

Submission in response to the Australian Law Reform Commission's Elder Abuse Inquiry Discussion Paper February 2017

Overview

The National Social Security Rights Network (NSSRN), formerly the National Welfare Rights Network, welcomes the opportunity to make a submission to the Australian Law Reform Commission's (ALRC) Elder Abuse Inquiry in response to its Discussion Paper (DP).

The NSSRN welcomes and supports the DP's four proposals concerning social security (Proposal 10-1 to 10-4). We believe that if implemented these proposals may help reduce the risk of elder abuse, especially financial abuse which directly or indirectly affects an older person's entitlement to social security payments.

In this submission, we put forward a recommendation which we believe merits inclusion in the ALRC's final set of proposals concerning social security law. It develops a proposal we outlined in our initial submission (Submission no. 151) in response to the ALRC's Elder Abuse Issues Paper (IP), in response to its question 9 concerning residence requirements and waiting periods.

Older migrants are vulnerable to and, in our experience, suffer from elder abuse. Their vulnerability arises from a number of circumstances, including language barriers, health problems, lack of knowledge of the Australian legal system, unfamiliarity with government and community services and lack of support networks in the wider community.

Their vulnerability may be increased by barriers to accessing income support through the social security system, which may make them dependent on children or other family and may deter them from seeking help for or escaping from situations of abuse or violence. The barriers to older migrants arise from the interlocking effect of social security:

- Age requirements
- Qualifying residence periods and waiting periods for new migrants, and
- Lengthy periods of ineligibility under the assurance of support scheme applicable to the main visa type for older migrants.

As detailed below, holders of subclass 143 (contributory parent) visa holders are particularly vulnerable and the interlocking effect of these rules means that, even if they leave a situation of elder abuse, they are only eligible for the special benefit payment. Special benefit is a last resort payment, usually paid below the poverty level newstart allowance (due to strict means testing arrangements) and is not appropriate for long term income support for people of retirement age who have low prospects of entering the labour market.

There are limited circumstances in which contributory parent visa holders may access income support during the 10 year assurance of support period. In most cases this is because of a serious illness or accident to the family member who gave the assurance, leaving them unable to support the visa holder, or because the family member is unable or unwilling to support them or it is unreasonable for the visa holder to accept the support. In our experience these requirements are stringently administered by the Department of Human Services.

Even if the policy rationale for the assurance of support scheme is accepted, there is no sound rationale for limiting income support to special benefit for these visa holders, once they meet the stringent requirements for access to income support and are in hardship through no fault of their own. They should be eligible for the age pension, the appropriate level of support, on reaching pension age.

This change would significantly improve the standard of living of a substantial number of very vulnerable older Australians, at little cost to the community.

Recommendation 1.

Amend social security legislation so that contributory parent visa holders who become eligible for a social security payment before the expiry of the assurance of support period (because their assurer is unable or unwilling to support them or it is unreasonable for them to accept that support) are eligible for the age pension if they meet the other criteria for this payment.

Draft amendments

Although this could be achieved in different ways, the following package of three amendments would give effect to Recommendation 1, in line with the standard way in which specified classes of visa holder are exempted from residence requirements under the *Social Security Act 1991* is:

(i) Amend section 43(1) of the *Social Security Act* by inserting new paragraph (e) as follows:

(e) the person is the holder of a visa that is in a class of visas determined by the Minister for the purposes of this subparagraph;

Note: This would enable the Minister to exempt subclass 143 visa holders from the normal 10 year qualifying residence period for the age pension. Use of a legislative instrument is the standard approach, as it enables changes to be made more readily in response to changes to migration and visa rules.

(ii) Make a determination under proposed s 43(1)(e) of the *Social Security Act 1991* which provides that:

(1) For the purposes of subsection 43(1)(e) of the *Social Security Act 1991*, classes of visa are:

(a) if the circumstances in subsection (2) are met, a Subclass 143 (Contributory Parent).

(2) For paragraph (1)(a), the circumstances are that:

(a) an assurance of support was in force in respect of the person (the assuree) but was cancelled by the Secretary in the circumstances specified by a determination under subparagraph 1061ZZGF(1)(b)(iii) of the *Social Security Act 1991*; or

(b) an assurance of support is in force in respect of the assuree and the person who gave the assurance of support is:

(i) unwilling or unable to provide an adequate level of support to the assuree; or

(ii) it is unreasonable for the assuree to accept that support.

Note: A legislative instrument in this form would limit the exemption to cases where the assurance of support is cancelled early due to injury or illness affecting the assurer's ability to support the visa holder or where the visa holder is eligible because the assurer is unable or unwilling to support them, or it is unreasonable for them to accept the support.

(iii) Amend the table in s 5(1) of the *Social Security (Assurances of Support) (DEEWR) Determination 2008* to insert item 10, Age pension under Part 2.2 of the Act.

Note: This would make the age pension a recoverable payment under the assurance of support scheme. The Commonwealth could recover payments to a subclass 143 visa holder before the expiry of their assurance of support period from the assurer.

Background

The main visa class for older migrants whose children are Australian citizens or permanent residents is the contributory parent visa (subclass 143). In 2014-15, 7175 contributory parent visas were granted compared to 1500 parent visas (sub class 103), the main alternative visa option.¹ Contributory parent visa holders are entitled to permanent residence. Applicants must be sponsored by their child and are subject to a mandatory assurance of support, usually given by their child or another relative.

Under an assurance of support (AoS) the assurer guarantees to provide financial support or repay any recoverable social security payments made to the visa holder during the period covered by the AoS. Where the AoS is mandatory, the assurer must provide security (a bank guarantee) for the required amount. An AoS may be cancelled in very limited circumstances, such as where illness or accident “critically affects” the assurer’s ability to provide support.²

For contributory parent visa holders, the AoS period is 10 years from the date of arrival in Australia, or date of grant of visa, whichever is later.³

The main working age social security payments, such as newstart allowance for unemployed job seekers, are recoverable.⁴ However, the age and disability support pension are not recoverable, nor is carer payment. If the assuree receives a recoverable social security payment during the AoS period, the full amount is a debt to the Commonwealth which the assurer is liable to repay. It is recovered in the first instance from any bank guarantee. Debts raised against the assurer must generally be repaid and may only be waived in very limited circumstances.⁵

Generally, an assuree is ineligible for a recoverable social security payment during the AoS period. If they make a claim for a recoverable payment, the Department of Human Services must determine whether:

- the assurer is willing and able to provide an adequate level of support to the assuree, and
- if so, whether it is reasonable to expect the assuree to accept this support.

Usually the process of establishing this involves contact with the assurer to give them the opportunity to provide support and avoid a debt. However, the policy requires the Centrelink decision-maker to involve a social worker if there is a risk of harm to the assuree and allows for contact with the assurer to be deferred until the risk of harm to the assuree has passed.⁶

¹ Department of Immigration and Border Protection, Annual Report 2014-15, p 68,

<https://www.border.gov.au/about/reports-publications/reports/annual/immigration-2014-15>.

² Guide to Social Security Law, 9.4.6.10 (Cancellation of an AoS), <http://guides.dss.gov.au/guide-social-security-law/9/4/6/10>.

³ Guide to Social Security Law, 9.2.2.360 (Visa Subclass 143 Contributory Parent (Migrant), <http://guides.dss.gov.au/guide-social-security-law/9/2/2/360>.

⁴ Guide to Social Security Law, 9.4.1.10 (Introduction to the AoS Scheme), <http://guides.dss.gov.au/guide-social-security-law/9/4/1/10>.

⁵ Section 1237, *Social Security Act 1991 (Cth)*.

⁶ Guide to Social Security Law, 9.4.7 (AoS – Debt), <http://guides.dss.gov.au/guide-social-security-law/9/4/7>.

If Centrelink grants a recoverable payment (because it is satisfied that the assessor is not willing or able to support the assuree, or because it is unreasonable for the assuree to accept the support), the payment is normally special benefit due to the application of residence requirements and waiting periods and age requirements for payment.

Holders of subclass 143 visas are subject to:

- the general 10 year qualifying residence period for age and disability support pensions, and
- the general 2 year Newly arrived resident's waiting period (NARWP) for most other social security payments, including the main working age payments such as newstart allowance for unemployed job seekers.

If over age pension age, they are also ineligible for:

- the age pension due to the 10 year qualifying residence period
- the disability support pension, as a proper claim for the disability support pension cannot be made once pension age⁷, and
- the newstart allowance, as they have reached pension age.

If a contributory parent visa holder becomes eligible for a social security payment during their first 10 years in Australia, it is normally special benefit. This is a discretionary payment of last resort for individuals who are ineligible for any other social security payment and in financial hardship for reasons beyond their control. Its basic rate is set at the same rate as newstart allowance. However, it is subject to strict means testing. In particular, there is a dollar for dollar income test and free board and/or lodging can reduce the payment by as much as two-thirds due to the assessment of value in kind for this payment. This means that most people in fact receive less than the basic rate of newstart allowance, itself widely recognised as inadequate.

As illustrated by the following case study, the effect of this framework is that older migrants experiencing elder abuse from family members may be deterred from escaping the abuse because of difficulty accessing income support, the inadequate levels of payment or the possibility the family member may get a debt. As noted in our submission in response to the IP, our members help clients who have experienced family violence and elder abuse and assist them to access income support in these situations.

Case study

Mr C migrated from China to Australia aged 63 on a contributory parent subclass 143 visa, sponsored by his daughter who was also the assessor. He moved in with his daughter and her husband. The relationship quickly broke down. Mr C suffered verbal and physical abuse, and was seriously injured and hospitalised after an assault. He approached our service for help. He had moved out and was living with a member of the Chinese community

Our service assisted him to obtain evidence of the violence and abuse from the hospital and police and claim special benefit. Centrelink accepted that he was eligible for payment, due to the failure of his assessor to support him and because it was unreasonable to expect him to obtain support, and granted his special benefit claim. It reduced it by two thirds to about \$170/fortnight on the ground that he was receiving free board and lodging from the person he was living with. In fact, Mr C began to pay rent, however his landlord refused to confirm this with Centrelink and threatened to evict him. Mr C felt he had to accept this, as he knew little English, and was still suffering from his injuries and was

⁷ Section 28, *Social Security (Administration) Act 1999 (Cth)*.

worried about being homeless. Although he was about 2 years off retirement age, he would have to remain on special benefit for about 9 more years, until he met the 10 year residence requirement for the age pension.

There are many other older Australians who end up in the same situation as Mr C. The overall number of special benefit recipients is small, with only about 5000 to 6000 recipients at any one time, and 5335 recipients in 2015-16. In its 2015-16 annual report, the Department of Social Services reported the most recipients are not of working age (although this would include a small number children), although it noted the proportion of working age recipients is increasing.⁸ Information provided through the Senate estimates process indicates that the majority of Special Benefit recipients are age pension age and over. As at June 2015, 3702 of the 5246 recipients, or 70%, were aged 65 and over.⁹

Most were also on a reduced rate of payment due to the strict income test.¹⁰

In our view, many of these recipients are likely to be contributory visa holders whose assurers are no longer supporting them but whose 10 year assurance of support period has not expired. In our experience many have experienced some form of violence, abuse or neglect.

The interlocking purposes of residence waiting periods and the AoS scheme are to:

- permit migration of individuals, while protecting the cost to the community through social security payments
- ensure that individuals and their families assume responsibility for their own support during the AoS period.

The existing framework recognises the need for limited exceptions to this, including circumstances where an individual is not supported by their family and is unable to support themselves, through no fault of their own. This includes situations of family violence and elder abuse.

In our view, it is consistent with these policy objectives for contributory parent visa holders to be eligible for the age pension if their assurer is unwilling or unable to support them during the AoS period, or it is unreasonable to expect them to accept that support, or if the assurance of support is cancelled due to the assurer's illness or disability. It does not serve a legitimate policy purpose to impoverish older migrants who are forced to access income support because children and family fail to meet their promise to support them.

We therefore recommend that contributory parent visa holders who are eligible for income support before the end of the 10 year AoS period because the assurer is unwilling or unable to support them, or because it is unreasonable for them to accept that support, should be exempt from the 10 year residence requirement for the age pension.

The cost to the community would be negligible. Age pension could, in these circumstances, be made a recoverable payment under the AoS scheme, permitting the Federal Government to recover the outlay from the assurer in most cases.

⁸ Department of Social Services, Annual Report 2015-16, p 36-37.

⁹ Senate Community Affairs Committee, Answers to Estimates Questions on Notice, Social Services Portfolio, 2015-16 Supplementary Estimates Hearings, Question no: SQ15-000897, http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/clacctte/estimates/sup1516/SocialServices/index.

¹⁰ Note 10, p 38. The extent of the rate reduction will vary and there is no public information about the average reduction.

Contact for this submission

The contact for this submission is:

Matthew Butt
Executive officer
National Social Security Rights Network
T: 0448 007 201
E: eo@nssrn.org.au