

Chapter 6: Child support and maintenance

women and family law
10th edition



WOMEN'S LEGAL SERVICES NSW



6 Child support and maintenance

The Department of Human Services delivers all the services and payments for Medicare, Centrelink and Child Support (formerly the Child Support Agency).

There are generally two types of financial support that you can receive for children after you separate from your partner (you can also receive financial support from the other parent even if you have never lived together):

- Centrelink family assistance payments from the federal government; and
- **child support** from the other parent.

You may also be eligible for spousal support or **maintenance** after you separate from your partner.

Child support, spousal maintenance and Centrelink family assistance payments apply to couples who were married or in a **de facto relationship**, including a same sex de facto relationship.

6.1 Centrelink family assistance payments

What types of Centrelink family assistance payments can I get if I separate from my partner?

You may be eligible for financial assistance from the federal government to help you with the costs of caring for your children. This financial assistance is generally referred to as 'Centrelink family assistance payments' and may include **Family Tax Benefit Part A**, **Family Tax Benefit Part B** and rental assistance. You may also be able to get other benefits such as a health care card and money to move into rental accommodation (eg payment of the bond).

The type of Centrelink family assistance payments and rates vary for every parent. The type of benefits and amounts depend on your circumstances including your income, the income of any new partner you live with, the number of children who live with you, the time the children spend with the other parent and other factors.

There may be other types of financial assistance from the government that you may be eligible for, depending on your circumstances.

To ask about and apply for Centrelink family assistance payments and other benefits from the government:

- visit humanservices.gov.au/paymentfinder to explore payments based on your circumstances;
- apply for payments online;
- contact Centrelink on 136 150; or
- visit your local Centrelink Service Centre.

If you were already receiving Centrelink family assistance payments or other payments from the government before you separated, you should advise of this change because the type of benefits you receive and the amounts paid will probably change.

If I am receiving Centrelink family assistance payments, do I have to try to get child support from the other parent?

Generally, yes.

Centrelink family assistance and child support payments are closely linked. You must apply for child support from the other parent by contacting Child Support to be eligible to receive more than the base rate of Family Tax Benefit Part A. How to apply for child support is explained below in **section 6.3**.

You have **13 weeks** from the date you separate from your partner to apply for child support. If you do not apply for child support within that time, you can only receive the base rate for Family Tax Benefit Part A.

There are some exemptions to this rule, including where:

- you fear that the other parent may be violent to you;
- you do not know where the other parent is; or
- you cannot establish who is the other parent of the child.

You can request to speak to the social worker over the phone or at a Centrelink Service Centre if you believe you should not need to register for child support from the other parent.

If you and the other parent are able to negotiate a child support agreement within the first 13 weeks of separation, you can register that agreement by contacting Child Support (see **section 6.7**). However, these agreements often take some time to negotiate and it is unlikely you will be able to register an agreement within 13 weeks from your separation. It is usually quicker and easier to apply

for child support immediately when you first apply for Centrelink family assistance payments.

If you only receive the base rate of Family Tax Benefit Part A or you do not receive any family assistance payments, you can make a private arrangement about financial support of the children without applying to Child Support. However, you should get legal advice before entering into a private agreement. See **section 6.7** for more details about private arrangements.

6.2 Child support

What does the law say about child support?

Child support laws provide for the assessment, collection and enforcement of child support payments. The child support laws are administered by the Department of Human Services. Generally, they apply to children in Australia:

- whose parents separated on or after 1 October 1989; and
- who were born on or after 1 October 1989; or
- who have a full sibling born on or after 1 October 1989.

In some limited circumstances financial support can be provided in the form of child maintenance (see **section 6.10**).

Do both parents have to pay child support?

All parents must contribute to the financial support of their children whether they were married, living in a de facto relationship or never lived together.

I was in a same-sex relationship when I had my children. Can I get child support from my ex-partner?

The Federal Government has removed discrimination against same-sex couples in family, child support and social security law (as well as other laws).

Since 1 July 2009 you are able to apply for child support from your former same-sex partner if you and your former partner are recognised as 'parents' under the *Family Law Act*. If you separated from your same-sex partner before 1 July 2009, you can still apply for child support now. Payments cannot be paid for the period before 1 July 2009 and may only start from the date of your application for

child support.

If you were in a de facto relationship with your same sex partner and the child was born through donor insemination, both you and your partner are the child's legal parents under the *Family Law Act*. See Chapter 4, **section 4.4** for more information about same-sex parents under the *Family Law Act*.

Do I have to apply for child support?

As a parent, you have responsibilities and rights. Many parents can choose to arrange child support independently without any assistance from government departments, the courts or other government agencies. If you are separated and receive only the base rate of Family Tax Benefit Part A (or you don't receive family assistance payments at all), you and the other parent can arrange your child support to suit you. However, making a private arrangement to receive less child support than your children are entitled to may negatively affect the amount of Family Tax Benefits you receive. See **section 6.1** for more information about family assistance.

6.3 Applying for child support

Who can apply for an assessment of child support?

Generally, a parent of a child can apply for an assessment of child support.

A person who is not a parent of the child can also apply for an assessment of child support if the non-parent carer is:

- an 'eligible carer' of the child; and
- is not living with either parent on a genuine domestic basis; and
- does not have care jointly with a parent of the child.

An 'eligible carer' is a person who has at least 'shared care' of the child i.e. they have care of the child for between 5 and 9 nights per fortnight.

How do I apply for a child support assessment?

You can:

- visit humanservices.gov.au/separatedparents and complete and lodge an 'Application for Child Support Assessment' form online; or
- telephone Child Support on 131 272 and ask to apply for child support over the phone.

What happens to my child support assessment application?

Before Child Support accepts an application for child support assessment, it must be satisfied that the people claiming to be the parents of the child are in fact the parents.

Once the assessment is made, Child Support notifies both parents of the assessment and lets both parents know about their right to apply for:

- a review of the decision; or
- a declaration that a person should not be assessed because they are not the parent of the child.

What can I do if I need proof that another person is a parent or proof that I am not a parent?

If you think that you are not the parent of a child, or if you do not have proof that the other person who you say is the parent of the child is the parent of the child, you can apply to the **Family Law Courts** for a declaration of parentage.

There are different time limits to file applications in the Family Law Courts about parentage in child support matters. When you receive the written notice from Child Support you must file your application for a declaration *within*:

- **56 days** of receiving the notice, if you are applying to the Federal Circuit Court; or
- **60 days** of receiving the notice, if you are applying to the Family Court or Local Court.

DNA testing may be ordered by the Court to determine if a person is a parent.

Where you are both women and where the Court has to decide if you or the other person is a parent, the Court will need other evidence about your relationship, how the child was conceived and what you and the other person intended when the child was conceived.

6.4 Child support payments

How are child support payments calculated?

Child Support payments are calculated by using a formula based on:

- the costs of caring for children (based on Australian research);
- the income of both parents;

- who cares for the children;
- whether the parents have any other dependent children living with them; and
- whether the parents have any other children for whom they must pay child support (i.e. any other children in child support cases).

There is a basic formula that can be varied to cover different family circumstances.

What if my circumstances do not 'fit' the formula?

If you think the child support assessment is unfair because it does not take into account the special circumstances of your case, you can apply to change the assessment. There are 10 reasons available under the law where you can apply to change the assessment. These reasons are listed on the form you need to use to apply to change the assessment.

You should also provide Child Support with any supporting documents that are relevant to your application to change the assessment. Child Support will send a copy of your application and supporting documents to the other parent. The other parent must fill in a response and provide any supporting documents to Child Support. Child Support must give you a copy of the response and supporting documents.

A senior case officer (**SCO**) will make a decision about whether to accept your application for a change of assessment. The SCO will usually have a conference with you and the other parent - either together, separately or by telephone. Sometimes the SCO will make a decision based on written submissions. Arrangements can also be made to use interpreters. You cannot have a representative appear on your behalf at the conference.

If you are worried about your safety, or if you feel you cannot participate in a conference with the other parent because of domestic violence, let a Child Support officer know when you file your application to change the assessment and when you are contacted by the SCO about your application. Talk to a Child Support officer and SCO about removing all identifying information from your supporting documents before they are sent to the other party.

The process of applying for a change of assessment takes about 3 months.

What should I do if I am unhappy with the decision of the SCO?

If you are unhappy with the decision of the SCO, you can object in writing or by email **within 28 days** of receiving the decision. A different officer will conduct a review of the case and notify you in writing of the decision about your objection.

If you also disagree with that officer's decision, you can apply to the Social Security Appeals Tribunal (SSAT) **within 28 days** of receiving the objection.

If at any point Child Support decides the issues are too complex, you will need to apply to the Family Law Courts to change the assessment. Child Support will tell you if this applies to your case.

What if the other parent's or my circumstances change?

You can ask Child Support to vary your child support assessment if:

- your income or the other parent's income changes by 15% or more from the income used in the original assessment; or
- subject to certain requirements, you earn extra money (e.g. working overtime or second job) to re-establish yourself after separation. You can apply for the extra income to be excluded from the child support assessment for a maximum of 3 years.

Is there a minimum amount of child support payable?

Parents who are responsible for paying child support and who receive income support from Centrelink or Veteran's Affairs, will have a "minimum child support payment" they must pay each week. For parents who have 3 or more families to whom they must pay child support, this minimum amount of child support payable is capped at 3 times the minimum amount and divided equally between all families.

Parents who are responsible for paying child support and who are on a low taxable income but are not receiving any Centrelink income support, may have to pay a set amount per child per week. This is known as a "fixed assessment." If you have more than 3 children, the amount you have to pay is capped. Parents who have good reasons about why their income is so low, can lodge an application with Human Services seeking that the fixed assessment not apply.

6.5 Disagreeing with child support decisions

What if I disagree with a decision made by Child Support about my case?

Child Support must tell you in writing about most decisions it makes about your case. If you think Child Support did not make the right decision, you can ask for a formal review of the decision. This is called an **objection**. You might want to object because you think Child Support did not consider all the facts, used wrong information, or did not apply the law correctly.

You must object to a Child Support decision **within 28 days** of the notice being delivered to your address (**90 days if you live overseas**). You must tell Child Support in writing or by email that you object to the decision. You should give Child Support any documents that support your objection.

You can also object to a child support decision after this time, but you need explain why you are late. If Child Support does not accept your late objection, you can file an appeal about this decision at the Social Security Appeals Tribunal (SSAT). You must do this **within 28 days** of receiving the decision.

Child Support will give the other parent a copy of your written objection and supporting documents. Talk to Child Support about removing all identifying information from your documents before they are sent to the other parent. Tell Child Support if there has been domestic violence or you are afraid of the other parent.

The other parent can respond and provide supporting documents. Child Support will consider the evidence and may talk to you and the other parent about the objection. Child Support has to make a decision about the objection **within 60 days (120 days if a parent lives overseas)** of receiving it.

Child Support must tell you in writing about the outcome of your objection and any changes made to the child support assessment. If you do not agree with this decision you can apply to the SSAT to review Child Support's decision. You must do this **within 28 days** from the date the decision was delivered to your address.

Handy Tip

- Don't ignore letters from Human Services.
- Tell Child Support in writing if you disagree with decisions it makes about your case.
- Check time limits.

6.6 Ending child support payments

Child support payments end if the child:

- dies;
- becomes a member of a couple (married or de facto relationship);
- is adopted; or
- no longer lives in Australia (except if they are in a reciprocating jurisdiction) or is no longer an Australian citizen.

Child support payments also end when a child turns 18. In limited circumstances, child support can continue after a child turns 18.

6.7 Child support agreements

What type of child support agreements can I make?

There are two types of agreements:

- limited child support agreements; and
- binding child support agreements.

Both types of agreements must be signed by both parents and registered with Child Support to be binding.

Child support agreements can cover a range of financial matters about the costs of the children. For example, they might provide for how much money is to be paid on a periodic basis (e.g. weekly), non-periodic payments (e.g. school fees, children's music and sporting activities) and binding agreements might include a lump sum payment of child support.

It is important to get legal advice if you are thinking about entering into a child support agreement. If you are considering a lump sum payment instead of weekly amounts, you must make sure you get

advice about whether this will affect your entitlement to family assistance or other Centrelink benefits.

What is a limited agreement?

A limited agreement is a formal written agreement signed by both parents. You do not need legal advice before signing a limited agreement. However, you should get legal advice to make sure you understand what you are agreeing to and if it is right for you.

There must be a child support assessment already in place before Child Support can accept a limited agreement. The amount you agree to accept or pay in the limited agreement must be equal to or more than the child support amount assessed by Child Support.

Limited agreements are used when parents want some flexibility about child support and are not meant for long-term arrangements.

A limited child support agreement can be ended:

- by another limited or binding child support agreement;
- by a joint letter to Child Support ending the previous agreement;
- if the annual rate of child support payable changes by more than 15%, either parent may choose to end the limited agreement and go back to being assessed by a standard child support assessment. You must tell Child Support in writing about this change;
- by either parent writing to Child Support once 3 years have passed since the making the agreement; or
- by a court order.

What is a binding agreement?

A binding agreement is a written agreement signed by both parents. However, it is different from a limited agreement because:

- you do not need to have a child support assessment formula in place;
- the agreed child support amount to be paid can be less than the child support amount assessed under the formula;
- you both must have independent legal advice before entering into or ending the binding agreement and you need a statement from your lawyers that legal advice has been given; and
- the binding agreement can only be ended by a new binding agreement registered with Child Support or a court order in very limited circumstances.

6.8 Collection of child support payments

How is child support collected?

If:

- Child Support issues a child support assessment; or
- you make a child support agreement and Child Support accepts the agreement; or
- a court order is registered with Child Support (**see section 6.10**),

you can choose to collect payments privately or you can request that Child Support collect child support payments.

Collecting child support payments privately may be an option for you if:

- the other parent has made child support payments regularly in the past; and
- you are satisfied the other parent will make future payments on time and in full.

If private collection arrangements break down, you can ask Child Support to collect payments. Child Support can only collect payments up to three months in arrears (in special circumstances this can be extended to nine months).

You can ask Child Support to collect child support payments for you if you do not want to receive payments directly from your ex-partner. Child Support can deposit the child support payments directly into your bank account or you can discuss other payment methods with Child Support.

6.9 Enforcing child support payments

What can Child Support do to collect unpaid child support payments?

Child Support generally tries to negotiate with the parent who has not paid child support to collect unpaid child support payments. However, if unsuccessful, Child Support may try to enforce payment in various ways such as:

- garnishing wages (take unpaid child support payments directly from a person's pay or bank account);
- enforcing tax return lodgements;
- intercepting tax refunds; or
- issuing overseas travel bans to stop parents who have failed to pay child support from leaving the country until they pay outstanding child support.

If these methods fail, Child Support may start legal proceedings to try and recover the 'debt' of child support payments.

What happens to child support payments if either parent is declared bankrupt?

Child support payments are not affected by bankruptcy. This means the child support debt can still be claimed against the non-paying parent, even if she or he declares bankruptcy.

6.10 Child maintenance

The *Family Law Act* provides for the Family Law Courts to issue child maintenance orders in limited circumstances:

- urgent child maintenance when there is a need for immediate assistance prior to Child Support making an assessment or providing payments;
- a departure is sought from an assessment given by Child Support;
- the child is over 18 and requires support to attend tertiary education; or
- the child is over 18 and has a disability and requires continued support.

6.11 Spousal maintenance

Can I get spousal maintenance from my former partner?

In some circumstances you may be able to receive maintenance from your partner to cover your living expenses.

In order to receive maintenance from your partner (married or de facto) under the *Family Law Act*, you must show that:

- you need the financial support; and
- your partner has the ability to pay for that support.

Maintenance may be ordered because:

- you have been in the relationship for a long time and have lost your work skills;
- you are caring for a child of the relationship;
- you cannot work because you have a disability or because of your age; or
- you have some other very good reason that stops you from supporting yourself.

The Court will usually make a maintenance order for a limited period of time. Sometimes the Court will order a lump sum be provided to you or transfer some property to you. Unless you will never be able to work, it is best to go to court with a plan about getting back into the paid workforce. For instance, apply for a course to retrain and apply to the Court for spousal maintenance for the period of time it would take to complete the course.

The Court looks at how much you need to support yourself. You should prepare a detailed budget taking into account all of your expenses. The Court will ignore any support you may receive from Centrelink when deciding whether you need maintenance. If you do get a pension or benefit, Centrelink may reduce your pension by some amount if you receive maintenance. The Court will also look at your partner's income and ability to pay for your support.

You can ask Child Support to collect your maintenance once an order is made.

You can apply for maintenance at any time after you separate, even if you are separated under the same roof. However you must apply for maintenance **within 12 months** of your divorce becoming final

for married couples or **within 2 years** from the date of separation for de facto couples. If you want to apply later, you will need to seek leave (permission) of the Court, which is only given in exceptional circumstances.

What are the steps involved in getting maintenance?

If you and your partner can agree, you can ask the Court to make your agreement legally binding by making '**consent orders**'. There is a Consent Orders Kit available from the Family Law Courts. You can enforce consent orders by going back to the Court if necessary. It is important to seek independent legal advice before making consent orders.

If you cannot agree, you can make an application yourself in the Local Court or the Family Law Courts.

What if I am still living with my husband/partner but they will not give me any money to live on?

You may be able to get maintenance for your own living expenses even though you are still married or in the relationship and living with your partner. You apply in the same way as if you were separated.

Can I get 'childbirth maintenance' if I am pregnant?

You may be able to claim childbirth maintenance from the father of your child if you are *not married*. Generally, you can ask for maintenance for the 2 months before and 3 months after the birth, plus reasonable medical expenses related to your pregnancy and childbirth.

You can apply to the Local Court or the Family Law Courts for such orders at any time during the pregnancy or **within 12 months** after the child's birth. The Court will consider the financial situation of each parent and any special circumstances.

Handy Tip

You can get free legal advice about child support and maintenance from the Child Support Service of Legal Aid NSW, LawAccess or some community legal centres. See Chapter 9: Referrals and Resources.