

# **CHILD SUPPORT OVERPAYMENTS**

## **A case of give and take?**

**January 1998**

**Report under section 35A of the Ombudsman Act 1976**

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## EXECUTIVE SUMMARY

This is a report of the Commonwealth Ombudsman's investigation of the Child Support Agency's practices for recovering amounts of child support overpaid to custodial parents.

Many of the people who contact the Ombudsman's office to complain about child support overpayments are aggrieved at being asked to repay money they received in good faith and spent for the benefit of their children. This view is understandable, but the situation is largely unavoidable, given the retrospectivity inherent in the child support legislation. However the Commonwealth's procedures for dealing with these overpayments should have regard to the special nature of the overpayment and the often precarious financial position of the family that will be obliged to repay the debt. Recovery of the debt should not simply be a triumph of 'bean counting' over the financial needs of the parents and their children.

The Child Support Agency already has procedures aimed at recovering child support debts without causing distress or serious financial hardship to the custodian and their children. We were concerned that, in many cases, Agency staff were not following these procedures. This was the initial focus of the Commonwealth Ombudsman's own motion investigation which we started in 1995 - an investigation in which the Agency willingly participated. The investigation has also revealed a number of systemic shortcomings in the Agency's procedures, and in the way these inter-relate with social security payments. It is worrying, for example, that retrospective reductions in child support cannot, in many cases, be matched by retrospective increases in social security payments (paragraph 3.28 discusses).

The Child Support Agency's positive response to our draft report and suggestions is acknowledged. In fact the Agency has already made some significant changes to its overpayment notification and recovery procedures. The Agency's response to each of our recommendations is included in full at the conclusion of this public report. We believe the action proposed by the Agency response will go some way to improve the administrative processes for recovering child support debts and hopefully make it less confusing and 'fairer' for those involved.

## INTRODUCTION

A few years after the Child Support Agency (CSA) began operation, we started to receive complaints from custodial parents with child support overpayments. Parents who had asked the CSA to collect their child support (Payees) were now finding that they had to repay some or all of the child support they had received and spent for the benefit of their children. The CSA's practice at that time was to suspend all their child support payments until any debts raised by the CSA against them were repaid. The Ombudsman's investigation of this practice led to the *Child Support (Registration & Collection) Act 1988* being amended in 1993 and the CSA subsequently introduced a process of negotiating the rate of recovery with the Payee. This process minimised the impact of a child support debt upon the financial position of the Payee.

Despite this change, the Ombudsman's office continued to receive complaints during 1993 - 1995 from Payees who had been overpaid child support and were therefore in debt to the CSA. In some cases, their full payments were being withheld by the agency without prior notice of the amount of the debt or an invitation to negotiate a suitable rate of recovery.

In November 1995 the Ombudsman's Office advised the CSA that it intended to monitor complaints over twelve months to identify those that related to Payee overpayments. We continued to investigate these complaints on an individual basis, and also provided a quarterly report to the CSA's National Office. We asked National Office to establish the underlying cause of the complaints and to take any action necessary to ensure that its guidelines were being correctly followed by CSA staff. The CSA agreed to this approach.

Sections One and Two of this report provide background information and outline the findings of the monitoring project. Section Three discusses the systemic issues we identified in the way the CSA handles Payee overpayments, and includes recommendations to address these problems.

The CSA has commented on the draft version of this report, and we have modified our report to incorporate those comments, where appropriate, or made reference to the comments in footnotes. The CSA's response to our recommendations is included in full in Section Four. The Ombudsman's recommendations and the CSA's response, read together, provide a useful basis for the CSA to further improve its administration and recovery of Payee overpayments.

## SECTION ONE

### ***THE CHILD SUPPORT SCHEME: BACKGROUND INFORMATION***

#### **A Payee's child support entitlement**

1.1 The amount of child support that a non-custodial parent, the Payer, is obliged to pay to the custodial parent, the Payee, is determined in various ways.<sup>1</sup>

1.2 For people covered by stage 1 of the child support scheme, the amount of child support is determined by a court order which sets the amount payable.<sup>2</sup>

1.3 For people covered by stage 2 of the child support scheme, the amount of child support is determined in one of the following ways: <sup>3</sup>

- the CSA's assessment in accordance with a formula; or
- an agreement between the parties which states the amount of child support; or
- a review officer's determination or a court order, departing from the usual formula assessment because of special circumstances of the parties.

#### **Collection of a Payee's entitlement**

1.4 The **Payee's entitlement** to child support is also called the **Payer's liability**. When a Payee registers his or her case with the CSA for collection, the CSA will take action to collect child support from the non-custodial parent, up to the full amount of the liability.

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<sup>1</sup> we acknowledge that the terms "custodial parent" and "non-custodial parent" are not currently used in a family law context, but have used them here for convenience and ease of understanding

<sup>2</sup> stage 1 of the child support scheme applies where the parties separated before 1 October 1989, and there are no children of the relationship born after that date

<sup>3</sup> stage 2 of the child support scheme applies where the parties separated on or after 1 October 1989, and/or there are children of the relationship born on or after 1 October 1989

## Payments to the Payee

1.5 Any amounts that the CSA collects from the Payer are disbursed to the Payee (but only sufficient to cover the Payee's actual entitlement). The CSA does not make payments in advance to the Payee. The general rule is that amounts are not paid out to the Payee unless the CSA has already received them from the Payer.<sup>4</sup>

1.6 This process of assessment, collection, and disbursement does not appear to leave much room for the Payee to be overpaid. Usually, the amount to be paid is worked out in advance, either by the CSA, a court, or by the parties themselves. The CSA collects this amount from the Payer and then passes it on to the Payee. Unfortunately, things are not always so simple. Payees may be overpaid child support for a number of reasons.<sup>5</sup>

## Accounting overpayments

1.7 In some instances, the overpayment may be the result of an accounting matter, such as:

- the CSA discovering that the Payer's cheque has been dishonoured after it has paid the amount to the Payee from its own funds;<sup>6</sup> or
- errors (and subsequent correction) in the CSA's recording of amounts remitted by large employers (ie for a number of Payers); or
- the Payee confirming that they have received private payments of child support from the Payer, which will reduce the amount that the CSA is entitled to collect from the Payer.<sup>7</sup>

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<sup>4</sup> there is a very limited exception to this rule in the situation where the CSA is satisfied that a Payer's employer has deducted the amount from his or her salary, but may not have sent it to the CSA

<sup>5</sup> s79 of the *Child Support (Registration and Collection Act) 1988* (the Collection Act) provides that a Payee is liable to repay an amount they were not entitled to receive, or that they are subsequently not entitled to receive because of a change to the Child Support Register

<sup>6</sup> the CSA has advised us in its response to our report that it has reviewed its policy on recovery of dishonoured cheque debts. The CSA accepts that it is inappropriate for it to seek recovery from the Payee in the first instance, and will instead pursue the Payer for the amount

<sup>7</sup> s71 &71 A of the Collection Act

## Retrospective changes

1.8 However, far more frequently an overpayment will arise as the result of the CSA making some retrospective change to the Payer's liability (which is also the Payee's entitlement).

1.9 Retrospectivity is a feature of the child support scheme. Child support amounts can increase or reduce according to a change in circumstance. In many situations there is no limit on the period in which the CSA may receive advice about, or act upon, a notice of change. Examples of changes that may result in a retrospective reduction in the Payee's entitlement include:

- the CSA's processing of a Payer's income estimate, which would reduce the child support for the entire child support year;<sup>8</sup>
- the CSA's reassessment of a Payer's liability when the Payer lodges a relevant tax return showing that actual income was lower than the CSA's "default" amount;<sup>9</sup>
- the CSA's late inclusion of the Payee's income in the assessment, where their income is above the disregarded amount;
- the inclusion of a Payer's dependent child in the CSA's formula assessment which has the effect of increasing the Payer's disregarded income;
- changes in custody or access arrangements (where the level of access is sufficient to bring into play the modified formula);
- a retrospective determination by the child support review officer; or
- a retrospective order by a court.

1.10 There are also situations where the CSA becomes aware of an error in its assessment, or in the way it processed a document. Such errors are usually corrected with retrospective effect.

1.11 In each of these situations, although the Payee may have received the correct amount of child support at the time, the reassessment will result in a reduction of their entitlement. If the CSA has collected more from the Payer than they are obliged to pay under this reduced assessment, the Agency should refund the overpaid amount to the Payer. The Payee is obliged to repay the amount of the debt to the Commonwealth.

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<sup>8</sup> s60 of the *Child Support (Assessment Act) 1989* (the Assessment Act). A child support year runs from 1 July to 30 June

<sup>9</sup> see s58 of the Assessment Act

### **Recovery of the Payee debt**

1.12 The CSA's computer system automatically issues notices showing a retrospective change to the assessment. The notices include a paragraph to the effect that if the Payee had already received more than the assessed amount, they **may** have been overpaid. But there is no automatic notice to advise the Payee that they **have** been overpaid, or the amount of the debt. The CSA staff processing the reassessment must generate a manual letter to explain the amount of the debt, and to notify the Payee that it is possible to negotiate recovery by instalments.

### **Notice of debt and negotiating recovery**

1.13 The complaints we received throughout 1993, 1994 and 1995 showed that the CSA's new policy of manual advice and negotiating the rate of recovery had not been implemented effectively. The complaints had a common thread. Payees contacted the Ombudsman because they had not received an adequate explanation of the reason for the overpayment, and/or the CSA had not contacted them to negotiate a rate of recovery before recovery commenced.

1.14 Our investigation of these complaints indicated that although the CSA had a National Policy for recovery of Payee debts, it required a high level of manual intervention on the part of CSA staff. The re-assessment that resulted in the Payee's overpayment did not automatically produce a notice of debt, nor did the system prompt the CSA staff to contact the Payer to arrange a refund, nor to contact the Payee to discuss arrangements to recover the debt. All these actions relied upon the vigilance of CSA staff. The complaints we received usually arose because CSA staff had failed to take appropriate action when the debt was created. In most cases we were able to resolve the matter with the CSA. However, we remained concerned that the complaints continued, and in some instances, CSA staff at branch level seemed to be unaware of their agency's nationally promulgated guidelines.<sup>10</sup>

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<sup>10</sup> Child Support Policy Guideline 3/95 'Repayment of Overpayments' and CSA Collection and Enforcement Policy 1996

### **Recovery from Payee tax refunds**

1.15 The CSA's recovery action is not restricted to withholding future child support payments. The CSA is also able to intercept any amount payable to the Payee by way of a tax refund in total or partial satisfaction of a child support debt. From July 1995, we started to receive complaints from a number of Payees whose tax refunds had been taken to recover a child support debt. In many cases, the Payee had no prior knowledge of the debt. In others, the debt was actually one that should have been recovered from the Payer, ie a 'top-up' debt.<sup>11</sup>

### **Other recovery methods**

1.16 In addition to the recovery methods outlined above, the CSA can request Centrelink to recover a child support debt from the Payee's social security entitlements. The CSA also routinely requests that the Payee repay the debt in cash, and will negotiate repayment by instalments.

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<sup>11</sup> this is the very limited exception mentioned under the heading "Payments to the Payee" in paragraph 1.5. Where the CSA is satisfied that an employer has deducted the amount from the Payer's salary but may not have sent it to the CSA, the CSA can pay this amount as an advance to the Payee from consolidated revenue. If the amount is not subsequently received from the employer, the CSA will recover it from either the employer or the Payer, depending upon the circumstances

## **SECTION TWO**

### ***MONITORING PAYEE COMPLAINTS***

2.1 In November 1995 my office advised the CSA that we intended to monitor complaints for twelve months from 1 July 1995 to 30 June 1996, to identify those that related to Payee overpayments. We undertook to provide the CSA's National Office with quarterly reports of these complaints, so that it could look at the underlying cause of each complaint and assess the degree to which the branches were following National Guidelines. The CSA agreed to this approach.

2.2 We received a total of 119 complaints from Payees with child support overpayments during the twelve month monitoring period. Where necessary, the Ombudsman's office investigated these individual complaints, but we then referred the matter to the CSA for further analysis.

2.3 The CSA's National office obtained comments from the branch that administered each case and then reported back to us with its own analysis of whether the case had been administered correctly, and if not, identifying any shortcomings. The CSA's reports covered 91 of the complaints that we identified.<sup>12</sup> The CSA's own analysis showed significant shortcomings in the way these overpayment had been administered. The CSA found that the Agency's actions were correct and generally in accordance with policy in only 26 of these 91 cases. Agency staff had failed to follow proper procedures in the remaining 65 cases.

#### **Inadequate notice and negotiation**

2.4 In 46 cases the CSA's errors related to notification and recovery arrangements. The CSA had either:

- failed to notify the Payee of the debt;
- notified the Payee after an unacceptable delay
- failed to provide an adequate explanation of the reason for the debt; or
- failed to negotiate a recovery arrangement with the Payee.

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<sup>12</sup> a detailed summary of the numbers of complaints in each quarter, and the CSA's assessment of the way they were handled is included at Appendix A

2.5 The CSA told us that these problems were mainly due to staff inexperience and lack of awareness of the correct procedures, and that it intended to address this with further training.

#### **Overpayments being recovered in error**

2.6 The remaining 19 overpayments were “top-up debts” and should not have been recovered from the Payee.<sup>13</sup> The CSA’s computer system had incorrectly identified these debts as Payee overpayments. The CSA undertook to implement system changes to ensure that this did not recur. This change finally occurred in late June 1996, and seems to have removed “top-up” debts as a cause for complaint.

#### **General improvement in CSA’s handling of overpayments**

2.7 As noted above, the CSA’s computer system has been modified to correctly identify ‘top-up’ debts as belonging to the Payer instead of the Payee. As a result, when the CSA asks a Payee to repay an overpayment, the overpayment is likely to be correct. In most cases, the CSA provides better written notice of the amount and reason for the overpayment, and the notice also invites the Payee to negotiate a suitable rate of recovery. But the CSA’s evident failure to comply with National Policy in a significant number of cases is of continuing concern.

#### **Complaints since the monitoring period**

2.8 The improvement in the CSA’s administrative procedures for notification and recovery of debts has not eliminated complaints. In the nine months following the monitoring period we received a further ninety-five complaints from Payees with child support overpayments. Many of these complaints did not require investigation. Often, our investigation officers spent time explaining the process to Payees - clarifying that the CSA is required to recover the overpayment, and reassuring them that debts can occur without the debtor (ie, the Payee) necessarily doing anything wrong.

2.9 Although the amounts involved are often quite small, the overpayment can have a devastating effect on low income Payees, whose income is reduced without warning and whose future payments are

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<sup>13</sup> see footnote 11 on page 9

uncertain. In these cases, we explain some of the options that may be available to Payees to try to mitigate the effects of the debt.<sup>14</sup>

2.10 We identified a number of systemic issues as a result of our focus on Payee overpayments, both during and since the monitoring period of the project. Some of these systemic issues relate to the CSA's administrative processes, others to the CSA's legislation. There is a further complication in the way that child support affects the Payee's social security entitlements [now paid by Centrelink]. Section Three of the report canvasses these issues in detail, and suggests remedies for the problems they cause.

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<sup>14</sup> these include applying for a review of the assessment if the debt arises as the result of the Payer's estimate, or in some cases giving advice about negotiating a recovery rate, or suggesting financial counselling

## **SECTION THREE**

### ***SYSTEMIC ISSUES***

3.1 We identified several systemic issues in the course of the project, including:

- Shortcomings in the way the CSA's accounting system records and manages Payee debts and recovery.
- The CSA's negotiation process.
- The Payee's possible loss of past Family Payment entitlements [paid by Centrelink].<sup>15</sup>
- The CSA's policy of intercepting Payee tax refunds to recover child support debts.
- The CSA's recovery action where the Payer falls into arrears after the CSA has raised an overpayment against the Payee.
- Overpayments arising from the Payer's estimate of current year income.
- The difficulties the CSA faces when its own error has contributed to the overpayment (or caused it entirely).

3.2 Each issue is dealt with separately in this section. Where possible, we have suggested a remedy for the problems identified.

#### **Shortcomings in the way the CSA's accounting system records and manages Payee debts and recovery**

3.3 Not every retrospective reassessment will result in a Payee overpayment. In general terms, there are two steps involved in the CSA's calculation of an overpayment. The first step is reassessment of the liability, which reduces the amount the Payee was entitled to receive. The second step is a comparison of the Payee's entitlement with the amount

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<sup>15</sup> which can mean that the Payee is in a worse position when the debt is recovered than they would have been if the overpayment had not occurred

the CSA has actually collected from the Payer and disbursed to the Payee. If the CSA has not collected all the child support due under the previous assessment, there may not be an overpayment. In some cases, the result of the retrospective reassessment may simply be that the Payer's arrears have been reduced.

3.4 Where the CSA has collected and paid out more than the revised liability, the reassessment will result in an overpayment. This is an amount that is both:

- a credit for the Payer (who is entitled to a refund of this amount from the CSA);
- an overpayment for the Payee (who is liable to repay the amount to the CSA, whether or not the CSA has yet refunded the credit to the Payer).

3.5 The CSA's computer system requires manual intervention to refund any credit to the Payer. Refunding the credit amount to the Payer is a necessary pre-cursor to the CSA entering into arrangements to recover the debt from the Payee by withholdings.<sup>16</sup>

*No refund to Payer, no recovery by instalments*

3.6 If the Payer does not request a refund of the overpayment, the overpaid amount remains in the account as an advance against their future child support. The CSA's accounting system shows the amount as an 'excess non-cash credit', which is money not available for payment to the Payee (who has already received it). As a result, the CSA's computer system would immediately stop further payments to the Payee. The Payee's

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<sup>16</sup> The CSA has provided the following comments on paragraphs 3.5 to 3.10:

"We do not consider it is correct to say the CSA's computer system draws a distinction between overpayments that the Payee owes the Payer and amounts the Payee owes directly to CSA. The distinction drawn is the system reflects the state of the account - that is, whether a payment to the Payee is in excess of entitlement and therefore is a debt due to the Commonwealth, or a repayment to a Payer has been funded from consolidated revenue and the Payee has a consolidated revenue debt. Nevertheless, it is true to say the CSA's computer system does limit automatic action relating to payments received because of the status of the account and the need for operator intervention. The system suspends payments on an account while certain action to address the overpayment is taken. There are sound reasons for doing this. If suspension of on-going payments did not occur, the overpayment to the Payee would be compounded by further payments in excess of entitlements. It is at this stage CSA commences negotiations with the clients to recover and repay the overpayment. Any failure to negotiate a recovery arrangement with the Payee will see the amount remain in *xs non cash* and no money will be disbursed. Therefore, the problem is not a system limitation, but one of debt management practice. Our policy requires that overpayments actually be paid to Payers. It may be that some of our Branch practices do not reflect this."

entitlement will gradually catch up with the amount received, as each month's child support falls due and is offset against the amount remaining in 'excess non-cash credit'. Once the credit is exhausted, payments to the Payee will recommence.

*Account in 'excess non-cash credit'*

3.7 If the account is in 'excess non-cash credit', the CSA notifies the Payee of the new assessment. It appears, however, that the CSA does not routinely advise the Payee of the amount of the overpayment, nor will it contact the Payee to negotiate recovery by withholdings. If the Payee wishes to negotiate an amount to be withheld from ongoing payments, it will be necessary for the CSA to convert the debt from an 'excess non-cash credit', to a 'consolidated revenue debt' which is money owed to the Commonwealth. Usually, the CSA will refund the credit to the Payer, in order to cancel the credit, and produce a consolidated revenue debt on the account.

*Recovery by instalments*

3.8 Once the CSA has refunded the credit to the Payer, they will have paid less to the CSA than the CSA has paid out to the Payee. The difference is shown as the Payee's debt to consolidated revenue. The Payee is then able to negotiate repayment by withholdings.

3.9 The Payee's ability to negotiate recovery by instalments depends on the CSA receiving continuing payments from the Payer. When the Payer makes a payment, the CSA can withhold part of each payment before disbursing it to the Payee. However, if the CSA receives no future payments, there will be no disbursements to the Payee (and no recovery).

3.10 We are not convinced of the logic of this arrangement. The Payee owes the debt to the CSA, whether or not the CSA has already refunded the credit to the Payer. Furthermore, the purpose of this distinction between a Payer's credit sitting in the account and money they pay afterwards is not clear. It would be feasible for the Payer to receive a refund of their credit and use that same amount to make future payments to the CSA (or even return the whole amount immediately to the CSA).

3.11 In some situations it is not desirable for the CSA to refund the credit to the Payer because it knows or expects that there will be a change to the

account that will reduce or overcome the overpayment. The Payer may also wish to make further payments to the CSA in satisfaction of their monthly child support liability, and for the CSA to disburse these amounts to the Payee. This option is not contemplated in the CSA's debt management practices and would appear not to be supported by the CSA's computer system, as illustrated in the following case study.

3.12 We have recently investigated a complaint in which the CSA retrospectively assessed a case, producing a credit of around \$3000 for John, the Payer, and an overpayment of the same amount for Sue, the Payee.

3.14 The circumstances which led to the debt were unusual, and it appeared likely that the assessment would be increased again by a review officer (with the effect of cancelling Sue's debt). CSA branch staff discussed the situation with John, who agreed that the CSA should retain the credit until the review officer had made a determination. The CSA continued to collect child support from John's salary. The CSA intended to release these monthly payments to Sue pending resolution of the complaint.

3.15 The branch altered the account details to convert the excess non-cash credit to a consolidated revenue overpayment, with nil recovery. It believed that this would have the effect of leaving the credit undisturbed. Four months later when the new determination was made, the CSA discovered Sue's debt had increased. The CSA's computer system had used part of the credit to make up shortfalls in the amounts that it collected from John's salary. The CSA accounting system had, in effect, paid Sue these amounts twice.

3.16 The CSA's accounting system should be an aid to the CSA administering its legislation, rather than a hindrance. The CSA should be able to manage a Payer's credit, correctly disburse payments to the Payee and put in place a workable recovery arrangement. The system should also produce information about the balance of a Payee's debt and when and how it occurred, in a format that can be readily understood by the Payee.

3.17 We suggest that the CSA explore options for recording details of Payee debts separately from the details of Payer credits, as part of the design phase of its proposed new Information Technology. A separate debt management system could assist in differentiating between money available for payment to the Payee and amounts standing to the Payers

credit, but which the Payee has already received. It may also overcome the difficulties the CSA encounters in negotiating recovery in the situation where the Payer has elected to leave the overpaid amount in credit.

### **Recommendation 1**

That the CSA explore options for recording details of Payee debts separately from the details of Payer credits, as part of the design phase of its proposed new Information Technology.

### **The CSA's negotiation process**

**3.18** The CSA's Child Support Discussion Paper 1/95 states that "a request for repayment of an overpayment should be made by a telephone call and confirmed by a letter". It also states that "the Agency should always negotiate with the Payee" and that "the ongoing entitlement should continue to be disbursed until the Payee has been notified and allowed reasonable time to respond". The CSA's "Collection and Enforcement Policy", issued in December 1996, sets out the CSA's new policy, which is to contact the Payee by telephone to advise that a debt has occurred and to negotiate recovery arrangements for that debt. The current policy does not require Agency staff to write to the Payee to confirm the amount of, or reasons for the debt.

**3.19** The CSA's current policy also states that it "will not take any action to recover an overpayment without first contacting the Payee". Despite this, many complainants told us that the CSA had stopped all payments without notice. This may actually be a timing issue, in that a disbursement date may have passed before the CSA was able to negotiate a repayment arrangement with the Payee. However, I believe the CSA should continue to disburse child support to the Payee until it has made reasonable efforts to negotiate a repayment arrangement with the Payee, and regardless of whether it has refunded the overpayment to the Payer.

**3.20** Even where the CSA acted in accordance with the guideline there were problems raised by some complaints. Contacting the Payee by telephone at the outset to explain the debt and negotiate recovery was not particularly effective in some cases. Most people would require time to plan or revise their budget. As well as looking at fixed costs such as

mortgage or rent, the Payee would require information about the amount (and certainty) of future child support payments, and the effect of the reduced child support upon their social security entitlement [now paid by Centrelink]. Without prior written notice, the Payee was not in position to negotiate effectively, and could not make an immediate offer.

**Recommendation 2**

That the CSA continue disbursements for a reasonable period after the Payee is notified of the overpayment.

**Recommendation 3**

That the Payee be given written notice of the overpayment reason and amount before the CSA seeks to negotiate recovery, and that the Payee be advised of future child support entitlement and collections as part of this negotiation process.

*Negotiated recovery: relative priorities of recovery/ongoing child support*

3.21 A further problem occurs where the Payee negotiates a recovery arrangement. The CSA records the withholdings as an amount to be deducted from each Payee disbursement. The withholding amount is not adjusted to reflect any changes in the amount the CSA collects, which can mean that the recovery arrangement takes precedence over ongoing child support. This anomaly is illustrated in the following example:

- Doug, the Payee, has a child support overpayment, but an ongoing entitlement of \$150 per month. He works out a budget and calculates he can manage with just \$100 per month. The CSA records withholdings of \$50 per payment.
- if the CSA receives nothing from Helen, the Payer, in a particular month, there will be no payment to Doug and no recovery.

- if the CSA receives only \$50 from Helen in a particular month, the CSA will retain this and disburse none to Doug.
- if the CSA receives only \$100 from Helen in a particular month, it will retain \$50 and disburse \$50 to Doug.
- if, in one month, Helen makes two \$75 payments to the CSA, and each of these payments is processed in time for one of the two CSA disbursement days per month, \$50 will be deducted from **each** disbursement. In this instance, the CSA will have recovered \$100 and Doug will have received only \$50 in the month.
- if Helen pays nothing in one month, and then \$300 the following month, the CSA will recover only \$50, releasing \$250 to Doug.

#### **Recommendation 4**

That the CSA negotiate and record recovery by withholding a percentage of each disbursement, rather than a set amount per disbursement. This would ensure that reasonable and consistent priority is given to the Commonwealth's recovery of the debt and to ongoing support for the children.

#### **The Payee's possible loss of past Family Payment entitlements [paid by Centrelink]**

3.22 If the Payee receives more than the basic rate of Family Payment from Centrelink, this may be affected by their child support. But Family Payment is not assessed with reference to the Payee's child support **entitlement**. Centrelink takes into account the amount of child support **actually received** by the Payee in a particular month to determine how much Family Payment they will get in the following month.

#### *Centrelink procedures for assessing Family Payment*

3.23 Centrelink sends a written advice to the Payee when it reduces Family Payment because of their child support receipts in the previous month. If the Payee disagrees, they can request a review of Centrelink's decision. Review requests can be made at any time, but there is a thirteen

week time limit for payment of arrears arising from a review. In most cases, the Payee will not be aware of the child support overpayment at the time they receive the child support, or when Centrelink takes it into account to reduce their Family Payment. Notice of the overpayment will come months, even years after the actual payment is made.

#### *Recovering the debt from future child support*

3.24 Where the Payee has a CSA overpayment, Centrelink will already have taken that child support into account in determining the Payee's Family Payment. If the CSA subsequently recovers that overpayment by withholdings from future child support, Centrelink will take into account only what child support the Payee receives during the period of recovery. Centrelink disregards the recovered child support. This policy seems fair, because Family Payment is worked out on the basis of the Payee's current need, taking into account the amount of child support they have received, at the time of receipt.

#### *Other recovery methods*

3.25 However, the CSA's recovery options are not limited to withholdings from future child support. The CSA can also recover Payee debts by:

- intercepting the Payee's tax refund;
- arranging for Centrelink to recover directly from other payments such as Sole Parent Pension, Newstart Allowance or Disability Support Pension; or
- cash refunds by the Payee.

3.26 If the CSA recovers the overpayment by using one of these methods, this circumvents the 'balancing out' effect of Centrelink's Maintenance Income Test, based on net current child support receipts. The Payee may actually be out of pocket.

#### *Arrears of Family Payment*

3.27 Once the Payee is notified of the child support overpayment, they could ask Centrelink to reassess their Family Payment to reflect the fact that they are required to repay the child support. We are not aware of any case Centrelink has paid arrears of Family Payment. This is because the

Social Security legislation imposes a strict limit on the payment of arrears.<sup>17</sup> Arrears will only be paid if the person seeks a review of the decision within thirteen weeks of the date they were notified of Centrelink's decision. In most cases, the Payee is not in a position to appeal against the reduction of family payment within thirteen weeks of Centrelink's notice, because they will not be aware of the child support overpayment within that period.

*The equity of this policy*

3.28 The four parties involved in any child support overpayment are the Payee, the Payer, the children, and the Commonwealth. When the CSA recovers the debt, the Payer has usually received a full refund of all amounts which they paid in excess of the liability (or the amount will remain in the account as a credit against future child support). The Commonwealth stands to recover all amounts it has refunded to the Payer. Social Security legislation prevents the Commonwealth from paying arrears to the Payee to place them in the position they would have been in if the overpayment had not occurred.<sup>18</sup> The only party who may be out of pocket will be the Payee, and (indirectly) the children. This does not fit comfortably with the CSA's role of collecting money for the benefit of the children. This is particularly so considering that the Commonwealth could actually be saving on its social security outlays as the result of this interaction of the social security and child support laws.

**Recommendation 5**

That the CSA, in conjunction with DSS [now Centrelink], consider options to overcome the situation where the Payee's Family Payment is not increased to reflect the retrospective reduction in child support. At the very least, the CSA should explore the possibility of waiving recovery of a portion of a child support overpayment, equivalent to the amount of the Payee's Family Payment reduction for that child support at the time it was received.

<sup>17</sup> section 887 of the *Social Security Act 1991*

<sup>18</sup> by contrast, Centrelink is able to 'reconcile' family payment entitlement where the CSA pays a lump sum payment for child support arrears. At the Payee's request, Centrelink will compare the amount of Family Payment which that person would have received if the child support had been paid when it was due, rather than as a lump sum. In this situation, the Payee is in a position to request a review within 13 weeks of receiving Centrelink's notice, so Centrelink can pay arrears

### **The CSA's policy of intercepting Payee tax refunds to recover child support debts**

**3.29** Section 72 of the *Child Support (Registration and Collection) Act 1988* (the Collection Act) authorises the CSA to intercept a tax refund to satisfy a person's child support debt. This means that the CSA can take a Payer's tax refund where they have arrears of child support. The refund will then be disbursed to the Payee. According to the Explanatory Memorandum to the Child Support Bill 1987, Section 72 was intended as "*an aid to efficient collection of child support debts by the Registrar*".

**3.30** However, because a Payee's child support debt is a debt due to the Commonwealth under the Collection Act, the CSA may also intercept a Payee's tax refund in the situation where they have been overpaid child support. The Explanatory Memorandum does not indicate any deliberate intention for the Commonwealth to use this measure as an aid in its own debt enforcement. It is worth noting that the CSA's legislative power to garnishee amounts held by third parties does not entitle it to do so in the case of Payee overpayments. In any case, we do not believe that the CSA should routinely use this discretionary power to collect money owing by the Payee to the Commonwealth, without considering the special circumstances of each case.

**3.31** The Registrar's power to intercept tax refunds is discretionary. We believe that legislation should be administered in a manner that promotes its objectives. The objectives of the Collection Act can be found in section 3. For example, section 3 (b) says: "*that periodic amounts payable by parents towards the maintenance of their children are paid on a regular and timely basis*".

**3.32** It follows that the CSA should intercept tax refunds where doing so would promote the objective of regular and timely maintenance for children. Intercepting a Payer's refund when they have arrears of child support promotes the objects of the legislation, since that money can then be disbursed to the Payee for the benefit of the children. It is difficult to argue that recovering a Payee's debt to the Commonwealth by intercepting their tax refund is consistent with the aims of the legislation, although it is certainly an action open to the CSA for the recovery of such a debt.

**3.33** We believe that the CSA should recover a Payee's child support debts in a way that minimises disadvantage to the Payee and thus the children. The CSA's negotiation of a rate of recovery should be open and

transparent. If the Payee has ongoing child support entitlement, and the CSA is recovering by withholdings, extra recovery action via an intercept may not be warranted. We believe the CSA should only automatically intercept the Payee's tax refund if the Payee has not responded to invitations to negotiate a suitable repayment arrangement. The CSA should also consider whether there are any financial repercussions affecting the Payee's Centrelink Family Payment entitlements before it recovers a Payee's debt in this way.<sup>19</sup>

#### **Recommendation 6**

That the CSA reconsider its policy on intercepting Payee tax refunds to recover Payee overpayment. Staff should be aware that this is a discretionary power. The CSA's guidelines should differentiate between using this power for child support collections from Payers and its debt recovery processes from Payees.

#### **Recommendation 7**

That if the CSA concludes an intercept of the Payee's tax refund is warranted in the circumstances of the case, it should negotiate a suitable amount with the Payee. This could be a percentage of the refund if the negotiations take place in advance, or an agreed dollar amount if the negotiations are taking place once the CSA knows a refund is available.

#### **Recommendation 8**

That the CSA's overpayment advices should warn the Payee that the CSA may recover the debt from future tax refunds if no current recovery arrangement is in place.

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<sup>19</sup> as described in Section 2

**CSA's recovery action where the Payer falls into arrears after the CSA has raised an overpayment against the Payee**

3.34 We have received complaints from Payees who have a child support overpayment which the CSA is seeking to recover, even though they are currently owed arrears of child support. Typically, the overpayment relates to an earlier period, where the CSA reassessed the liability and refunded the resulting credit to the Payer. Subsequently the Payer has fallen behind with child support payments. The CSA may not be able to take collection action against the Payer, but it may nevertheless insist that the Payee repay their overpayment to the Commonwealth.

3.35 The case example which follows illustrates another possible scenario. It is based upon a complaint we received in 1996.

3.36 Christine, the Payee had a child support overpayment that arose because Richard, the Payer lodged an income estimate, reducing his liability. Richard elected to leave the resultant credit with the CSA, to avoid the situation where Christine would have to repay money she had already received and spent for the benefit of their children. Christine applied for a review of the liability, presumably to overcome the effect of the estimate. The Review Officer decided to increase Richard's child support, despite the fact that he was unemployed (the Review Officer took into account Richard's potential earning capacity).

3.37 Unfortunately, the CSA's computer system mistakenly identified the credit arising from Richard's estimate as cash available for payment to Christine. When the CSA implemented the Review Decision, amounts were disbursed to Christine without the CSA first receiving them from Richard.

3.38 The CSA eventually discovered this error and advised Christine that she would have to repay the overpayment (around \$2,000). Normally, recovery would be by withholding from future child support. In this case, however, Richard did not make any further payments to the CSA. He had no income other than his Centrelink payments, and no valuable assets. His child support arrears increased to approximately \$20,000. The CSA assessed that legal action to collect arrears was unlikely to be successful, so Christine had no prospect of receiving ongoing child support payments.

3.39 The CSA advised Christine that it intended to recover the debt. As she was employed, the CSA said she was required to make cash payments to

the CSA. The CSA also advised her that it intended to intercept her tax refund if one became available. Christine was making cash payments, but was finding it difficult to manage on her salary. She found it distressing to be repaying the debt when she knew she was owed considerable child support which the CSA could not collect.

3.40 There appear to be no specific guidelines that would assist CSA in making a decision about what recovery action is appropriate in a situation like Christine's, where the Payee has a debt but is also owed child support by the Payer which would be sufficient to satisfy that debt.

3.41 Following our investigation, the CSA conceded the 'unreasonableness' of the outcome for Christine. The agency agreed to suspend recovery action until it was able to collect some child support payments from Richard. The CSA will attempt to recover Christine's overpayment from future child support collections. However, Christine's debt cannot simply be transferred to Richard. If the CSA cannot collect any child support from Richard (or if his arrears reduce because of some retrospective change to the assessment) the CSA may once again ask Christine to repay the debt.

#### **Recommendation 9**

That the CSA develop a policy regarding the circumstances in which it would be appropriate to recover an overpayment where the Payee has uncollected child support arrears. The CSA's policy should address the comparative priorities of debts to the Commonwealth and support for children.

#### **Overpayments arising from the Payer's estimate of current year income**

3.42 For stage 2 cases, the CSA works out child support using a formula. The formula assessment is based on the taxable income of the Payer and Payee for the financial year two years prior to the child support year. This is intended to produce an amount of child support that reflects the parties' current financial circumstance, but it may not be a fair amount of child support if the income of either party is currently lower than it was two years before. If either party believes their (own) taxable income for the current year is at least 15% less than it was two years ago, they may elect to have their child support worked out with reference to their current

income.<sup>20</sup> This estimate process is most frequently used by child support Payers and has the effect of reducing the amount of child support.

3.43 The income estimate can be lodged at any point in the child support year. It is not necessary for the person who lodges the estimate to prove that their income has dropped. When the CSA receives the estimate form, it reassesses the Payer's child support for the full year. This retrospective reassessment is one of the most common causes for child support overpayments. The overpayment arising from an estimate is a recoverable debt, repayable by the Payee, as soon as the CSA processes the estimate.

3.44 Although the Payer is not required to show proof of a reduction of income, there is some protection against incorrect estimates. The CSA 'reconciles' the estimate, by comparing the Payer's actual taxable income (as shown in their tax return, when lodged) with their estimate.<sup>21</sup> If the Payer's estimate was lower than their actual taxable income, the CSA will increase the assessment accordingly. This extra child support can then be collected by the CSA and passed on to the Payee.

3.45 We understand that the CSA is looking at options to modify this process, so that estimates will be prospective in effect. But even if this occurs, I believe there will still be an inherent unfairness in the estimate process, as illustrated in the following example.<sup>22</sup>

3.46 Jane's 1996/97 child support for four children was based on the 1994/95 taxable income of her former husband, Bill. In 1994/95, Bill's income was \$45,000. In February 1997, Bill lodged an estimate with the CSA saying he expected that his income for the year would be only \$37,000. The CSA reassessed Bill's child support and told Jane that she had been overpaid a total of \$2,000. According to the CSA's new assessment, Bill did not have to pay any more child support, so the CSA could not recover the debt by withholdings. The CSA told Jane that it could ask Centrelink to withhold part of her Sole Parent's Pension (SPP) to repay her debt. Jane believed this was very unfair. She said that Bill had lodged estimates in previous years and his estimates had always been less than his taxable income as shown in his tax returns. But the CSA could

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<sup>20</sup> section 60 of the Assessment Act

<sup>21</sup> section 64 of the Assessment Act

<sup>22</sup> the information in the example is based upon a Payee's complaint to the Ombudsman. The account of what occurred when 'Jane' contacted the CSA is from her perspective. As 'Jane' was satisfied with the outcome of her discussion with the CSA's complaints service, we did not proceed to investigate her complaint

not reconcile Bill's current estimate until after he lodged his 1996/97 return.

3.47 Jane contacted the Ombudsman's office to complain about the CSA's decision to recover a debt which she was certain was wrong. We suggested she discuss her situation with a CSA Complaints Officer, who in turn suggested that Jane apply for a review of Bill's child support on the basis of her belief that the assessment did not properly reflect his financial capacity. Applying for a review did not guarantee that Jane would not have a debt, but it delayed the CSA's recovery of that debt. The CSA Complaints officer told Jane that the CSA would not ask Centrelink to recover the debt while her review application was being considered. She was pleased with this outcome, but still considered it very unfair that she was required to repay a debt that may well be wrong.

3.48 The assessment arising from the estimate is provisional in nature. The CSA is not required to verify the estimate. Apart from seeking a review of child support, as Jane did, the only protection for the Payee is the 'reconciliation' process which can only take place when and if the Payer lodges a tax return. If the reconciliation process increases the amount of child support payable, this will have the effect of cancelling the Payee's debt. If the CSA has recovered any part of that cancelled debt, it must repay that amount to the Payee and recover it from the Payer.<sup>23</sup>

3.49 We believe this process is unnecessarily cumbersome and impacts unfairly upon the Payee who is repaying a debt that has yet to be verified.

#### **Recommendation 10**

That the CSA delay recovery of estimate overpayments until it reconciles the estimate. As part of this change, the CSA may also wish to consider whether it should delay refunding any credit arising from the estimate to the Payer, until after the estimate is reconciled.

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<sup>23</sup> paragraph 6 of Child Support Discussion Paper 1/95

**The difficulties the CSA faces when its own error has contributed to the overpayment (or caused it entirely)**

3.50 Many of the people who contact us about Payee child support overpayments are aggrieved at being asked to repay money they received in good faith and spent for the benefit of their children. This view is understandable, but the situation is unavoidable, given the retrospectivity inherent in the child support legislation.

3.51 In a small number of cases, not only has the Payee received child support in good faith, but the payments were collected as the result of a CSA error. The CSA is required to correct these errors when detected, and to reimburse to the Payer any amounts erroneously collected. Ideally, the CSA should seek to return the parties to the position they would have been in if the error had not occurred. Paragraph 3.27 outlines one circumstance which could lead to the Payee being in a worse financial situation following recovery action. This section deals with another.

*Undetected CSA errors that may lead to financial losses*

3.52 We recently investigated a complaint in which the CSA erroneously accepted an application for an administrative assessment of child support (ie a stage 2 application). The applicant/Payee, Barbara had separated prior to 1 October 1989, which meant that the CSA could only collect child support arising from a court order. Barbara and Mark had never obtained a court order. Once the CSA detected its error, it reimbursed the Payer, Mark, with the child support erroneously collected. The CSA then commenced recovery action against Barbara.

3.53 We argued that Barbara had been financially disadvantaged as a direct result of the CSA's failure to detect an obvious defect in her application. Although Barbara had received money from Mark without a lawful stage 2 assessment, the fact that the CSA made the assessment had prevented her from pursuing her lawful options. If the CSA had refused her stage 2 application at the outset, she would then have known that she should apply to a court for an order for child support, which the CSA could then register and collect. The lapse of time, and changes in circumstances for both Mark and Barbara meant that Barbara could not do this now.

3.54 The CSA had recovered most of the debt from Barbara's tax refund, and asked her to make a cash refund of the balance. Following our investigation, the CSA eventually sought and obtained approval from the Department of Finance to make an Act of Grace payment equivalent to the amount it had already recovered. The Department of Finance also decided to waive the Commonwealth's right to recover the balance of the debt from Barbara.

3.55 While this remedy was appropriate and fair, achieving it took significant time and effort on the part of Barbara, the Ombudsman's office, the CSA and the Department of Finance. It would be desirable for the CSA to use the experience of this particular case to develop guidelines for staff to use in other such cases.

3.56 The circumstances which led the Department of Finance to decide to waive recovery of the debt are comparable to the circumstances that the Commonwealth would take into account in considering a claim for Compensation for Detriment arising from Defective Administration (CDDA). Decision-making under the CDDA scheme is devolved to the agency against which the claim is made. However, the scheme is not available for waiver of debts.

3.57 We note that other Commonwealth departments administer legislation that includes specific waiver provisions.<sup>24</sup> In these departments it is possible for delegated officers to waive recovery of specific categories of debts. These specific waiver provisions are an adjunct to the waiver provisions that the Department of Finance administers under the *Financial Management and Accountability Act 1997*. It may be appropriate for the CSA to consider seeking a comparable amendment to the Child Support legislation for the small number of cases which are likely to qualify.

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<sup>24</sup> for example, the Department of Social Security (S1237 of the *Social Security Act 1991*), and the Department of Employment, Education, Training and Youth Affairs in respect of Student Assistance payments (Section 289 and 290 of the *Student and Youth Assistance Act 1973*)  
[NB Centrelink is the new agency responsible for administration of both these acts]

**Recommendation 11**

That the CSA consider options for waiving recovery of Payee overpayments where the debt arises from CSA error and recovery would leave the Payee in a worse financial situation than if the CSA's error had not occurred. As a minimum, the CSA should develop a specific instruction to staff on situations where it would be appropriate to approach the Department of Finance for approval to waive recovery of the debt.

**Recommendation 12**

That the CSA explore the possibility of a legislative amendment to the *Child Support (Registration and Collection) Act 1988* which would enable the Registrar to waive recovery of a Payee's child support debt where the debt arises from CSA error and recovery would leave the Payee in a worse financial situation than if the CSA's error had not occurred.

## **SECTION FOUR**

### **CSA COMMENTS ON RECOMMENDATIONS**

#### ***Ombudsman Recommendation 1***

*That the CSA explore options for recording details of Payee debts separately from the details of Payer credits, as part of the design phase of its proposed new Information Technology.*

#### **CSA Response**

The CSA's computer system currently does distinguish between Payee debit and Payer credit. However, options for recording details of Payee debts separately from the details of Payer credits is also being explored in the design of the new child support system. This system is due for implementation in December 1998.

#### ***Ombudsman Recommendation 2***

*That the CSA continue disbursements for a reasonable period after the Payee is notified of the overpayment.*

#### **CSA Response**

CSA policy on overpayments requires that no recovery will occur before contacting the Payee, and that a payment arrangement be negotiated immediately upon becoming aware of an overpayment. If this policy were not adopted, the overpayment problem may be compounded by continuing disbursement in excess of entitlements. Making a recovery arrangement allows continued disbursement with a small amount withheld. It is feasible that, in the particular circumstances of a case, an arrangement could be to commence withholding from an agreed time in the future, therefore providing for full disbursement for a period of time.

#### **Ombudsman comment on CSA response**

In our view, it would be reasonable for the CSA to disburse to the Payee any amount that it collects from the Payer in satisfaction of current liability after the overpayment has occurred. Disbursements of current

child support will not increase the amount of the debt. The debt balance will remain static and the Payee will have time to rearrange their finances.

### **Ombudsman Recommendation 3**

*That the Payee be given written notice of the overpayment reason and amount before the CSA seeks to negotiate recovery, and that the Payee be advised of future child support entitlement and collections as part of this negotiation process.*

### **CSA Response**

Current CSA policy supports the need to notify the Payee of overpayments, reasons and amount immediately. As noted above, oral advice is the preferred method of communication. On request, CSA would also include these details in a letter confirming the arrangement.

CSA can certainly advise the Payee of the Payer's current liability. In many cases where an overpayment occurs, the Payee will already have received a revised notice of assessment advising the Payer's current liability. However, CSA cannot predict with any certainty a future rate of child support payment to which a Payee may be entitled. The Department of Social Security (DSS) [now Centrelink] is responsible for determining the amount of benefits to be paid after the application of the maintenance income test, and may be able to calculate future family payments based on a given child support income amount.

### **Ombudsman comment on CSA response**

We do not believe that oral advice of a debt is, in itself, adequate. The CSA does not provide Payees with written statements of their child support account, so there is no written notice of the amount of the debt, or of its diminishing balance whilst recovery occurs. In our view, the CSA's initial telephone advice of a debt should be routinely followed up by a written notice.

### **Ombudsman Recommendation 4**

*That the CSA negotiate and record recovery by withholding a percentage of each disbursement, rather than a set amount per disbursement. This would ensure that reasonable and consistent priority is given to the Commonwealth's recovery of the debt and to ongoing support for the children.*

## **CSA Response**

We agree it may be more appropriate in some cases to recover an overpayment through withholding a percentage of each disbursement. CSA retains the responsibility for ensuring that Commonwealth debt is managed responsibly in overpayment recovery.

The option of using a percentage of the entitlement for debt recovery will be explored in the development of the new child support accounting system. There are a number of options, such as a choice between a set amount or a percentage, and the inclusion of a minimum set amount for recovery of the overpayment. Such an approach could overcome the current difficulties faced by clients, while maximising the repayment of Commonwealth debt.

## **Ombudsman Recommendation 5**

### ***Recommendation 5***

*That the CSA, in conjunction with DSS [now Centrelink], consider options to overcome the situation where the Payee's Family Payment is not increased to reflect the retrospective reduction in child support. At the very least, the CSA should explore the possibility of waiving recovery of a portion of a child support overpayment, equivalent to the amount of the Payee's Family Payment reduction for that child support at the time it was received.*

## **CSA Response**

This recommendation provides that CSA/DSS ought to review the calculation of family payments where there has been an overpayment of child support. This recommendation has been brought to the attention of the Department of Social Security [which retains responsibility for Social Security policy]. DSS advises it is examining options for resolution of this problem. Discussions between DSS and CSA are expected to take place in the near future to further explore options. CSA will advise you of the outcome.

The recommendation that CSA explore the option of waiving a portion of an overpayment equivalent to the amount of the Payee's Family Payment reduction is not considered an appropriate measure by both DSS and CSA. DSS believes this would blur the distinction between family payments and

child support, and it would be preferred that these be treated as separate issues.

Waiver by CSA of the portion of a Payee debt corresponding to a reduction in social security benefits would also blur responsibility for determination of entitlements to social security benefits. Additionally, the administrative cost to achieve this outcome would be significant, and there may also be privacy implications for clients.

An overpayment of child support is a debt due to the Commonwealth, and as such CSA is able to seek to have the Minister for Finance waive such an amount under the *Audit Act 1901* [now the *Financial Management and Accountability Act 1997*]. There is a general duty to recover amounts repayable to the Commonwealth. Therefore, the decision to recover or not recover a liability owing to the Commonwealth must take into account the need for sound financial management and the protection of the interests of the Commonwealth.

#### **Ombudsman Recommendation 6**

*That the CSA revise its policy on intercepting Payee tax refunds to recover Payee overpayment. Staff should be aware that this is a discretionary power. The CSA's guidelines should differentiate between using this power for child support collections from Payers and its debt recovery processes from Payees.*

#### **CSA Response**

Child Support Ruling CSR 96/3 states that the application of a tax refund will not be used in circumstances where a client, whether Payer or Payee, is complying with an existing payment arrangement and where this would cause the person serious hardship.

The current CSA collection and enforcement policy reflects that intercepting tax refunds is discretionary. It states that tax refunds should not be intercepted where the client does not have the capacity to pay. We do not consider the policy needs to differentiate between Payees and Payers.

#### **Ombudsman Recommendation 7**

*That if the CSA concludes an intercept of the Payee's tax refund is warranted in the circumstances of the case, it should negotiate a*

*suitable amount with the Payee. This could be a percentage of the refund if the negotiations take place in advance, or an agreed dollar amount if the negotiations are taking place once the CSA knows a refund is available.*

### **CSA Response**

Section 72 of the Registration and Collection Act states that "the amount owing" (the tax refund) may be applied to the amount of the debt. Our interpretation to date has been that, although the word "may" gives discretion as to whether or not a tax refund may be applied, there is no discretion that a part of an amount may be applied. We have considered your comments and agree to reconsider our interpretation.

CSA's collection and enforcement policy recognises that hardship will be taken into consideration in deciding whether to apply the tax refund. CSA negotiates with the Payee based on the particular circumstances of the case. This provides an opportunity to consider the financial circumstances of the Payee and his or her capacity to pay.

### ***Ombudsman Recommendation 8***

*That the CSA's overpayment advices should warn the Payee that the CSA may recover the debt from future tax refunds if no current recovery arrangement is in place.*

### **CSA Response**

CSA's written overpayment advice currently does advise the Payee that the CSA can recover any unpaid amounts from their tax refund.

### ***Ombudsman Recommendation 9***

*That the CSA develop a policy regarding the circumstances in which it would be appropriate to recover an overpayment where the Payee has uncollected child support arrears. The CSA's policy should address the comparative priorities of debts to the Commonwealth and support for children.*

### **CSA Response**

The recommendation suggests that the CSA's policy of recovering Payee overpayments while the Payer also has child support arrears is

inappropriate, as both debts are due to the Commonwealth. As noted earlier, there is a general duty to recover amounts repayable.

CSA's current policy strikes a balance between priorities of support for the children and recovery of those debts. CSA policy covers situations where there is no capacity to pay. CSA may agree to forgo collection of the overpayment for a period where satisfied that there is no capacity to pay.

CSA has reviewed its policy on recovery of overpayments to the Payee which result from the Payer's cheque payments being dishonoured. It is not appropriate in the first instance to seek recovery from the Payee, but to pursue the Payer for the amount.

### ***Ombudsman Recommendation 10***

*That the CSA delay recovery of estimate overpayments until it reconciles the estimate. As part of this change, the CSA may also wish to consider whether it should delay refunding any credit arising from the estimate to the Payer, until after the estimate is reconciled.*

### **CSA Response**

Your recommendation appears to imply that the rights of the Payees in this situation ought to be paramount to the rights of the Payers. Both Payers and Payees have the right to equitable treatment under the law.

The Child Support (Assessment) Act 1989 expressly provides the right to Payers to lodge estimates and requires the Registrar in the majority of cases to give immediate effect to them. We have a responsibility to uphold the rights and enforce the obligations under the law of all parties involved in child support. While I understand your concern for Payees it would be unfair to Payers to require them to pay more than they are required to under the law which recognises capacity to pay.

The recent changes to the income estimate provisions contained in Child Support Legislation Amendment Act (No.1) 1997 Act No 83 of 1997 (Date of effect 21 July 1997) will operate to reduce the number of instances where overpayments are created by the lodgment of income estimates. These provisions are dependent on the existence of regulations which are currently being developed.

## **Ombudsman comment on CSA response**

Changing the arrangements for processing income estimates so that they have prospective effect should prevent Payee overpayments from estimates in almost all cases. We also note the Government's intention to empower the Registrar to reject an estimate where he is not satisfied that it accurately reflects the actual income of the parent.<sup>25</sup> These two changes will substantially address our concerns about the impact of estimate processes upon the Payee.

### **Ombudsman Recommendation 11**

*That the CSA consider options for waiving recovery of Payee overpayments where the debt arises from CSA error, and recovery would leave the Payee in a worse financial situation than if the CSA's error had not occurred. As a minimum, the CSA should develop a specific instruction to staff on situations where it would be appropriate to approach the Department of Finance for approval to waive recovery of the debt.*

### **CSA Response**

The Commonwealth's policy is to recover overpayments wherever possible. CSA will explore the circumstances in which the use of waiver provisions are recommended. Staff instructions will then be issued.

### **Ombudsman Recommendation 12**

*That the CSA explore the possibility of a legislative amendment to the Child Support (Registration and Collection) Act 1988 which would enable the Registrar to waive recovery of a Payee's child support debt where the debt arises from CSA error and recovery would leave the Payee in a worse financial situation than if the CSA's error had not occurred.*

### **CSA Response**

CSA has recently reviewed whether it is necessary to seek its own power to waive debts similar to the power of DSS [now Centrelink]. It was

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<sup>25</sup> the Government Response to the Report of the Joint Select Committee on Certain Family Law Issues (recommendations 125 to 129)

considered premature to do so, as the CSA until recently had not explored the use of the existing channels of the exercise of the general waiver powers by the Minister for Finance. We consider this may provide adequate avenues for the management of CSA errors.

The decision to recover or not recover a liability owing to the Commonwealth must take into account the particular circumstances of the case, the need for sound financial management and the protection of the interests of the Commonwealth.

*Detailed analysis of complaints received in 1995/96***First Quarter**

A.1 We received forty complaints from July to September 1995. We reported these cases to the CSA's National office and requested a copy of the CSA's written notice of the debt and details of negotiation. The agency obtained these details from the branches for discussion at a meeting with our investigating officer. The CSA agreed that most of the cases we had identified showed significant failures and errors on the agency's part.

A.2 The CSA could not identify four cases on the basis of the information we recorded about the complainant, so its report covered thirty-six cases. The CSA's own assessment of these cases indicated that there were only two cases out of thirty-six where the agency's action was correct and generally in accordance with policy.

A.3 The CSA's handling of the remaining thirty-four cases was deficient. The deficiencies included:

- thirteen overpayments which the CSA should have recovered from the Payer and not the Payee (the CSA advised that this was a problem with the way its computer system identified and categorised debts),
- sixteen cases where the CSA was correctly recovering the debt from the Payee, but it had either failed to notify of the debt or the notice was inadequate, or there was an unacceptable delay in issuing the notice,
- five further cases which had other errors relating to the CSA's decision to recover the debt.

A.4 The CSA decided to implement system changes to overcome the problem of incorrect identification of "top-up" debts as Payee overpayments.<sup>11</sup> This change occurred in late June 1996, and seems to have removed "top-up" debts as a cause for complaint.

A.5 In cases where the CSA had failed to provide adequate and timely notice of the debt, the CSA told us that the main reason for this appeared to be staff inexperience and lack of awareness of the correct procedures. The CSA assured us that many branches had already addressed this

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problem and was confident that we would see an improvement in future reports.

### **Second quarter**

A.6 There were twenty-seven complaints received from October to December 1995. The CSA reported back to us on twenty-one of these complaints.<sup>26</sup> There seemed to be some improvement in these reported cases, but the CSA's actions still only complied with national policy in fewer than half the cases included in its report (nine cases out of twenty-one).

A.7 The CSA's handling of the remaining twelve cases was deficient. The deficiencies included:

- five cases where the overpayment was a top up debt, recoverable from Payer rather than Payee,
- three cases where the CSA had either failed to provide the Payee with adequate notice of the amount and reason for the debt before taking recovery action, or failed to negotiate a rate of recovery, and
- four further cases with other instances of CSA error.

### **Third Quarter**

A.8 Thirty-six complaints were received from January to March 1996.<sup>27</sup> The CSA reported back on twenty-two of these complaints. There were no top up debts at all in this quarter, and we were pleased to note some improvement in advice and negotiation. But we remained concerned that the CSA's actions appeared to accord with its national policy in fewer than half of the reported cases (only ten cases out of twenty-two).

A.9 The CSA's handling of the remaining twelve cases was deficient. The deficiencies included:

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<sup>26</sup> the CSA could not identify one case from our information, and did not report back to us on five others. Our preliminary analysis of these five complaints, as advised to the CSA, indicated that one overpayment was recoverable from the Payer, not the Payee; three had instances of failure to adequately advise or explain the debt, or negotiate recovery; and one appeared to have been dealt with in accordance with the CSA's policy

<sup>27</sup> the CSA could not identify one case from our information, and did not report back to us on thirteen others. Our preliminary analysis of these thirteen complaints, as advised to the CSA, indicated that two overpayments were recoverable from the Payer, not the Payee; four had instances of failure to adequately advise or explain the debt, or negotiate recovery; and seven appeared to have been dealt with in accordance with the CSA's policy

- six cases where the CSA had either failed to provide the Payee with adequate notice of the amount and reason for the debt before taking recovery action, or failed to negotiate a rate of recovery, and
- six further cases with other instances of CSA error.

#### **Fourth Quarter**

A.10 We received sixteen complaints during April to June 1996.<sup>28</sup> The CSA reported back on twelve of these complaints. Of these twelve complaints, only five appeared to have been administered in accordance with the CSA's National policy.

A.11 The CSA's handling of the remaining seven cases was deficient. The deficiencies were not so marked as in previous quarters, but included:

- six cases where the CSA had either failed to provide the Payee with adequate notice of the amount and reason for the debt before taking recovery action, or failed to negotiate a rate of recovery, and
- one top up debt, which should have been recovered from the Payer, rather than the Payee.

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<sup>28</sup> the CSA was unable to identify an overpayment for one case, and did not report back to us on 3 others. Our preliminary analysis of these three complaints, as advised to the CSA, indicated that two overpayments appeared to have been dealt with in accordance with the CSA's policy; and one we had insufficient information to categorise