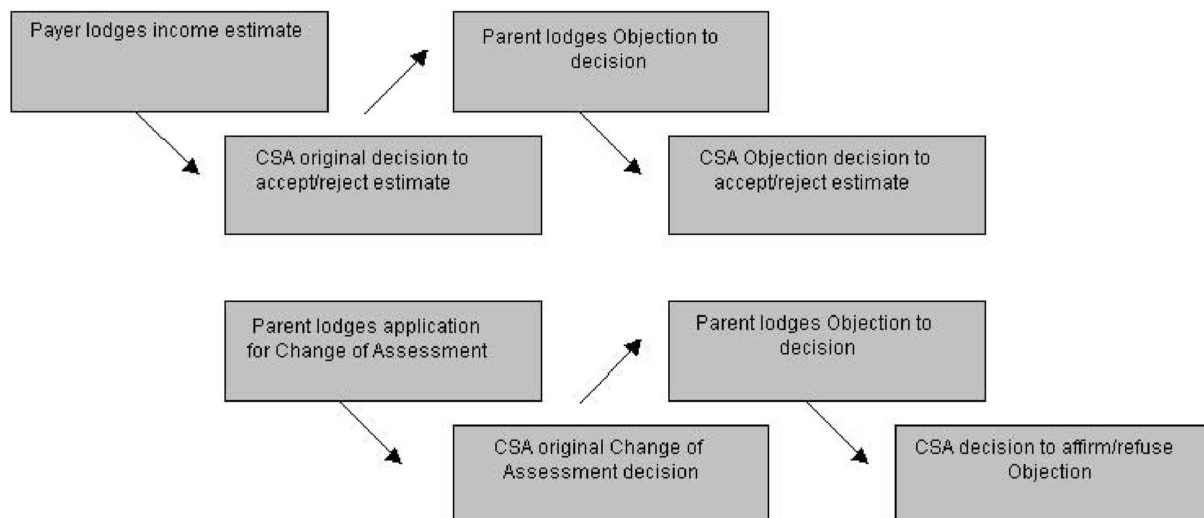
Firstly, Objection Officers are employed at the same administrative level as Senior Case Officers, rather than at a more senior level. Logically, this would seem to compromise the value that the internal review process could add to Change of Assessment decisions. This may particularly be the case in respect of the perceived independence of the process, conflicting with guidelines for best practice in administrative review.[54]

A related problem is that most Senior Case Officers are legal practitioners with experience in family law and are, arguably, more qualified in respect to change of assessment decisions, than the internal administrative Objection Officers.

Secondly, there can also be a perception that Change of Assessment decisions are returned from a semi-external process for internal CSA review. The normal administrative law hierarchy is that an internal review process is followed by at least one layer of external administrative review. In this case, there seems to be a semi-external decision making process, followed by an internal review mechanism; or, to look at it another way, there is a

two-tier internal review process, where the first layer arguably has more expertise than the second.

There are also some situations in which the Change of Assessment process can, in effect, be used to review an objection decision. For example, as illustrated in the diagram below, a payer may lodge an estimate of income with the CSA on the basis of a reduced income. The payee may then object to the CSA's decision to accept the estimate (or the payer may object if the decision was to refuse the estimate). If either parent does not agree with the outcome of the objection process, an application may be made for a Change of Assessment, so that a Senior Case Officer can more closely consider the payer's income and earning capacity. Of course, either parent can then lodge an objection to the outcome of that process. This can create a protracted and confusing sequence of actions and internal review processes, as well as demonstrating that the two mechanisms do not work together to progress an internal review.



A third and additional problem arises in cases where a Senior Case Officer has made a decision that the matter is too complex for a Change of Assessment process and the parents need to have the matter considered by a court. In these cases, the legislation requires the parent seeking the change to go through the objection process before making an application to the court.[55] This simply creates an additional hoop for parents to jump through before having the matter dealt with in an appropriate forum.

The Administrative Appeals Tribunal (AAT) is the only mechanism for external administrative review of CSA decisions. However, the only decisions reviewable by the AAT relate to decisions to grant or refuse applications for extensions of time; the remission of late payment penalties imposed on payers with child support arrears; and the imposition of Departure Prohibition Orders (preventing payers with child support debts from leaving Australia).[56]

The only other viable mechanism for external review of CSA decisions is by the FCA (or another court with FCA jurisdiction[57]); the application for review must name the other parent as the respondent.[58] Further, this mechanism is really only applicable to Change of Assessment decisions.[59] There remains no mechanism for external administrative review of most CSA decisions, although the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and section 110 of the *Child Support (Assessment) Act 1989* (Cth)can be used to seek review in the Federal Court of Australia of administrative decisions by the CSA (except for Change of Assessment decisions, which are specifically excluded).

The court review and appeal mechanisms can be daunting and confronting for those who must appear before them. The formal and adversarial nature of courts can be a major disincentive for a person wishing to access review and appeal processes.

Use of the courts

The adversarial approach used by the courts is often thought to create or exacerbate conflict between disagreeing parties, because of the way in which parties are required to put their competing interests to a magistrate or judge, who then makes a decision, with one party the 'winner' and the other the 'loser'.[60] In child support disputes, the nature of the disagreement is of a profoundly personal nature, dealing with matters related to relationship breakdown and the financial and practical care of children of the relationship, such as occurs in child support matters. This can mean that a parent may have a greater stake in avoiding court proceedings to avoid further conflict with the other parent. Anecdotal evidence suggests that, in some cases, there may be an entirely opposite effect, with excessive use of the court system by some parents to continue disputes and conflict. The unique nature of family law matters, including child support, particularly the need to act in the best interests of the children, have for some time been the subject of concern in relation to the adversarial nature of dispute resolution:

> … individual litigants, corporations and consumer groups expressed the view that the adversarial system was unsuitable for many types of disputes, particularly family law disputes, because the system was concerned with 'winning at all costs', exacerbated conflict, victimised the poor and less powerful and left children out of the process.[61]

The Family Court does have mechanisms in place that address the differences between it and other courts, such as its ability to intervene in children's matters by obtaining additional information not provided by either parent, to call its own additional witnesses, order family reports and appoint child representatives.[62] It is also has sophisticated arrangements for assisting self-represented litigants.[63] However, it seems that there is a continuing reluctance for parents to use this mechanism. For example, court ordered child support assessments post-1989 (when the CSA commenced child support formula assessments) numbered less than 2000 as at 30 June 2002, or just 0.3 per cent of the CSA caseload.[64] Further, only 420 appeals on child support matters and 329 departure applications were made to the FCA between 1 October 1989 and 29 June 1991.[65] While there is no recent available data on the total number of child support matters that have been considered within the FCA jurisdiction or the Federal Court of Australia, anecdotal information from the CSA indicates that judicial review and appeal of child support decisions is not common.

Many tribunals, on the other hand, have been set up to be inquisitorial and less formal, and include provisions to minimise conflict. This may include a requirement that applicants cannot have legal representation, or a prohibition on the agency from appearing. Tribunals may conduct their own investigations:

> … with the tribunal controlling the proceedings, defining issues, deciding on the factual material to be considered and calling witnesses on its own motion. In some proceedings parties may be restricted to answering questions from tribunal members, with no right to examine witnesses or address the tribunal, and there is less emphasis placed on a single determinate hearing, with oral argument and case presentation.[66]

Most importantly, tribunals that consider disputes purely between government agencies and their clients have the potential to reduce conflict between the parties:

> Tribunals and other administrative decision-making processes are not intended to identify the winner from two competing parties. The public interest 'wins' just as much as the successful applicant because correct or preferable decision-making contributes, through its normative effect, to correct and fair administration and to the jurisprudence and policy in the particular area.[67]

It would be unlikely, however, that this could ever be entirely true for child support matters, because disputes determined between the CSA and a parent will, in most cases, have an impact on the other parent in the case, who will often generally have a competing interest in the matter.

Role of the Ombudsman

A non-adversarial and informal method of challenging CSA decisions currently exists through the Commonwealth Ombudsman. The CSA consistently ranks as one of the three highest volume agencies for complaints (along with Centrelink and the ATO, both of which have many times the number of clients of the CSA).[68] The Ombudsman received nearly 2500 complaints about the CSA in 2002-03.[69]

The *Ombudsman Act 1976* expressly permits the Ombudsman to make suggestions or recommendations to government agencies where a decision is considered to be unjust.[70] The Ombudsman also presents as an alternative to judicial review for clients of the CSA, even though the Ombudsman has the ability to decline to investigate a matter where there is another appeal process available to the person, including through courts.[71] This is because the Ombudsman's office has always taken the view that the cost, time and general reluctance of parents to appeal to the courts on child support matters result in the office acting as a more accessible mechanism to CSA clients. In other words, the lack of administrative review processes significantly increases the resource requirements within the Ombudsman's Office.

However, while s 15 of the Ombudsman Act enables recommendations to be based on merit, the Ombudsman will not undertake a merits review of decisions and make suggestions or recommendations solely because it considers that a better decision could be made, except in unusual circumstances. The Ombudsman will generally only ask an agency to reconsider its decision in cases where a view is formed that the decision is not lawful, that is, that no reasonable person could have made such a decision. This is because the Ombudsman will generally not displace the judgement of the decision-maker by second-guessing the merits of particular decisions. Rather, the concern is to identify instances of defective administration, that is, circumstances where decisions are unreasonable.

Further, the Ombudsman is not able to compel an agency to change its decision. This means that, except in limited circumstances, there is no non-adversarial mechanism available for parents to seek merits review of decisions made by the CSA.

Quality of CSA decision making

The Commonwealth Ombudsman recently investigated the quality of decision-making in, arguably, the most difficult and contentious area of CSA administration – Change of Assessment decisions made on the basis of parents' financial resources, including the capacity to earn a higher income than reflected by a formula assessment.[72]

Change of Assessment applications are made in only around 6 per cent of child support cases, with around 60 per cent of these applications resulting in a change to the assessment.[73]

One reason parents may apply to the CSA for a change to the administrative assessment, is that they consider the formula assessment 'would result in an unjust and inequitable determination of the level of financial support to be provided by the liable parent for the child because of the income, earning capacity, property and financial resources of either parent'.[74] Where the reason has been established, CSA Senior Case Officers must also consider

whether it would be 'just and equitable as regards the child, the carer entitled to support and the liable parent; and otherwise proper'[75] to make the change.

Parents commonly apply for a Change of Assessment on the basis of this reason where they believe that: the other parent operates a business or company in a way that means that personal taxable income does not reflect the resources available to that person; the other parent has voluntarily left employment or not taken appropriate steps to secure employment; the other parent has received a large termination, compensation or other lump sum payment; or the other parent has salary packaged income so that taxable income has been reduced.[76]

As part of the Ombudsman's investigation into CSA decisions relating to parents' income and earning capacity in Change of Assessment processes, an analysis was undertaken of 1156 decisions made over a six month period (1 June to 30 November 2002), where parents applied for a Change of Assessment for this reason.[77] Each decision was read and given a rating in terms of its quality. The ratings are indicative only and generally based only on reading the decision, although some queries were raised with the CSA and further information obtained. They were as follows:

1. good decision;
2. better explanation needed and/or grammar/spelling/other editing errors;
3. not able to determine whether good decision or not;
4. better decision could have been made, but outcome would be same/close;
5. concern with decision, but open to Senior Case Officer;
6. decision was not reasonably open to Senior Case Officer.[78]

Of the 1156 decisions analysed, 678 (59 per cent) were initiated by applications from payees and 470 (41 per cent) by payers. The remaining cases (eight or one per cent) were cases where the child support liability of both parents were equal, such as when the parents had shared care of the children and their incomes were similar. [79]

The table below indicates that around 17 per cent of decisions were not correct or preferable and could be open to change through an external merits review process. In a further 7 per cent of cases, it was not clear whether a better decision could have been made.[80]

Table: CSA Region by quality of decisions

	NSW/ACT (n=362) %	**Vic/Tas** (n=343) %	**WA** (n=212) %	**Qld** (n=172) %	**SA/NT** (n=67) %	**Total** (n=1156) %
Good dec'n	68	73	75	68	76	71
Better expl'n needed	4	1	1	3	3	3
Unclear	3	10	9	9	5	7

Outcome ok	5	2	1	3	7	3
Concerns with dec'n, but open	12	10	11	12	7	11
Not reas open	8	4	3	5	2	5
Total	**100**	**100**	**100**	**100**	**100**	**100**

The research undertaken by the Commonwealth Ombudsman also found that approaches to decision-making varied in different CSA regions. Where Senior Case Officers found that a parent had the capacity to earn a higher income than assessed, but could not determine the amount, decisions were made using different indicators. For example, decision-makers in the Victoria/Tasmania region were more likely to set a new child support assessment based on the costs of raising children, while in New South Wales/Australian Capital Territory a measure of average income was more likely to be used, and in Western Australia Senior Case Officers generally referred to award rates or guides for relevant occupations.[81]

As can be seen from the table, there were also statistically significant variations in the quality of decision-making across CSA Regions. In using two nominal variables, as in the table above, one recommended measure of association or statistical significance is Lambda.[82] It is generally accepted that associations of more than 0.05 (in small samples) or 0.01 (in large samples) are indicators that there is an association between the variables.[83] In this case, the Lambda test showed an association of 0.196. This indicates that the CSA Region in which the decision was made was a statistically significant predictor of the quality of the decision.

The quality of decision-making was highest in South Australia and the Northern Territory, while decisions made in Queensland and New South Wales and the Australian Capital Territory were more likely to be of poorer quality. However, in the latter two locations, the decisions were clearer and more easily able to be categorised. It is possible that if the decisions in all Regions that were unclear ultimately belonged in the last two categories, Queensland would stand out on its own as the Region with the poorest decisions.[84]

The CSA, as a Commonwealth body, could reasonably be expected to demonstrate consistency in decision-making in each of its office locations. That is, a parent should be able to expect the same outcome in his or her child support case, regardless of where he or she lives.

Parliamentary interest

The CSA and the Child Support Scheme have been the subject of intense parliamentary scrutiny and there have been two major public inquiries in the last ten years that have considered the Child Support Scheme in part or in whole. Both of these inquiries ultimately recommended that CSA decisions be subject to external merits review by an existing or new tribunal.

In the most recent enquiry, the Senate Standing Committee on Family and Community Affairs[85] recently completed an inquiry into Child Custody matters. The terms of reference for the Committee included, 'Whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children'.[86] The report recommended that there be external review of child support decisions, rather than the current need for appeals to courts with Family or Federal Court jurisdiction. The Committee proposed that this could be a tribunal set up specifically for that purpose within the portfolio

responsibilities of the Commonwealth Department of Family and Community Services or as part of a family tribunal that the Committee proposed be set up to consider child custody matters.[87]

There is only limited reference in the report to the views of the Committee about the specific need for external review of CSA decisions and the reasoning for its recommendation for a tribunal for this purpose.[88] However, the Committee focussed strongly on the need for a tribunal to consider child custody matters and it seems that its reasoning for such a family tribunal is highly pertinent to child support matters. For example, the Committee noted:

> It has become very clear to the committee during this inquiry that the dynamics and emotions of family separation make adversarial litigation inappropriate … It is predicated on a win/lose outcome.[89]

The Committee gave detailed consideration to the problems of an adversarial system, noting that the nature of disputes between parents in the court system make it more difficult to resolve conflict and act in the best interests of the child:

> … the adversarial ethic pits people against each other to determine a winner and a loser. It pushes them apart when they need to be brought together around their children's needs. It trawls over the past when they need to be looking to the future.[90]

The Committee also examined the growth in self-represented litigants in family law disputes and the particular difficulties experienced by parents facing the court system in such circumstances.[91] This reasoning is relevant to the Committee's express views about the need for a tribunal to review CSA decisions:

> The change of assessment process was an improvement particularly on the previous court based processes. However, the committee believes that there should be a proper external review process similar to the Social Security Appeals Tribunal processes.[92]

Unfortunately, the Government has excluded further consideration of external review of CSA decisions from the Terms of Reference of the Child Support Taskforce and Reference Group that were set up in response to the Committee's report.[93] It may be that the Government aligned this issue with its rejection of the need for a tribunal to deal with residency and contact between parents and their children.[94]

The Senate Standing Committee on Family and Community Affairs was not the first to conduct a Parliamentary inquiry that encompassed child support matters. In 1994, the Joint Select Committee on Certain Family Law Issues[95] published its report examining the operations and effectiveness of the Child Support Scheme. The Joint Select Committee also recommended external merits review of CSA decisions.[96]

The Joint Select Committee was established in May 1993 in response to complaints about the Child Support Scheme and the CSA that had been made to the Commonwealth Ombudsman, the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act and to Members of Parliament and Senators.[97]

Submissions by the Child Support Agency and the Commonwealth Ombudsman considered the need for a tribunal to review decisions made by the CSA. The CSA's submission included an appendix containing the views of Senior Case Officers contracted to what was then called the Child Support Review Office (and is now simply known as the Change of Assessment process within the CSA).[98] The submission suggested that the Child Support Review Office be physically separated from the CSA and, effectively, operate as a tribunal:

> A concerted effort needs to be made to utilise hearing rooms of other agencies such as the Social Security Appeals Tribunal, Veterans' Review Board, Immigration Review Tribunal, wherever possible, or obtain fully separate premises for the Review Office.[99]

In separating the function, the submission also suggested that the review powers be wider than making decisions to change the assessment in cases:

> The Scope of Review Officers are currently confined to Part 6A applications, and there is no general power to review decisions taken by the Agency on a wider range of support matters. Currently a person who disputes a decision of the Agency as to the application of an administrative assessment, or one of the components of that assessment must ultimately take the matter as an appeal under section 110 of the Act to a court … It is suggested that there are direct benefits to be gained from expanding the role of the Review Office beyond the departure jurisdiction under Part 6A into a broad administrative review of CSA decisions under the Act.[100]

The submission by the Commonwealth Ombudsman was not as strong in suggesting that an external review mechanism was necessary in respect of CSA decisions. However, the Ombudsman was concerned that the Child Support Review Office was representing itself as a form of external review when, legislatively, it was an internal process, and suggested that the Office either operate as intended or an external review process be created:

> The CSA has promoted its arrangements for the exercise of the new power to make determinations as being a review mechanism. The decision-makers have been specifically recruited at senior levels for that task. They are known as review officers and as a group, they are located in an area called the 'Child Support Review Office' (CSR office). The CSR office is promoted as independent of the CSA, akin to a body such as the Social Security Appeals Tribunal. Once a review officer makes a decision, even if it appears unreasonable on the face of it, the decision cannot be changed without a fresh application or a court hearing. But the Assessment Act is clear that the review officers are original decision-makers who are delegates of the CSA Registrar – they are part of the CSA, not independent of it. The resources allocated to the CSR office are consistent with this. In reality therefore, the way in which the CSR office should exercise its function is unclear.[101]

The Joint Select Committee recommended that, 'the child support legislation be amended to establish an external review office, called the Child Support Appeals Office, to determine appeals by custodial parents or non-custodial parents' (Recommendation 77)[102] and that 'the relevant legislation be amended to establish a Child Support Claims Tribunal within the registry of the Administrative Appeals Tribunal' (Recommendation 81).[103]

Recommendation 77 related to moving the departure, or change of assessment, process from inside the CSA to an external and independent body, with members appointed by the Minister, in much the same way as other administrative tribunals.

In its response (November 1997), the Government expressed the view that an external review office was not necessary, but that, 'recommendations arising from the 'Reform of the Merits Tribunal' review,[104] which might improve the proposed Child Support Agency review process, will be considered.'[105] The response did not provide any further detail or address the concept of a new merits appeal tribunal. A further internal review mechanism was introduced, however, which allowed for parents to lodge an 'objection' to most decisions made by the CSA.[106]

The objection process provides a further internal review mechanism for CSA decision-making, increasing accountability and possibly improving the overall quality of decisions by the Agency. However, as discussed above, many of the most contentious decisions are made through the Change of Assessment process and objection officers reviewing these decisions may not have the level of expertise and experience to improve many of those decisions. External administrative review can enable greater accountability by a government agency and is likely to result in improved decision-making more broadly in that agency.[107]

The case for a tribunal

The benefits provided by external review in other areas of public administration can be applied in the child support jurisdiction. While acknowledgement and consideration would

need to be given by a review body of the impact that decisions may have on third parties (that is, the need for the parent who is not a party to the proceedings between the other parent and the CSA to be able to make representations to the tribunal), this may not be an insurmountable disadvantage.

There is also a need to recognise that, for many clients of the CSA, decisions of the Agency are final. The reasons for the reluctance of parents to return to the courts to deal with child support matters generally include one or more of the following: [108]

- a belief that the CSA has made a wrong decision that should be corrected without the need to apply for a court hearing against the other parent;
- the related desire for a remedy that is less likely to antagonise the other parent (further);
- previous unhappy experiences with the family court system;
- the perceived cost of proceedings;
- the time involved;
- the formality of court proceedings and lack of understanding of the processes;
- a reluctance by parents to represent themselves, especially in cases where the other parent is likely to have legal representation;
- fear of retribution (eg family violence, withholding contact) from the other parent if taken to court.

The introduction of a tribunal to review CSA decisions would have a number of benefits. Firstly, conflict between parents may be significantly reduced, both because a tribunal would operate in a less adversarial way than a court, and because a parent would be naming the CSA as the respondent in the action, rather than the other parent. In cases where the other parent objects to the application and joins in the proceedings, an advantage may remain by the use of non-adversarial procedures.

A second and related advantage is that, assuming legislation provides for a standard tribunal model, its inquisitorial nature would mean that the process would be less formal and less costly. An administrative tribunal may also be able to deal with some routine CSA matters that currently must be determined by a court, such as ‘stays’ of administrative action. For example, a payer may seek a suspension of enforcement action, including the garnishee of a bank account or the intercept of a tax refund, while that parent is seeking a reduction in the assessment or arrears through a Change of Assessment process. Currently, the CSA will only suspend such action on the order of a court. The transfer of this jurisdiction to a tribunal may be simpler for the parent and more cost effective.

Finally, the CSA would be compelled to either implement the tribunal’s decision or appeal the matter to a higher authority (depending on how the system is set up.)

Establishing a tribunal may also improve normative decision-making processes:

> As a general rule, their decision-making occurs more quickly than hearings before the courts, they consider more cases, and hence have the opportunity to provide a more comprehensive view of the law on a topic and, because of the frequency with which their jurisdiction is invoked, they often lead the way in examining issues of general relevance to the wider community.[109]

It would seem that the benefit to be gained in this respect, compared to those offered through judicial review, may be greater than in many other jurisdictions because of the relatively low number of CSA cases dealt with through the courts.[110]

Where would a tribunal sit?

If CSA decisions were to be reviewable, consideration would need to be given to the need for a single or two tier process, and whether a new tribunal should be created to deal exclusively with CSA appeals, or whether the jurisdiction of an existing or proposed tribunal (such as the Social Security Appeals Tribunal (SSAT) and/or the Administrative Appeals Tribunal (AAT)) could be extended to CSA matters.

A single appeal right to the AAT may not be attractive, as it is more formal and more costly than the use of a lower tier tribunal, particularly for high volume agencies – as would be anticipated with a body that reviews CSA decisions. While it is difficult to predict the number of appeals on CSA matters, the volume of complaints to the Commonwealth Ombudsman may give some indication of demand. In 2002-03, 9642 Centrelink complaints and 2500 CSA complaints were received by the Ombudsman.[111] The number of Centrelink matters currently heard by the SSAT is comparable to the number of complaints about Centrelink matters to the Ombudsman.[112] If the number of appeals to a tribunal in respect of CSA matters also remains comparable to the number of complaints received by the Commonwealth Ombudsman, it could be expected to increase the workload of the AAT by around 37 per cent (based on 6700 applications made to the AAT in 2002-03).[113]

On the other hand, the creation of a new tribunal would contribute to the proliferation of existing tribunals, would entail a significant additional cost to set up and operate, and may also be politically difficult to advocate. Since the failure of the Administrative Review Tribunal Bill 2000, the Government abandoned its policy to amalgamate existing tribunals into a single entity. Nevertheless, the Government remains committed to reforming tribunals where it can do so without the need for legislative reform[114] and it is, therefore, unlikely to support the creation of a new tribunal.

The traditional argument against incorporating a new tribunal jurisdiction into an existing one is the need for specialised knowledge within the new tribunal and the risk of loss of knowledge in the existing one. The experience of the Victorian Civil and Administrative Tribunal (VCAT), however, presents an example to the reverse, as it has found that 'the ability to move members between lists can expand the pool of specialist tribunal members'.[115] This can be an advantage where panels are used, ensuring quality and consistency of decision-making.[116] Including child support appeals in an existing tribunal is also more likely to contain costs and more readily fits into a climate disposed to rationalising the existing tribunal system.

If CSA decisions were to be reviewable by an existing tribunal, they would seem to be most logically dealt with by the SSAT. Several arguments could be put for this, including that appellants to the SSAT, comprising income support and family support recipients, have many commonalities with CSA clients. These similarities include source of income (approximately one third of CSA payers and most payees rely on Centrelink benefits as their main source of income), that most are low income earners (median income of CSA payers is approximately $21,000 per year, while median income of payees is less than half of that amount).[117] Other similarities include the shared area of government responsibility, with both Centrelink and the CSA within the Family and Community Services portfolio, and the interaction between receipt of child support and family assistance entitlements. Another advantage of incorporating merits review of CSA decisions into the SSAT is the use of multi-member panels in that tribunal, with specialist knowledge consistent with that needed for CSA. Panels incorporate a legally qualified member, a welfare member and a departmental

member (although, there are often only two members who will make a decision in respect of Centrelink matters).[118]

The main difficulty in giving the SSAT jurisdiction over CSA decisions lies with the unique nature of the Child Support Scheme. It can be argued that, because any decision made by the CSA affects two parties in diametrically opposing ways – creating a detriment for one and a benefit to the other – that disagreement with CSA decisions is a matter that needs to be dealt with between the parties, rather than as an action against the CSA. At a minimum, a tribunal would have to allow for the other parent to take part in the process. This would require developing new procedures for the SSAT, which currently does not allow parties, other than the appellant, to appear before it.

Conclusion

It seems that, despite the complexity in dealing with two clients with competing interests in each case, there needs to be some appeal mechanism for CSA decisions that are in dispute that does not require CSA clients to take direct action against each other. The principles of external merits review through a tribunal system are equally as relevant to CSA decisions as other government decisions. It seems that external review mechanisms have been set up in every other area of government administration, with very good reason, and that this area of government decision- making has fallen behind.

The informality, speed and nature of investigation and decision-making by administrative tribunals seems ideally suited to the CSA environment. Many parents who are not satisfied with CSA decisions face one or more disadvantages, including low income. There is commonly existing conflict between parents that can be exacerbated by more formal processes, particularly judicial review, or parents do not seek judicial review to avoid further conflict.

The resources needed to set up a new tribunal to deal with child support matters, would be high and would likely result in government resistance. Further, the current Government has expressed an intention to amalgamate the existing tribunals and, while the necessary legislation has so far been unsuccessful, is unlikely to want to see any further proliferation. In any case, it would seem that the existing SSAT has an appropriate structure and could easily acquire the required expertise, so would require less adjustment than other alternatives to be geared to consider child support matters.

The main constraint in extending the review of CSA matters by the SSAT is that the tribunal would need to be able to put mechanisms in place to accommodate disputing parties. It is likely that the tribunal would need to become accustomed to these changes in procedures at the same time as dealing with a significant increase in the volume of applications. At the same time, child support legislation is complex and the SSAT would need to acquire expertise in this area. There is a need to ensure that such changes could be implemented without undermining the current effectiveness of the SSAT. While this may be problematic, this option deserves to be explored, as it remains the most viable for external merit review of CSA decisions.

It is a pity that, despite the recommendations of two Parliamentary Committees, such consideration falls outside of the Terms of Reference of the newly convened Child Support Taskforce and Reference Group.

Endnotes

1 Approximately 1.3 million parents of over 1.1 million children are registered with the Child Support Agency (Child Support Agency and Attorney General's Department, *Facts and Figures 2002-03*, CSA, Canberra, 2003, p17-18).
2 Tabled 29 December 2003.
3 Recommendations 26 and 27 of the Report propose setting up a Ministerial Taskforce to review the operation of the Child Support Scheme and its composition, p 174-176.
4 Prime Minister (2004) *Reforms to the Family Law System,* media statement 29 July 2004, p 2; and Anthony, Larry (2004) *Taskforce to examine child support scheme*, media statement 16 August 2004.
5 Recommendation 26, p 174-175.
6 Recommendations 25 and 27, p 174 and 176. While some of the components of recommendation 25 are to be considered by the Taskforce and Reference Group, tribunal review of CSA decisions (Recommendation 27) has not been included in the terms of reference for either body.
7 Anthony, *above n 4*.
8 Jan Bowen, *Child Support: A Practitioner's Guide* (2nd ed), The Law Book Co Ltd, Sydney, 2002, p 1.
9 Michael Carmody, 'Opening address by Child Support Registrar to the Joint Select Committee on Certain Family Law Issues', 22 September 1993, p 2.
10 Jan Bowen, *above n 8*, p 1.
11 Michael Carmody, *above n 9*, p 1.
12 Child Support Consultative Group, *Child Support: Formula for Australia*, AGPS, Canberra, May 1988, pp 4-5.
13 Jan Bowen, *above n 8*, p 1.
14 *Ibid*, pp 1-2.
15 Jan Bowen, *Child Support: A Practitioner's Guide* (Ist ed) The Law Book Co Ltd, Sydney, 1989, p 9. This subsequently changed, so that automatic withholdings are only applied at the request of the payer or where the payer refuses to make voluntary payments; this is set out in the *Child Support (Registration and Collection) Act 1988* (Cth) ss 43 and 44.
16 Child Support Consultative Group, *above n12,* p 5. The operation of the CSA was moved from the Australian Tax Office to the Family and Community Services Portfolio in October 2001.
17 Jan Bowen, *above n 8*, p 15.
18 1996 reforms to the *Family Law Act 1975* (Cth) changed the terms 'custodial parent' and 'non-custodial parent' to 'resident parent' and 'non-resident parent'.
19 Jan Bowen, *above n 8*, pp 16-17.
20 Jan Bowen, *above* n 8, pp 16-17 and *Child Support (Assessment) Act 1989* (Cth) s 39.
21 Jan Bowen, *above n 8*, p 17 and *Child Support (Assessment) Act 1989* (Cth) ss 43-46.
22 Jan Bowen, *above n 8*, p 16 and *Child Support (Assessment) Act 1989* (Cth) s 37.
23 Jan Bowen, *above n 8*, p 21 and *Child Support (Assessment) Act 1989* (Cth) s 44.
24 Jan Bowen, *above n 8*, p 21 and *Child Support (Assessment) Act 1989* (Cth) ss 41, 57, 66, The minimum child support assessment was not part of the original Scheme and was introduced from 1 July 1999.
25 Jan Bowen, *above n 8*, pp 23-24, and *Child Support (Assessment) Act 1989* (Cth) ss 8, 47-54.
26 Jan Bowen, *above n 8*, pp 81-82 and Parts IV and V of the *Child Support (Registration and Collection) Act 1988.*
27 Jan Bowen, *above n 8*, p 84 and *Child Support (Registration and Collection) Act 1988* s 104.
28 John Faulks, 'Foreword', in Jan Bowen, *above n 15,* p v.
29 Western Australia (WA) has not conferred its Constitutional power to make laws in respect of children born outside of marriage to the Commonwealth, as the other States have, so has its own Act to include ex-nuptial children in the Child Support Scheme. WA amends the Act to reflect changes to the Commonwealth child support legislation, but there is usually a time lag, so different rules may apply to affected child support cases in that State.
30 *Child Support (Assessment) Act 1989* (Cth) s 58.
31 *Ibid,* ss 60-64.
32 *Ibid,* ss 83-89.
33 *Ibid,* s 67.
34 *Ibid,* ss 71-72A.
35 Jan Bowen, *above* n 8, p 82.
36 *Ibid*, p 83 and *Child Support (Registration and Collection) Act 1988* (Cth) Part 5A.
37 *Ibid,* s 117 and Part 6.
38 *Ibid,* s 117 and Part 6.
39 *Ibid,* s 117 and Part 6.
40 CSA, unpublished data, 2004.
41 Jan Bowen, *above n 8*,p 62.
42 Jan Bowen, *above n 8*, p 57.
43 Child Support Agency and Attorney-General's Department, *above n 1,* p 19.
44 eg Family Law Council, *Report on Child Contact Orders: Enforcement and Penalties*, AGPS, Canberra, 1998, para 10.01.
45 Child Support Agency and Attorney-General's Department, *above n 1,* pp

17-18.
46 *Ibid*, p 27.
47 *Ibid*, p 30.
48 *Ibid*, p 6.
49 Child Support Consultative Group, *above n 12,* pp 141-144.
50 Jan Bowen, *above n 15,* p 57.
51 Information provided by the CSA.
52 Office of the Commonwealth Ombudsman, 'Submission to the Joint Select Committee on Certain Family Law Issues: Inquiry into the Child Support Scheme', unpublished, August 1993, pp 17-18.
53 Jan Bowen, *above n 8,* pp 77-79, *Child Support (Assessment) Act 1999* (Cth) s 98X and *Child Support (Registration and Collection) Act 1988* (Cth) ss 82 to 85.
54 Administrative Review Council, *Report to the Attorney General: Internal Review of Agency Decision Making*, ARC, report no 44, November 2000, p 65.
55 *Child Support (Assessment) Act 1989* (Cth) s 98W(2)
56 *Child Support (Assessment) Act 1989* (Cth) s 98ZF and *Child Support (Registration and Collection) Act 1988* (Cth) ss 72T, 95 and 100,
57 Most Magistrates' Courts have FCA jurisdiction and do, in fact, consider more cases than directly by the FCA.
58 *Child Support (Assessment) Act 1989* (Cth) s 123.
59 *Ibid.*
60 Australian Law Reform Commission (2000) *Managing Justice: A review of the federal civil justice system*, Report no 89, Canberra: AGPS, p 90-93.
61 *Ibid*, p 93.
62 *Ibid*, pp 95-96.
63 *Ibid*, pp 95-96.
64 Child Support Agency and Attorney-General's Department, *above n 1*, p 15.
65 Child Support Evaluation Advisory Group, *Child Support in Australia: final report of the evaluation of the Child Support Scheme*, vol 1, AGPS, Canberra, 1992, p 257.
66 Australian Law Reform Commission, *above n 60,* pp 635-636.
67 *Ibid*, p 635.
68 Office of the Commonwealth Ombudsman, *Annual Report 2002-03*, Office of the Commonwealth Ombudsman, Canberra, 2003, p 11
69 *Ibid*, p 27
70 *Commonwealth Ombudsman Act 1976* (Cth) s 15.
71 *Ibid*, s 6.
72 Commonwealth Ombudsman (2004) *Child Support Agency: Change of Assessment Decisions: Administration of Change of Assessment decisions made on the basis of parents' income, earning capacity, property, and financial resources*, Office of the Commonwealth Ombudsman, Canberra, 2004.
73 Child Support Agency and Attorney-General's Department, *above n 1,* p 15.
74 *Child Support (Assessment) Act 1989* (Cth) s 117(2)(c)(i).
75 *Child Support (Assessment) Act 1989* (Cth) s 117(1)(b)(ii).
76 Commonwealth Ombudsman, *above n 72*, pp 4-5
77 *Ibid*, p 11
78 *Ibid,* p 10
79 *Ibid,* p 11
80 *Ibid,* p 13
81 *Ibid,* p 14.
82 D A de Vaus Surveys in Social Research, (3rd ed) Allen and Unwin, St Leonards, 1992, p 194.
83 *Ibid*, p 191.
84 Commonwealth Ombudsman, *above n 72*, p 14.
85 Senate Standing Committee on Family and Community Affairs, *op cit, n 2.*
Ibid, p xvi.
87 *Ibid*, Recommendation 29.
88 *Ibid*, p 152.
89 *Ibid*, pp 65-66.
90 *Ibid*, p 75.
91 *Ibid*, pp 79-80.
92 *Ibid*, p 152.
93 Larry Anthony*, above n 4*.
94 Prime Minister*, above n 4*, p 1.
95 *Child Support Scheme: An examination of the operation and effectiveness of the Scheme*, Parliament of the Commonwealth of Australia, Canberra, November 1994.
Ibid, pp 230-233.
97 *Ibid*, p 1.
98 Child Support Agency, 'Submission to the Joint Select Committee on Certain Family Law Issues', unpublished, 1993, pp 96-127.
99 *Ibid*, p 97.

100 *Ibid*, p 98.
101 Office of the Commonwealth Ombudsman, *above n 52*, 1993, pp 17-18.
102 Joint Select Committee on Certain Family Law Issues, *above n 95*, p 230.
103 *Ibid*, p 231.
104 This is a reference to Administrative Review Council, *Report to the Minister for Justice: Better Decisions: Review of Commonwealth Merits Review Tribunals*, report no 39, AGPS, Canberra, 1995.
105 Department of Social Security, Child Support Agency and Attorney-General's Department, *Government response to the Report of the Joint Select Committee on Certain Family Law Issues*, Canberra, November 1997, p 35
106 *Ibid*, p 33.
107 Robin Creyke, 'Tribunals: divergence and loss' (2001) 29 *Fed L Rev* 403 at 425.
108 The following list is based on some of the author's experience handling complaints received in the Office of the Commonwealth Ombudsman and Child Support Evaluation Advisory Group, *Child Support in Australia: final report of the evaluation of the Child Support Scheme*, AGPS, Canberra, 1992, vol 1, p 260, vol 2, pp 102, 117.
109 Robin Creyke, *op cit n 107*, 2001 p 245.
110 Child Support Agency figures for 2001/02 show that court ordered departures of child support are less than 2000 (or 3 per cent of cases). While refused departures and applications regarding other aspects of CSA decision making are not included, the CSA considers that overall numbers are not significant.
111 Office of the Commonwealth Ombudsman, *above n 68*, 2003, pp 20, 27.
112 Social Security Appeals Tribunal, *Annual Report 2002-03*, SSAT, Canberra, 2003, p 13.
113 Administrative Appeals Tribunal, *Annual Report 2002-03*, AAT, Canberra, 2003, p 17.
114 Attorney-General for Australia, *Improving the Federal Merits Review Tribunal System*, media release, 6 February 2003.
115 Stuart Morris, J, 'The Emergence of Administrative Tribunals in Australia', a paper delivered at the Annual General Meeting of the Victorian Chapter of the Australian Institute of Administrative Law Inc on 13 November 2003 at Parliament House, Melbourne, p 7.
116 *Ibid*, p 7.
117 CSA and Attorney-General's Department, *above n 1*, pp 20-21.
118 Robin Creyke, *The Procedure of the Federal Specialist Tribunals*, AGPS, Canberra, 1994, pp 34-35.