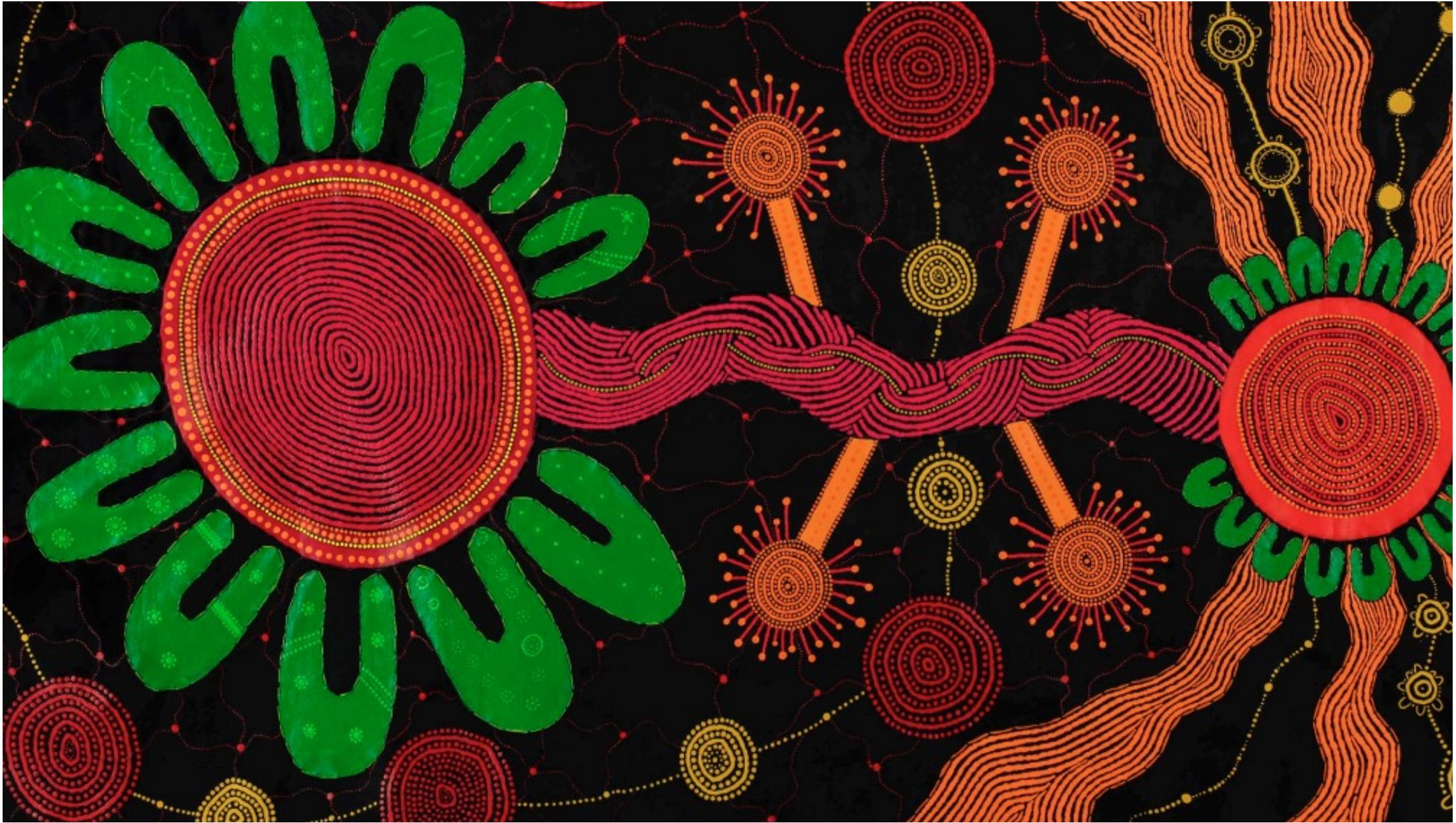# CSI – Child Support Investigations
(ss 106A, 107, 143)

Presented by Uniting Communities Law Centre

Family Law & Child Support Team

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What the UC Family & Child Support Team do:

- We offer services in family law from general advice, representation and assistance in all areas of family law including but not limited to divorce, parenting matters, property settlements and child support [Ph: (08) 8202 5960]. Our funding guidelines zone us for this service, as there are 4 other CLC's in SA.

- Child Support phone advice service = not zoned, running as a state-wide service - not means tested [Ph: (08) 8202 5960]
  - Paternity matters: s106A, s107 & s143 applications
  - DNA testing
  - COA applications = 10 reasons
  - Departure applications = 10 reasons + child support debt +18-month applications
  - ART child support proceedings
  - Child Support appeals to FCFCOA
  - Limited Child Support Agreements advice
  - ACM applications
  - Spousal maintenance applications

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Agenda

Child Support Foundations	*Section 106A:* When a Court declares that a person IS a parent	*Section 107:* When a Court declares a person is NOT a parent	*Section 143:* After parentage is debunked: Who owes what?

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Child Support Foundations

What is Child Support (CS)?

Child Support refers to the provision of financial support for children by parents who are no longer together, whether married or de facto.

Services Australia – Child Support (SACS) is responsible for calculating CS payment, administering and enforcing child support assessments, and deals at first instance with issues relating to CS assessments.

A child support assessment is based on the parents combined incomes (Adjusted Taxable Income (ATI)), care arrangements and the costs of the child.

Child support typically continues until a child turns 18 but can be extended to the end of the school year if the child is in secondary school.

Child Support Agreements:

1. Private agreement:
Parents may choose to have a private agreement between each other that can be less than, or more than, the amount payable under a CS assessment. NOTE: If you do not elect to receive CS through a registered assessment recipient of FTBA will only get MIN rate.

Parties may also created a limited or binding child support agreement (BCSA) which is a formal arrangement requiring both parties to receive independent legal advice before finalisation and outlines the party's child support obligations.

2. Assessment with SACS: Apply online OR via phone with SACS
Parents should consider registering a case with SACS and applying for a child support assessment. This is a formal calculation completed by SACS. → More powers under the legislation to enforce and collect CS = Easier to manage issues and reflect a change in circumstances (Change of Assessments Application).

The Law:
1. *Child Support (Registration & Collection) Act 1988* (Cth)
- Register and collect periodic payments arising from assessments, agreements and court orders;
- Mechanism to object to and seek AAT and judicial review of child support decisions.

2. *Child Support (Assessment) Act 1989* (Cth)
- Mathematical formula assessments
- Administrative mechanisms to change the assessment
- Child Support Agreements

The Guide [Guides to Social Policy Law Child Support Guide] is published and maintained by the Australian Government offers information regarding the Australian child support scheme: https://guides.dss.gov.au/child-support-guide

Exemptions:
In certain situations, such as domestic violence, a parent may be able to get an exemption from the requirement to seek child support.

Proof of Parentage: Presumptions of biological parentage

Services Australia – Child Support must be satisfied that you are a parent of the child before it can make a child support assessment.

There will be a presumption of biological parentage if:

- You were married to the mother at the time the child was born. *CSA s29(2)(a).*
- Your name is on the child's Birth Certificate. *CSA s29(2)(b).*
- A Court order declares or recognises you are a parent of the child. *CSA s29(2)(c).*
- You made a statutory declaration that you are a parent of the child. *CSA s29(2)(d).*
- You have adopted the child. *CSA s29(2)(e)*

- The mother and putative father cohabitated at any time 20 to 44 weeks prior to birth. *CSA s29(2)(f-h).*

Person also considered a parent if:

- The child has been adopted *CSA s29(2)(e).*
- They are a parent of the child through:
    - Artificial conception *S60H Family Law Act 1975; or*
    - Surrogacy *s60HB Family Law Act 1975; CSA 29(2)(i).*

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Proof of Parentage: DNA Testing

DNA testing can assist to resolve uncertainty over parentage and must be completed by accredited laboratories pursuant to the *Family Law Act 1975 (Cth)*.

Services Australia – Child Support <u>CANNOT</u> accept a DNA parentage testing report as proof of parentage to start or end a case. ❌

<u>Evidence required to commence or end a CS case:</u>

The Father executes a statutory declaration acknowledging paternity and mother makes new application for CS with SACS. ✔

The Father is added to the Child's Birth certificate. ✔

DNA testing reports produced as evidence in court to obtain a court order stating that a person is, or is not, a parent of the child. ➔ *106A or 107 Application.* ✔

Legal DNA Test v Peace of Mind DNA test

<u>Accredited:</u> NATA Accreditation (National Association of Testing Authorities).	<u>Accredited:</u> No
<u>Chain of custody:</u> Strict chain of custody maintained, Independent third party.	<u>Chain of custody:</u> No chain of custody.
<u>Identification:</u> Photo ID, passport sized photos, participant signature and same day testing.	<u>Identification:</u> No ID verification, self collected at home.
<u>Use in Court:</u> Can be used in Court.	<u>Use in Court:</u> Cannot be used in Court.

Section 106A: when a Court declares that a person IS a parent

Scenario 1: Commencing a case WITHOUT filing in Court

Applicant can make new application for CS if able to provide new information that would satisfy presumption parentage in relation to the person who is to be assessed in respect of the costs of the child.

- Name is on the child's Birth Certificate. *CSA s29(2)(b).*
- Statutory declaration that you are a parent of the child. *CSA s29(2)(d).*

Scenario 2: Commencing a case by filing in Court

If issue of parentage cannot be resolved:

- Time Limit: 56 Days after client receives a letter from SACS refusing their application for child support. *Federal Circuit and Family Court of Australia (Family Law) Rules 2021 – Rule 1.13*
- Application is made pursuant to the Federal Circuit and Family Court of Australia (FCFCOA) along with Affidavit. *Child Support (Assessment) Act 1989 s106A*
- Need to serve Application and Affidavit on OP & SACS. *Child Support and Child Maintenance Proceedings – Practice Direction 3.28*

NOTE on Orders Sought:

- If client is certain about parentage, orders seeking DNA testing are NOT required *(CASE STUDY)*
- Where multiple putative fathers, DNA orders will be required.
- Affidavit needs to explain why the other party is the only possible father, or why there could be multiple putative fathers.

What happens if client lies about a person being the father?

- Making false/misleading statements or fraudulently listing a person on BC as a parent = Obtaining a Financial Advantage by Deception/Centrelink Fraud = Imprisonment up to 10 years. *Criminal Code Act 1995 – Shc The Criminal Code s134.2*

- The other party cannot seek a 107 order declaring them not to be a parent MUST appeal 106A order to the full bench of the FCFCOA (Division1) = if appeal successful Court may grant overpayment order = payee now incurring a debt and owing payer overpaid CS.

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Section 106A: Case Study *[Jane Doe v Bob Smith]*

Facts:

- Jane & Bob were in a relationship for 1 year and were not living together.

- Jane fell pregnant during the relationship.

- Right before the birth of the child (X) Bob blocked Jane and relocated.

- Jane certain Bob was father of (X).

- Jane applied for a Child Support Assessment with SACS – but was refused because no father listed on BC.

- Could not commence proceedings within 56 days of refusal letter due to difficulty locating Bob and resolving issue of paternity.

Applying the law:

- Requested Bob sign BC/stat dec OR voluntarily participate in a legal DNA test if he believed he was not the father of the child. – No response.

- Filed in FCFCOA under 106A to have Bob declared parent and assessed in respect of costs of the child + dispense with 56-day time limit.

- Process server could not locate or serve Bob and instead served Bobs parents.

- Parents were in contact with Bob advising him there was a court date.

- Interim orders for DNA testing were made by the Court at the request of Bob.

Outcome:

- The parties participated in a legal DNA test which concluded Bob <u>WAS</u> father of (X).

- Final orders were made declaring Bob a parent of the child.

- Final Orders were served on SACS who commenced the CS case and backdated the assessment to jane's last CS application.

- Jane then began to receive CS.

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Section 107: Declaration a person is <u>NOT</u> a parent

Scenario 1: Ending liability WITHOUT filing in Court

- The payee can contact SACS and elect to end the Child Support case = No more ongoing CS liability. *Child Support (Assessment) Act 1989 s151.*
- Despite ongoing liability being removed, any arrears will remain + no repayment of overpaid child support.
- Ending a CSA will reduce the amount of FTB a parent is eligible to receive.
- No Court Order = Payee may re-apply for CS in the future and still name other person as the parent, even if legal DNA test concludes they are not a parent *(although very unlikely).*

Scenario 2: Ending lability by filing in Court:

- Time Limit: 56 Days after CSA is accepted by SACS and listed person does not believe they are the father. *Federal Circuit and Family Court of Australia (Family Law) Rules 2021 – Rule 1.13*
- Application is made pursuant to the Federal Circuit and Family Court of Australia (FCFCOA) along with Affidavit. *Child Support (Assessment) Act 1989 s107 + s143*
- Need to serve Application and Affidavit on OP & SACS. *Child Support and Child Maintenance Proceedings – Practice Direction 3.28*

NOTEs on s107 Order:
- When an application is made under s107 the Court <u>MUST</u> consider a repayment order pursuant to s143 ordering the mother to repay all or a determined sum of child support paid to her by the father.
- The quantum of overpayment sought by a s143 order would not be known unless and until a s107 order is made by the Court and SACS re-calculate all assessments from start date of liability as if the child is not part of the assessment.
- Cannot make a s107 application if applicant was declared a parent by way of s106A order. Must appeal 106A order.

Section 107: Case Study *[John Doe v Sarah Simpson]*

Facts:

- John & Sarah had two daughters (X) and (Y).

- Shortly after the birth of their youngest daughter (Y) John discovered Sarah was having an affair with their next-door neighbour.

- Parties formally separated and Sarah applied for Child Support for both children. SACS granted application given John was listed as the father of X and Y on BC.

- John was assessed to pay child support, and continued to pay child support for both children post separation despite not knowing whether he was the father of Y.

- The parties agreed to voluntarily participate in a legal DNA test which concluded John was NOT the father of Y.

- John had paid ~$10k in CS for X and Y.

Applying the law:

- John filed in FCFCOA under s107 for a declaration to be made that he is not a parent of Y using the legal DNA test results.

- Sought orders to dispense with 56-day time limit.

- The Court had to consider a repayment order pursuant to s143 CSA.

- John elected not to pursue a s143 repayment order as he did not want mother to be in worse financial position and place children at a disadvantage.

Outcome:

- Declaration was made that John was NOT a parent of Y.

- John was removed from the Child Support Registrar and no longer liable to pay CS for Y.

- Approximately ~$4k in arrears for child support were waived by SACS NOTE: (this will ONLY happen if mum requests SACS to waive the arrears and does not renege her decision within the 28-day cooling off period)

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Section 143: After parentage is debunked: Who owes what?

Applying the case Study: John Doe & Sarah Simpson:

Once s107 order actioned by SACS the department will re-calculate all assessments from start date of liability as if the child is not part of the assessment = recovery of child support amounts when no liability existed.

- Courts **MUST** consider a repayment order (usually will not enforce unless sought by Applicant) and have regard to:

  - Whether payee/payer knew or suspected, or should reasonably have known or suspected that the payer was a parent of the child; _s143(3B)(a)_
  - Whether the payee/payer engaged in any conduct (by act or omission) that directly or indirectly resulted in the Registrar accepting their child support application; _s143(3B)(b)_
  - Whether there was any delay by the payer in applying for a finding by a court that the payer is not a parent of the child; _s143(3B)(ba)_
  - Whether there was any delay by the payer in applying under section 107 for a declaration once he or she knew, or should reasonably have known, that he or she was not a parent for the child; _s143(3B)(c)_
  - Whether there is any other child support that is, or may become, payable to the payee for the child by the person who is a parent of the child; _s143(3B)(d)_
  - The relationship between payer and the child; _s143(3B)(e)_ and
  - The financial circumstances of the payee and payer. _s143(3B)(f)_

NOTEs on s143 Order:

- Children cost different amounts across all ages = not all children weighted equally on an assessment. Eldest child always weighted more – Payer may not get 50% of CS overpayment made.

- Any arrears on child support case may first be offset against overpayment determined by one of the children's case ending.

- If client has another or multiple child support cases for different child/ren to different mother(s) they may have to pay additional child support to them as those children from different child support cases will have been underpaid = arrears created on other CS cases.

Family Law & Child Support Service

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Questions?