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Chair  
Social Services Committee  
Parliament Buildings  
P O Box 18 041  
Wellington 6160

**Child Support Amendment Bill**

1. This submission is made by the Legislation Advisory Committee (LAC).
2. The LAC was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. The LAC has produced and updates the Legislation Advisory Committee Guidelines: Guidelines on the Process and Content of Legislation (LAC Guidelines) as appropriate benchmarks for legislation. The LAC Guidelines have been adopted by Cabinet.
3. The terms of reference of the LAC include:
  - (a) to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues:
  - (b) to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.
4. The LAC considered the Child Support Amendment Bill at its meeting on 15 February 2012.

## PRIVACY

5. At present, liable parents under the Child Support Act 1991 can choose how to make their child support payments. However, if a person defaults in their payments, future payments are deducted directly from their PAYE income. Clause 27 of the Bill would amend sections 129 and 130 of the Act so that, under the new scheme, child support payments would be compulsorily deducted from the pay of every liable PAYE income earner, whether they have previously defaulted or not.
6. The LAC considers that the proposed amendment raises privacy concerns. It does not appear that clause 27 adequately balances the requirements of the Privacy Act 1993 with the public interest or that it sufficiently meets any of the exceptions to the Act.
7. Clause 27 breaches the Privacy Act because it involves IRD disclosing private information to employers. Employers will be informed both of an employee's liability for child support and the extent of that liability. This involves the disclosure of personal information about the person's family and parenting relationships and about their financial circumstances. Since a person's liability for child support may have arisen in any number of factual circumstances, it seems clear that some employees may rightly have concerns about employers being informed of their liability.
8. Information privacy principle 11 (IPP11) is relevant. It states:

Principle 11 Limits on disclosure of personal information

**An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—**

- (a) That the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained; or
- (b) That the source of the information is a publicly available publication; or
- (c) That the disclosure is to the individual concerned; or
- (d) That the disclosure is authorised by the individual concerned; or
- (e) That non-compliance is necessary—**
  - i. To avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
  - ii. For the enforcement of a law imposing a pecuniary penalty; or
  - iii. **For the protection of the public revenue;** or
  - iv. For the conduct of proceedings before any court or [tribunal] (being proceedings that have been commenced or are reasonably in contemplation); or
- (f) That the disclosure of the information is necessary to prevent or lessen a serious and imminent threat to—
  - i. Public health or public safety; or
  - ii. The life or health of the individual concerned or another individual; or
- (g) That the disclosure of the information is necessary to facilitate the sale or other disposition of a business as a going concern; or

- (h) That the information—
- i. Is to be used in a form in which the individual concerned is not identified; or
  - ii. Is to be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or
- (i) That the disclosure of the information is in accordance with an authority granted under section 54 of this Act.
9. Disclosure includes the sharing of personal information.
10. LAC guideline 15.2.3 states that:
- Policy advisers developing legislation should:
- strive to develop legislation that is compliant with the IPPs;
  - consider, if an aspect of the proposed legislation appears to be inconsistent with an IPP, whether one of the exceptions contained in the IPPs themselves or one of the exemptions included elsewhere in the Act to the IPPs might apply;
  - consider, if no exception or exemption in the Act applies to the inconsistent provision, –
    - using an alternative measure in the legislation which will better protect privacy interests through complying with the IPPs; or
    - making the inconsistency with the IPP as narrow as possible, and preparing a full explanation for the relevant Cabinet Committees why an inconsistency with an IPP might be necessary in the proposed legislation in order to achieve the policy goals.
11. On the proposal in clause 27, paragraph 112 of the Regulatory Impact Statement (RIS) states:

It is recognised that some paying parents may have concerns about their employers knowing that they are making child support contributions. However, arguably the public interest in operating an effective child support scheme should outweigh these individual concerns.

## **Comment**

12. The LAC's privacy concerns may be allayed if the deduction is to be taken without employers knowing what it is for. However, at paragraph 112, the RIS implies that employers will know that deductions will be for child support payments (in the same way that Kiwisaver and ACC contributions are currently indicated).
13. Alternatively, it may be that the infringement can be justified under exception (e)(iii) of IPP11, which relates to non-compliance with IPP11 being necessary "[f]or the protection of the public revenue". However, it is not apparent to the LAC that the case for this has been made.
14. There is no indication in the RIS that the proposed clause 27 is directed at protecting the public revenue. Instead, the RIS implies that the proposal is aimed at meeting receiving parents' concerns about the non-payment of child support and the instability of payments (see paragraph 22), and to prevent the escalation of child support debt (see table on page 7).
15. It appears to the LAC that the proposal will reduce IRD costs in administering the child support scheme and in chasing defaulters, however these are administrative rather than public revenue costs. A public revenue cost does arise as a result of the

State's inability to defray the cost of benefits where people default in their child support payment.<sup>1</sup> However, there is no information on the extent of this cost, or the likely savings from the proposed amendment. It follows that it is not clear to the LAC whether the infringement of IPP11 can adequately be justified by exception (e)(iii).

16. The LAC suggests that consideration should be given to whether the privacy infringement inherent in the proposal can indeed be justified by exception e(iii).
17. We highlight two points that are relevant to that exercise. First, the compromise to the privacy of defaulters is easier to justify than that of non-defaulters. It is arguable that the present situation – whereby automatic deduction is applied to defaulters – is warranted on the grounds that defaulters are failing to meet their obligations, which may in turn pose a risk to the public revenue. However, non-defaulters pose no such risk. The public revenue does not require protection from those who responsibly meet their child support liability. The breach of the privacy interests of those who are meeting their obligations is therefore difficult to justify.
18. Secondly, when considering the public revenue exception, the nature and gravity of the other exceptions under IPP11 should be taken into account. These include the maintenance of the law, enforcement of a law imposing a pecuniary penalty, or conduct of proceedings before any court or tribunal, a serious and imminent threat to public health or public safety; or the life or health of an individual. These imply that it is anticipated that there should be a relatively serious degree of risk before an exception to IPP11 is called upon. It follows that the degree of risk to the public revenue should be comparatively serious before exception (e)(iii) is triggered.
19. In addition, the LAC would bring to the Committee's attention that the RIS notes that in IRD's online consultation 66% of respondents were in favour of this change. The RIS does not indicate the balance of payers / recipients / other respondents that make up the 66%. Thirty-three per cent of respondents to the online consultation were payers of child support.
20. The LAC would also like to emphasise LAC guideline 12.2.3, set out in paragraph 9 above. In particular, we draw attention to the point that "policy advisers developing legislation should ... consider, if no exception or exemption in the Act applies to the inconsistent provision, using an alternative measure in the legislation which will better protect privacy interests through complying with the IPPs; or making the inconsistency with the IPP as narrow as possible, and preparing a full explanation for the relevant Cabinet Committees why an inconsistency with an IPP might be necessary in the proposed legislation in order to achieve the policy goals". We also note that the Privacy Commissioner is not listed as having been consulted on the Bill.

#### DEFINITION OF "AGREEMENT"

21. The Bill introduces a new formula by which child support liability is to be assessed. Among other things, application of the formula requires that the Commissioner of

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<sup>1</sup> At paragraph 7, the RIS explains that child support is paid to the Crown which then passes the payment to the person who has primary care for the child. It goes on, "[i]f the caregiver is receiving a sole-parent benefit, the child support payments are retained by the Crown to help defray the cost of the benefit and any excess is passed on to the caregiver."

Inland Revenue should determine the proportion of care that each carer or parent provides to the child. This determination is key to the decision as to who is liable, and to the extent of their liability.

22. Clause 9 of the Bill substitutes new section 15 of the Act which sets out how the Commissioner should establish proportions of care. He or she may "rely on the content of any care order or agreement" when establishing the proportion of ongoing daily care provided by each parent.
23. Clause 5 adds a definition of "care order or agreement" to the interpretation section of the Act, as follows:

care order or agreement means any of the following that are in force:

  - (a) a parenting order made under section 48(1) of the Care of Children Act 2004;
  - (b) an overseas parenting order as defined in section 8 of the Care of Children Act 2004;
  - (c) any agreement (not being an order referred to in paragraph (a) or (b))—
    - (i) that the parents of a child agree to treat as binding on them; and
    - (ii) that identifies the proportion of care that each parent and carer of the child will provide to the child"
24. It appears from the RIS and Explanatory Note to the Bill that a formula assessment of child support liability will be required for many more applications for child support than is currently the case. To reduce the likelihood of objection or appeal against a formula assessment, it may be advisable to place greater definition around "any agreement ... that the parents of a child agree to treat as binding on them." For instance, the Bill could provide that the agreement should be in certain form (for example, written) and signed by both parents.
25. The LAC does not wish to be heard in support of the submission.



Sir Grant Hammond  
Chair  
Legislation Advisory Committee