

## 6. Child support and maintenance

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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 for your child 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 maintenance after you separate from your partner, whether you were married or in a de facto relationship, including a same sex 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 (e.g. payment of the bond).

The type of Centrelink family assistance payments and rates vary for every parent. This depends 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, including your child support situation.

Depending on your circumstances, you may be eligible for other types of financial assistance from the government, such as a parenting payment.

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

- ▶ visit the Payment and Service Finder on the [servicesaustralia.gov.au](https://servicesaustralia.gov.au) website 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 Centrelink that you are separated because the type of benefits you receive, and the amounts paid, will probably change.

## 6.2 Child support

### Do both parents have to pay child support?

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

### What does the law say about child support?

Child support laws provide for the assessment, collection, and enforcement of child support payments. Generally, they apply to all children in Australia.

The child support laws are administered by Services Australia. Services Australia also delivers all the services and payments for Medicare, Centrelink and Child Support. Services Australia: Child Support is referred to as Child Support.

In some limited circumstances financial support can be provided in the form of court-ordered child maintenance. See ▶ below at 6.11.

### Do I have to apply for child support?

As a parent, you have responsibilities and rights. Some parents arrange child support independently without any assistance from government departments, the courts or other government agencies.

If you do not receive any family assistance payments or only receive the base rate of Family Tax Benefit Part A you can make a private arrangement about financial support of the children without applying to Child Support or making a written child support agreement without risking any loss of Centrelink payment. However, you should get legal advice before deciding to have a private arrangement as these are unlikely to be enforceable.

See ➤ *section 6.10* below for more details about private arrangements.

If you are receiving Centrelink family assistance payment, in most cases you will need to try to get child support from the other parent by contacting Child Support otherwise it might negatively affect the amount of Family Tax Benefit you receive.

### How are child support payments calculated?

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

- ▶ the number and ages of the children;
- ▶ the costs of caring for children (based on Australian research);
- ▶ the income of both parents;
- ▶ the percentage of care (number of nights) which each parent (or carer) has 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.

### 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.

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 three 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 Child Support seeking that the fixed assessment does not apply.

### Care arrangements

The child support formula takes into account the percentage of care that each parent has of the children. This is usually measured according to the number of nights that the child actually spends with each parent. The same care determination applies both for the child support assessment and the assessment of a carer parent's Family Tax Benefit.

## 6.3 Applying for child support

### Who can apply for an assessment of child support?

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 at least five nights per fortnight.

You have 13 weeks from the date you separate from your partner to apply for child support. If you were not living with the other parent when your child was born, the 13-week period starts from your child's date of birth. 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 do not know the identity or whereabouts of the other parent.

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

A written child support agreement that is accepted by Child Support may also meet Centrelink's requirement that you seek child support from your child's other parent. However, you should seek legal advice before signing any child support agreement, as the rules are complex. (see ➤ *section 6.10* below). It is usually quicker and easier to apply for child support immediately when you first apply for Centrelink family assistance payments.

### How do I apply for a child support assessment?

You can:

- ▶ visit [servicesaustralia.gov.au/separated-parents](https://servicesaustralia.gov.au/separated-parents) 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 named as the parents of the child are in fact the parents. Acceptable proof of parentage includes:

- ▶ the person is named as a parent on the child's birth certificate;
- ▶ the child was born during the person's marriage to the child's mother;
- ▶ the person has acknowledged they are a parent in an affidavit or statutory declaration;
- ▶ the person is a man and cohabited with the child's mother during a specified period before the birth.

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 (see ➤ *section 6.4*); or
- ▶ a court declaration that a person should not be assessed because they are not the parent of the child (see ➤ *section 6.4*).

## 6.4 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 most Child Support decisions within 28 days of the notice being delivered to your address or online account (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 object to a child support decision after 28 days, but you need to explain why you are late.

If Child Support does not accept your late objection, you can file an appeal about their decision not to accept your late objection in the Administrative Appeals Tribunal (**AAT**). You must do this within 28 days of receiving the decision not to accept your application.

### What happens after I lodge an objection?

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.

### **What if I disagree with the decision Child Support makes about my objection?**

If you do not agree with this decision you can apply to the AAT to review Child Support's decision. You must do this within 28 days from the date the decision was delivered to your address. If it outside of the 28 days, you must ask the AAT for an extension of time.

### **What if I disagree with the decision about the care percentage?**

There are different rules for an objection to a decision about the care percentage used in the child support assessment. You can lodge your objection with Child Support or Centrelink on the telephone, as well as in writing.

If you do not object within 28 days of receiving notice of the decision, you do not need to request an extension of time. However, if your objection is successful, the favourable decision may only have effect from the date you lodged the objection.

### **What if I disagree with decision Child Support makes about my objection to the calculation of the care percentage?**

The AAT can review Child Support's decision on an objection to a care decision. This application should be filed in the AAT within 28 days of the date the decision was delivered to your address.

If you apply to the AAT more than 28 days after the date the decision was delivered to your address, you do not need to apply to the AAT for an extension of time. However, if the AAT changes the decision in a way that is favourable to you, that decision may only have effect from the date you applied to the AAT.

### **What if I disagree with the AAT decision?**

AAT decisions about a care percentage are subject to a further right of review in the AAT (called a second-tier review).

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

If Child Support has refused your application because you do not have proof that the other person is the parent of the child, you can apply to the Family Law Court for a declaration of parentage under s 106A of the *Child Support (Assessment) Act 1989*. You should seek legal advice before making a court application.

If Child Support has assessed you to pay child support and you think that you are not the parent of the child in question, you can apply to the Family Law Court for a declaration under s 107 of the *Child Support (Assessment) Act 1989*. You should seek legal advice before making a court application.

### Is there a time limit on making an application for a declaration of parentage to the Family Law Court?

There is a time limit to file court applications about parentage in child support matters.

You have 56 days from the date you receive the Child Support notice of acceptance or rejection to file an application for a declaration of parentage in the Family Law Court.

The Court may order DNA testing to determine if a person is a parent.

You can apply for legal aid to cover both the cost of DNA testing and representation.

Where you and the other parent are both women and where the court has to decide if the non-birth parent is a parent for child support purposes, the court will need other evidence about your relationship, such as how the child was conceived and what you and the other parent intended your parenting or family arrangements to be at the time the child was conceived.

#### Handy Tip

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

## 6.5 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 for periodic payments and Child Support accepts the agreement; or



- ▶ a court order for periodic payments is registered with Child Support (see ▶ *section 6.10*),

then the person entitled to receive payments under the assessment, agreement or order can choose to collect payments privately or to apply for Child Support to collect payments for them. Child Support can only collect periodic payments of child support payable to the payee. If you have a court order or a child support agreement that provides for some or all of the child support to be paid as non-periodic amounts, or payments to a third party (e.g. school fees) you will need to enforce those amounts privately.

### Private collection

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

- ▶ the assessment is based on up-to-date and reliable income information for the other parent (not an estimated income or a provisional income because they have not lodged their income tax returns);
- ▶ 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 you choose private collection, your Family Tax Benefit will be worked out on the assumption that the other parent is paying child support to you in full and on time. Centrelink will not pay you extra Family Tax Benefit if the other parent fails to pay you the correct amount of child support. If private collection arrangements break down, you can ask Child Support to take over collection for you. It is important that you do this quickly, as a delay may mean that you miss out on some or all of the unpaid child support. Child Support can only collect up to three months of overdue payments when you apply for them to take over collection (in exceptional circumstances this may be extended to nine months).

### Child Support collection

If you do not have a good relationship with the other parent, especially if you there is a history of disagreements or secretiveness about money, or family violence or controlling behaviour, you should ask Child Support to collect child support payments for you.

If you choose to have Child Support collect payments for you, your Family Tax Benefit is assessed on the basis of the actual child support that you receive over a financial year. If you do not receive all of the expected child support you may be eligible for a top-up payment when your Family Tax Benefit is balanced at the end of the financial year. You should also talk to Centrelink about switching to the “disbursement” method for Family Tax Benefit if your child support payments are frequently less than the required amount (this is not available if you choose private collection).

## 6.6 What if the other parent's or my income changes?

The Australia Taxation Office advises Child Support whenever it issues a new tax assessment for a parent with a child support case. Child Support will then update that parent's child support amount as required.

You can ask Child Support to vary the income used for you in the child support assessment:

- ▶ by lodging an estimate if your income reduces by 15% or more from the income used in the current child support assessment; or
- ▶ subject to certain requirements, if 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 (but only in the first three years after separation);
- ▶ by making a change of assessment application

Parents receiving Family Tax Benefit or who have a child support assessment must notify Centrelink or Child Support if their pattern of care changes so that their payments can be reviewed.

## 6.7 What if our parenting arrangements change?

If the change in care has occurred because one of the parents is refusing to follow a written parenting order or parenting plan (a “Disputed Care Change”), the parent who now has less care can request an Interim Care Determination.

### What is an Interim Care Determination?

Child Support can make an Interim Care Determination if:

- ▶ there is a parenting order or parenting plan in place; and

- ▶ one parent has more care than they should under the parenting order or parenting plan; and
- ▶ the parent with less care disagrees with the changed care and is taking 'reasonable action to ensure compliance' with the parenting orders or parenting plan.

An Interim Care Determination means the amount of child support paid could continue as per the existing written care agreement, instead of the actual care arrangements for up to 52 weeks. The Interim Care Determination period can be cut short if the parent with less care stops taking continuous reasonable action, or if the person with increased care takes reasonable steps to participate in Family Dispute Resolution.

### **What is reasonable action to ensure compliance?**

Reasonable action is not defined but is likely to mean starting court proceedings or Family Dispute Resolution, talking to a lawyer, or the other party about the disputed care change.

### **How long does an Interim Care Determination last?**

This is complicated. Generally, the maximum interim period (that is where child support will continue to be paid in accordance with a court order despite the actual care) will be either:

- ▶ 52 weeks from the date the orders were made; or
- ▶ 26 weeks from the date of the change of the care date, whichever is later.

The maximum interim period for a case where the care arrangements that are not being followed are set out in a written parenting plan is 14 weeks.

There are special circumstances where an Interim Care Determination will not apply. This is likely to be circumstances relating to the welfare of the child, such as violence or neglect and evidence is required to prove the special circumstances.

Once the interim period has ended, child support is worked out on the basis of the actual care arrangements for the children.

## 6.8 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 by:

- ▶ requiring the person's employer to make deductions from wages or salary;
- ▶ garnishing bank accounts;
- ▶ 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 to recover the 'debt' of child support payments. If you are unhappy that Child Support has not done this, you can start court enforcement proceedings yourself but only after giving Child Support 14 days written notice of your intention to do so.

Child Support will not enforce a child support debt which has accrued when registered for 'private collection'. You have to do this by starting your own enforcement proceedings against the other parent in the Family Law Court.

It is also possible to enforce a child support debt under civil law in a Local Court, but the court is likely to transfer the matter to the Family Law Court.

#### Handy Tip

Get legal advice before starting any court enforcement of a child support debt.

### 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 they declare bankruptcy.

## 6.9 When does a child support assessment end?

A child support assessment usually continues until the child turns 18. If the child is still in full time secondary education when they turn 18, either parent can apply to extend the assessment until the end of that school year, or the day of their last exam. The extension application needs to be made before the child turns 18, although it may be accepted later in exceptional circumstances.

A child support assessment will end before the child turns 18 if the child:

- ▶ dies;
- ▶ becomes a member of a couple (married or de facto relationship);
- ▶ is no longer in the care of either parent (unless the eligible carer is not a parent of the child, in which case it will end if the child leaves their care);  
or
- ▶ is adopted.

If the child and eligible carer leave Australia, the assessment can continue if they move to a country which has an agreement with Australia to collect child support and the payer remains in Australia. Otherwise, the child's departure from Australia, will end the assessment unless they continue to usually live in Australia or if they are an Australian citizen.

If the liable parent leaves Australia to live in a non-reciprocating country, the assessment will end from the date they cease to be habitually resident in Australia.

## 6.10 Child support agreements

Some parents might choose to make a child support agreement rather than going through Child Support.

A child support agreement may allow parents to make an agreement that better suits them and their needs and which might provide for both periodic (e.g. weekly) payments as well as non-periodic or lump sum payments (e.g. payment of school fees, medical expenses etc).

It is important to get advice before deciding to enter into a child support agreement because it may have impacts for things like Family Tax Benefits payments.

### 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 accepted by Child Support before they are legally enforceable.

Child support agreements can cover a range of financial matters about the costs of the children. For example, they might set out 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. Make sure you get advice about how the agreement will affect your entitlement to family assistance or other Centrelink benefits. Advice about how your Centrelink benefits might be affected is especially important if you are considering an agreement for reduced child support, or a lump sum payment, or for the other parent to pay for non-periodic expenses such as school fees, rather than periodic payments to you. You should also consider whether the agreement will still be suitable if your circumstances change in future, and whether and how the agreement can be terminated.

### What is a limited agreement?

A limited agreement is a formal written child support agreement signed by both parents. It is not compulsory to get legal advice before signing a limited agreement, but it is still a good idea so 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 on the day that it accepts the agreement.

Limited agreements are easier to end than a binding child support agreement, however, they are less flexible than a child support assessment. When negotiating with the other parent, you should consider what may change in future and whether the agreement will still be suitable. For example, you or the other parent may re-partner, have additional children, become unemployed or the care arrangements for your children may change.

A limited child support agreement can be ended:

- ▶ by another limited or binding child support agreement;
- ▶ by both parents writing a joint letter to Child Support ending the previous agreement;
- ▶ if the “notional assessment” of child support 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 three years have passed since they made the agreement; or
- ▶ by a court order.

### What is a binding agreement?

A binding agreement is a written child support 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 (unless the agreement makes provision for a lump sum payment);
- ▶ the agreed child support amount to be paid does not need to be at least as much as the child support amount assessed under the formula on the day that Child Support accepts the agreement;
- ▶ you both must have independent legal advice before entering into or ending the binding agreement and you each 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. In most cases, it will be necessary to show the court that exceptional circumstances have arisen since the agreement was made that mean a party to the agreement or the relevant child will suffer hardship if the agreement is not set aside.
- ▶ if an agreement was made before 1 September 2008 and at least one of the parties did not have legal advice before they signed it, the agreement can be set aside if the court decides it is ‘just and equitable’ to do so.
- ▶ a binding agreement is terminated if the parent entitled to receive payments under the agreement stops being an “eligible carer” (i.e. no longer has the child in their care for at least for at least 35% of the

nights) for a continuous period of 28 days (this can be extended to 26 weeks in exceptional circumstances).

### Handy Tip

The rate of Family Tax Benefit will not be tied to the terms of a child support agreement. 'Notional assessments' are made from time to time by Child Support, based on the taxable incomes of both parents. This is complicated and before you enter into a child support agreement get advice about the impact it will have on your Family Tax Benefit.

## 6.11 Child maintenance

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

- ▶ the child is under 18 but no application can be made under the *Child Support (Assessment) Act 1989* (for example because the liable parent lives overseas in a non-reciprocating jurisdiction, or because the child is seeking child maintenance in their own right, as there is no eligible carer who can apply for child support);
- ▶ the child is over 18 and requires support to complete their education; or
- ▶ the child is over 18 and has a disability and requires continued support.

## 6.12 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 former 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 while you are married. However, you must apply for maintenance within 12 months of your divorce becoming final for married couples or within two 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 Court. 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 Family Law Court.

### What if I am still living with my spouse 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 and living with your spouse. You apply in the same way as if you were separated. This is not available to de facto couples.

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

You may be able to claim childbirth maintenance (called 'childbearing expenses') from the other parent of your child if you are not married. Generally, you can ask for a contribution to reasonable medical expenses related to your pregnancy and childbirth and for set up costs for the baby such as prams etc. You can also seek maintenance for the 'childbirth maintenance period' which generally starts two months before your expected date of confinement and three months after the birth. Your claim for maintenance may be for a longer period of time if, for example, you had to stop work earlier on medical advice because of a pregnancy related issue.

You can apply to the Family Law Court for these 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.

Child Support cannot register or collect orders for childbirth maintenance or childbearing expenses. If the other parent does not comply with orders to pay childbearing expenses, you will need to go back to court to enforce the orders.

#### Handy Tip

You can apply for legal aid for applications to court for spousal maintenance. Legal aid is not available for an application for childbearing expenses, unless you are also applying to court for proof of parentage for a child support assessment

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*.