NATIONAL WELFARE RIGHTS NETWORK

Submission to Senate Community Affairs Legislation Committee

Social Services Legislation Amendment

(Enhanced Welfare Payment Integrity) Bill 2016

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About the National Welfare Rights Network

The National Welfare Rights Network (**NWRN**) is the peak community organisation in the area of social security and family assistance law, policy and administration. Our member organisations are community legal centres and other legal services which provide free and independent information, advice and representation in the area of social security and family assistance law.

There are NWRN member organisations in each State and Territory. This includes two Associate Members in the Northern Territory, the Central Australian Aboriginal Legal Aid Service (**CAALAS**) and the North Australian Aboriginal Justice Agency (**NAAJA**).

The NWRN draws on its member organisations' experience providing legal services to current and former recipients of social security and family assistance payments to develop proposals for legislative, policy or administrative reform, make submissions to government and advocate for the rights of people who need the support of the social security and family assistance system.

Summary of this submission

The two measures proposed in the *Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016* (**the Bill**) and the NWRN's response to them are set out below.

1. The Bill introduces a power to make a "departure prohibition order" (**DPO**) prohibiting a person from departing Australia if they have a debt and have not made a satisfactory arrangement to repay it into social security, family assistance, paid parental leave and ABSTUDY legislation. Once a DPO is made, it is a criminal offence for the person to depart Australia if they know of the order or are reckless as to its existence. The DPO regime is to commence from 1 July 2016 (or the Bill's passage, if later).

The NWRN opposes this measure.

A DPO involves the power to impose a significant restriction on a person's freedom of movement by administrative decision. As detailed below, the Bill confers a wide discretion on the Secretary as to the circumstances when a DPO may be made. Given that the Department of Human Services (**DHS**) already has extensive powers to recover debts – from an individual's tax returns or bank accounts, for example – we do not think that an adequate justification for why this power is necessary has been provided.

If, however, the Bill were to proceed, we recommend at a minimum the following amendments:

- Restriction of the Secretary's discretion to make a DPO, so that it may be exercised only where it can be shown that a debtor has persistently and unreasonably failed to repay their debts.

- Restriction of the Secretary's discretion to make a DPO, so that it may be exercised only where alternative means of debt recovery have failed or are not reasonably practicable.

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- Any DPO regime is subject to the general appeal system under the relevant legislation. In particular, if a DPO regime were introduced into social security and family assistance legislation, all decisions made under that regime, including the initial decision to make a DPO, should be subject to the normal system of merits review, internally and at the Administrative Appeals Tribunal.

2. The Bill removes the statutory limitation period in social security, family assistance and paid parental leave legislation preventing recovery of debts if DHS has not taken action to recover the debt for six years. This measure is to commence from 1 July 2016 (or the Bill's passage, if later) and is to apply to debts outstanding on, or after its commencement.

The NWRN opposes this measure. In fact, we recommend insertion of the same statutory limitation period into ABSTUDY legislation (the *Student Assistance Act 1973*) to remedy an unjustified difference in the legislative framework for recovery of ABSTUDY debts.[1]

Statutory limitation periods are not arbitrary cut-off points. They exist throughout civil law for a number of important and principled reasons, including the prejudice which can arise to a defendant when important evidence is lost due to the passage of time.

These reasons apply equally in the area of debts under the legislation amended by this Bill. Although doubtless it is not the intention of the Bill to enable this, without a six year limitation period it is conceivable that DHS could become aware of a debt, take no action in relation to it at all and then raise it and notify the debtor and seek to recover it more than six years later. At this point it may be difficult or impossible for the debtor to challenge the debt, if they disagree with it, due to the passage of time. For example, if DHS allege that the person was a member of a couple and living with their partner, they may no longer be in contact with neighbours or other people who could verify they were not living with them.

In short, the six year limitation period acts as an important discipline on DHS to engage in timely identification, raising, notification and recovery of debts.

As we explain below, it is also important to recognise that DHS can fairly readily extend the six year period indefinitely by taking some form of recovery action within six years. This includes something as relatively minimal as an internal file review. The main obstacle to doing this appears to be the large number of outstanding debts and a lack of resourcing for DHS's debt recovery operations to ensure that all of them are pursued in a timely fashion. But if it is a lack of resources, rather than the stringency of the six year limitation period, that is the issue, the solution should be to increase resources for DHS debt recovery operations, not remove an important backstop protection against unfair debt recovery.

[1] There is another unjustifiable difference in the treatment of ABSTUDY debts, compared to other social security and family assistance debts, which is the imposition of a 3 month time limit for appealing against the decision to raise and recover a debt. See ss 304 and 312 of the *Student Assistance Act 1973* (Cth). This should also be remedied.

Before addressing these two measures in more detail, it is useful to provide some background to the Bill's main concern, which is the issue of outstanding Commonwealth debt under social security and family assistance legislation and DHS's management of it.

Outstanding social security and family assistance debt and its management by DHS

As the Minister for Social Services, the Hon Christian Porter (**the Minister**), explains in his second reading speech for the Bill, its two measures are part of a wider plan to increase the recovery of outstanding debt by DHS announced in the 2015-16 Mid-Year Economic and Fiscal Outlook (**MYEFO**).[2] This wider measure involved additional funding of $29.5 million over four years to 2018-19 for DHS to expand its debt recovery activities.[3] As is clear from the Minister's second reading speech, much of this funding was aimed at expanding DHS's debt recovery using its existing powers by, for example, putting in place more repayment arrangements with former recipients of social security and family assistance payments.[4] The Bill deals with those aspects of the measure which require legislative change because they expand DHS's debt recovery powers. Overall the MYEFO measure is projected to result in "net underlying cash savings" of $157.8 million over the forward estimates, through additional recovery of outstanding debts. The Bill's explanatory memorandum states that the separate contribution the Bill makes to these savings has not been separately costed.[5]

The Bill, and the MYEFO measure it is part of, are aimed at addressing a concern with the increasing number and value of outstanding social security and family assistance debts. Another government bill presently before this Committee, the *Social Services Legislation Amendment (Interest Charge) Bill 2016*), which proposes to introduce an interest charge on certain social security and family assistance debts, if they are not being repaid, also aims to address this concern. In his second reading speech the Minister points to the fact that as at June 2015 there were over one million outstanding debts and stated that $870 million is owed by about 270,000 former payment recipients "who do not make sufficient or regular repayments".[6]

In fact, the increasing number and value of outstanding debts under management by DHS is a long term trend, reflecting the fact that DHS has recovered less debt each year than it raises for some

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[2] Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016, Second Reading Speech (2 March 2016), p 2, accessible at http://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r5634 (accessed 29 March 2016).

[3] Mid-Year Economic and Fiscal Outlook 2015-16, Appendix A: Policy decisions taken since the 2015-16 Budget, Expense Measures, accessible at http://budget.gov.au/2015-16/content/myefo/html/11_appendix_a_expense.htm (accessed 22 March 2016).

[4] Note 2, p3.

[5] Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016, Explanatory Memorandum, Outline, accessible at http://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r5634 (accessed 22 March 2016).

[6] Note 2, p 2.

time.[7] The trend was noted by the Australian National Audit Office (**ANAO**) in its reviews of Centrelink's management of social security payment debt in 2004[8] and 2007.[9]

The Minister's figures suggest that the average size of each debt is small, in the order of $2500 to $3000 and that the majority of the debt (close to 75%) is under repayment. This is consistent with the ANAO's findings in 2004 and 2007. In 2004 it found that most outstanding debt was small and about 75% was being repaid. It also found that the majority of outstanding debt was less than one year old, but a substantial portion (about 37%) was older than two years.[10] In its 2007 follow-up, the ANAO found that the number and value of debts had continued to increase. It also found that the portion of debt under recovery had fallen to 69.9%, while the age of the debt base had increased, with a higher proportion (about 45%) older than two years.[11]

In short, most social security and family assistance debts are relatively small and are being repaid, but it can take a number of years for people to repay them. This is consistent with the experience of our members. Many of their clients incur small debts for a range of reasons, which they then struggle to repay slowly over time, especially during periods when they are in receipt of social security payments and have little money left over after meeting basic expenses such as rent, food and utilities. Although DHS's standard rate for recovering social security debts from current recipients of social security payments (known as recovery by "withholdings") is 15%, many people are unable to afford even this and make minimum repayments of $15 per fortnight from their social security payments. At this rate, which is still a very significant repayment for someone on a social security income, a $3000 debt takes over four years to repay. If payments such as Newstart Allowance remain too low for people to meet basic living expenses, then despite the measures in this Bill the value and age of DHS's debt base is likely to continue to grow.

Given this reality, increased debt recovery will not have much impact on the bulk of the outstanding debt already under repayment. This means that debt prevention is also a critical component of any plan to reduce the debt base. Although DHS has done excellent work on debt prevention in recent years, there is room for further improvement. Our members continue to see preventable debts arise in a number of areas, including:

- Cases where DHS has failed to apply stimulus income reporting to new claimants who report variable fortnightly income in their claims;

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[7] For example, in 2014-15 DHS raised 2,350,131 debts worth $2.5 billion, but recovered only $1.43 billion. See Department of Human Services, Annual Report 2014-15, p 103, accessible at https://www.humanservices.gov.au/corporate/annual-reports (accessed 22 March 2016).

[8] Australian National Audit Office, Management of Customer Debt (Audit Report No. 4, 2004-05), accessible at http://anao.gov.au/Publications/Audit-Reports/2004-2005/Management-of-Customer-Debt (accessed 29 March 2016).

[9] Australian National Audit Office, Management of Customer Debt - Follow-up Audit (Audit Report No. 42, 2007-08), accessible at http://www.anao.gov.au/Publications/Audit-Reports/2007-2008/Management-of-Customer-Debt-Follow-up-Audit (accessed 29 March 2016).

[10] Note 8, p 34-5.

[11] Note 9, p 42-5.

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- Continued problems for families, mostly single mothers, who receive social security and family assistance payments, declare their annual income for family assistance payments, but this is not applied by DHS to their social security payment; and

- Problems in incorrectly assessing claims for student payments by distance education students.

Another significant concern in relation to debt prevention is the government's proposal to phase out the family tax benefit part A and part B supplements.[12] The supplements have a key role in preventing debts arising from the reconciliation process and the difficulty some families have in accurately estimating their annual income. We are concerned that if this measure proceeds, more families will have a debt at the end of the year. In evidence to the Senate last year, the Department of Social Services indicated that about 12% of families have their debts offset by the supplements, meaning that many of these families may have incurred a debt without them.[13]

We now address the two measures in this Bill in detail.

Schedule 1 – Departure Prohibition Orders

Schedule 1 of the Bill introduces a new power into social security, family assistance, paid parental leave and ABSTUDY legislation to make a "departure prohibition order" (**DPO**) prohibiting a person who owes a debt under this legislation from departing from Australia for a foreign country if they do not have a satisfactory arrangement in place to repay their debts. It is an offence punishable by a term of imprisonment of up to 12 months for a person to knowingly or recklessly leave Australia in contravention of a DPO.

The Minister's justification for this new power is:

The government considers it is not appropriate for an individual to travel overseas, when they have the means to fund that travel but have not set up any appropriate arrangement to repay their outstanding debt to the Commonwealth taxpayer.[14]

He also points to the use of DPOs in relation to unpaid child support debts and says that the proposed DPO regime is "consistent" with the regime in child support legislation.

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[12] This is one of the measures in the *Social Services Legislation Amendment (Family Payments Structural Reform) Bill (No 2) 2015*, currently before the Senate.

[13] Senate Community Affairs Legislation Committee, Official Hansard, Thursday 19 November 2015, p 33, accessible at http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/068adf10-f588-402a-a5b6-c607bb8d507e/toc_pdf/Community%20Affairs%20Legislation%20Committee_2015_11_19_4012_Official.pdf;fileType=application%2Fpdf#search=%22committees/commsen/068adf10-f588-402a-a5b6-c607bb8d507e/0000%22 (accessed 29 March 2016).

[14] Note 2, p 2.

The explanatory memorandum states that DPOs *will be used for debtors who persistently fail to enter into acceptable repayment arrangements.*

The NWRN opposes this measure.

Although the Minister's explanation of the regime suggests that it will be applied in a targeted fashion, the Bill itself confers a wide discretion as to the circumstances when a DPO may be made. For instance, although the explanatory memorandum says it *will be used for debtors who persistently fail to enter into acceptable repayment arrangements*, there is no legislative requirement to this effect. In fact, a legislative requirement to this effect which is part of the child support DPO regime has specifically been excluded from this Bill. Under the Bill's DPO regime a DPO may be made if the person has a debt and:

- there is no satisfactory arrangement for the debt to be wholly paid; and
- the Secretary reasonably believes that it is desirable to make the order for the purpose of ensuring that the person cannot depart Australia without repaying the debt or making arrangements satisfactory to the Secretary for their repayment.[15]

Although this is modelled on the child support regime, it specifically leaves out an additional restriction in that legislation, namely that the decision-maker is "satisfied that the person has persistently and without reasonable grounds failed to pay" their child support debts.[16]

In addition, although the DPO power is a significant, coercive administrative power, there has been no explanation of why DHS's existing and extensive debt recovery powers are inadequate. DHS has the power to recover a debt from a person's tax return, bank account or wages. It is not clear why these powers are insufficient, nor has the Secretary's discretion to make a DPO been restricted to those cases where alternative means of debt recovery, which do not impinge on basic civil rights, have failed or are not reasonably practicable.

The Bill also contains a discrete system of appeal and review for the DPO regime, which is identical to the one available for DPO decisions under child support legislation. Under this regime, the decision to impose a DPO may only be appealed to a federal court. Decisions in relation to the revocation of a DPO or issuing a departure authorisation certificate (which permits a person to travel despite being subject to a DPO) are subject to review by the AAT.

The NWRN does not believe there is sufficient justification for excluding decisions made under the DPO regime from the general system of appeal. In particular, the general system of merits review is a crucial safeguard in social security and family assistance law, as it is free, informal and allows a fresh look at the facts and evidence in the case. This should extend to the critical decision to make a DPO, which under the Bill, may only be appealed to the federal courts. Although the result of this may be that DHS is administering DPO regimes with differing appeal rights, this situation already exists as child support appeal rights differ from the rights available under social security and family assistance law already.

[15] Proposed ss 102A, 200A, 1240 and 43G.
[16] Section 72D, *Child Support (Registration and Collection) Act 1988* (Cth).

Although we oppose this Bill, if it were to proceed we recommend at a minimum the insertion of the following safeguards:

- Restriction of the Secretary's discretion to make a DPO, so that it may be exercised only where it can be shown that a debtor has persistently and unreasonably failed to repay their debts.

- Restriction of the Secretary's discretion to make a DPO, so that it may be exercised only where alternative means of debt recovery have failed or are not reasonably practicable.

- Any DPO regime is subject to the general appeal system under the relevant legislation. In particular, if a DPO regime were introduced into social security and family assistance legislation, all decisions made under that regime, including the initial decision to make a DPO, should be subject to the normal system of merits review, internally and at the Administrative Appeals Tribunal.

Schedule 2 – removal of the six year limitation period

Schedule 2 of the Bill amends social security, family assistance and paid parental leave legislation by removing the current six year limitation on debt recovery by DHS. Although the *Student Assistance Act 1973* (Cth) does not have an equivalent limitation period, the Bill inserts an additional provision confirming that there is no such time limit.

The rationale for this proposal offered by the Minister is that:

The government also considers that, where there is a debt owed by a person to the Commonwealth, these debts should be recovered wherever possible, and should not be bound by arbitrary timelines.

He explains that if a person owes more than one debt to the Commonwealth, they are usually only able to pay them off one at a time over an extended period and, as a result, some of their debts may pass the six year time limit before recovery action can be taken.

In assessing this proposal, it is critical to understand the operation of the current limitation period.

Generally, DHS may only use its debt recovery powers in relation to debts, if there has been action to recover the debt within a six year period. Once the six year period expires, DHS cannot take compulsory debt recovery action.

The six year period begins on the day a departmental official becomes aware of the circumstances which have caused the debt, or could reasonably have been expected to have done so. This means, for instance, that where a person has failed to advise the department of a change in circumstances, the six year period will not usually start running until the department becomes aware of the change.

It is important to recognise, however, that the six year period can be readily extended. Under DSS policy:

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The period can be extended if there has been some activity on the debt during that 6 year period. Every time that any activity (such as recovery action) takes place within the initial 6 year period, a new 6 year period begins. In effect, this means that since any action extends the 6 year period, recovery can be extended indefinitely.[17]

Recovery action includes actual recovery, such as by withholdings or garnishee action of a tax return or bank account. However, it also includes fairly minimal activity such as the person acknowledging that they owe the debt or even simply a file review in relation to debt recovery action by a DHS officer.

As DSS policy says:

If departmental activity (including file review) were begun within the initial 6 year period, the limitation period would be extended a further 6 years. Each resulting recovery action or debt repayment would begin another 6 year period, as above.

This is consistent with our members' experience, and the fact that in the majority of cases they see the six year time limit is not in issue.

In short, this is not a stringent limitation period. It therefore appears that the main reason why debts expire is not the law as such, but the practical limitations on recovery action imposed by DHS's resources. As such, we think the solution should be to provide additional resourcing to support DHS's debt recovery operations, or make changes to debt recovery processes, rather than remove this important backstop protection against unfair or oppressive debt recovery.

[17] Department of Social Services, Guide to Social Security Law, 6.7.3.08 ("Statutory Limitation Period"), accessible at http://guides.dss.gov.au/guide-social-security-law/6/7/3/08 (accessed 22 March 2016).