

**SENATE STANDING COMMITTEE ON
COMMUNITY AFFAIRS**

LEGISLATION COMMITTEE

**Families, Housing, Community Services
and Indigenous Affairs and Other
Legislation Amendment (Budget and Other
Measures) Bill 2010 (Changes to Disability
Support Pension)**

SUBMISSION

SUBMISSION NUMBER: 8

SUBMITTER

Department of Families, Housing, Community Services and Indigenous Affairs



Australian Government

**Department of Families, Housing,
Community Services and Indigenous Affairs**

**SUBMISSION TO THE SENATE STANDING
COMMITTEE ON COMMUNITY AFFAIRS
INQUIRY INTO FaHCSIA AND OTHER
LEGISLATION AMENDMENT (BUDGET AND
OTHER MEASURES) BILL 2010**

5 November 2010

INTRODUCTION

The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), through the Minister for Families, Housing, Community Services and Indigenous Affairs, has policy responsibility for income support and supplementary payments to people with a disability and their carers.

Schedule 2 of the *FaHCSIA and Other Legislation Amendment (Budget and Other Measures) Bill 2010* makes amendments to the *Social Security Act 1991*. This Schedule will introduce an ongoing residency requirement to qualify for the Disability Support Pension (DSP).

The proposed amendments provided in Schedule 2 of the Bill will bring DSP into line with other workforce age payments such as Parenting Payment, Austudy, Youth Allowance, Carer Payment, and Newstart Allowance which all have an ongoing residence requirement. In line with these other workforce age payments DSP will generally only be available to Australian residents (ie. permanent residents who reside in Australia).

The Bill does not affect the current portability entitlements of DSP recipients. In line with the current policy DSP recipients will continue to be entitled to be paid overseas for up to 13 weeks to travel overseas for short periods.

An important point to note is that the proposed amendments in the Bill relate to the residency requirements for DSP while the issue before the Committee is one of continued payment of DSP while overseas (portability). These are two distinct and separate concepts under the social security law.

As the two matters of residency to qualify for DSP and portability of DSP are not connected the department believes that the passage of the Bill should proceed.

Any changes to portability policy requires careful consideration by Government to ensure that the policy settings are right and balance support to people with disabilities with the need to encourage both social and economic participation for people on working age payments. The impact of participation on a range of positive life outcomes for people is outlined in the 2010 Intergenerational Report.

Any delay to the passage of this Bill would have a detrimental impact on DSP recipients. The measure was widely publicised on 28 March 2010 and 20 October 2010 as commencing on 1 January 2011 and if the amendments do not proceed it would cause ongoing uncertainty for a group of DSP recipients who have knowledge of the change. Centrelink has also scheduled significant system changes to accommodate the measure and prepared a communication campaign.

PURPOSE OF SCHEDULE 2 (RESIDENCE REQUIREMENT TO QUALIFY FOR DSP)

The requirement to be a permanent Australian resident to qualify for a social security payment is a fundamental element of Australia's non-contributory tax payer funded social security system. This requirement has generally applied to all Australian social security payments since the introduction of the age pension in 1909. The definition of an Australian resident is provided in section 7(3) of the Social Security Act, 1991 and takes account of factors to determine whether a person is residing in Australia, such as their domestic, financial and family ties to Australia, their ties to other countries, the frequency and duration of any absences from Australia and the reason for such absences.

The proposed amendments in Schedule 2 of the *FaHCSIA and Other Legislation Amendment (Budget and Other Measures) Bill 2010* will introduce an ongoing residency requirement for DSP, bringing it into line with other workforce age payments.

The total DSP population at 30 June 2010 was 792,581. This measure will only affect a small group of approximately 1,000 DSP recipients who reside overseas and undertake regular return trips to Australia every 13 weeks for short periods to maintain their DSP qualification. It is expected that when the measure is implemented 150 of these DSP recipients who are currently spending less than 8 weeks per year in Australia will decide to remain overseas permanently and lose their qualification for DSP.

Any DSP pensioners who are Australian residents but need to travel overseas for short periods will still have access to the 13-week temporary absence rule.

PORTABILITY FOR DSP RECIPIENTS

The issue the Committee is examining is the provision of extended portability for severely disabled DSP recipients that may be subject to a Guardianship Order. In the Department's view there are significant policy and administrative issues related to the use of Guardianship Orders for the purpose of determining extended portability of DSP. A description of the current portability arrangements for DSP and possible issues relating to the use of Guardianship Orders for the purpose of extended portability is discussed in detail below.

Like most other workforce age payments, since 2004, DSP is generally only portable overseas for 13 weeks. Only in the following limited circumstances can DSP be paid overseas indefinitely.

- The person has a terminal illness, is severely disabled and is going overseas to return to their country of origin or to be with or near a family member for care and support.

- The person was residing overseas on 1 July 2004 and has not since returned to Australia and resumed Australian residence. These are people grandfathered from changes introduced in 2001 or 2004 limiting portability.
- The person is covered by an international social security agreement.

There are also provisions in the *Social Security Act, 1991* to allow for a person to be granted a portability extension in limited and defined circumstances. For example, if the DSP recipient is prevented from returning to Australia before the end of the portability period because they are involved in a serious accident while overseas.

Portability provisions have been gradually tightened by Government. In 2000 the portability for DSP was reduced from 52 weeks to 26 weeks. It was further reduced in 2004 to the present 13 week period. This is consistent with the purpose of disability support pension, which is to assist people with the cost of living in Australia, and to engage people of workforce age in activities in Australia that will lead to greater levels of economic and social participation.

The 2010 Intergenerational Report presents further evidence of the need to strengthen workforce participation by all Australians. The Report notes that over the next 40 years, the labour force participation rate for people aged 15 and over is projected to fall, reflecting the projected fall in the proportion of people aged 15 and over in the labour force and falling hours worked by those in employment. Steps to improve Australia's participation rate will minimise the impact of an ageing population. The Report notes that wellbeing is enhanced if members of society have the opportunity to participate in economic and social activities.

The 13 week portability period is an acknowledgement of Australia's multicultural heritage and that many Australians have strong links to other countries. Thirteen weeks is seen as a sufficient period of time for a person to be away from Australia and overseas for instance for holidays or to deal with personal matters overseas that may arise from time to time. Further extensions to this 13 week period can also be granted in limited circumstances – such as in the event of a family crisis. However, the intention has never been for taxpayers to subsidise a prolonged overseas stay for a person of workforce age. It is not the intention of the 13-week portability period to allow people to live overseas and return to Australia for only short periods every 13 weeks to maintain payment of their Disability Support Pension.

The allowable 13 week portability period for DSP is defined in section 1217 of the *Social Security Act 1991*.

Guardianship

A guardian is a person appointed by a relevant State or Territory Guardianship Tribunal (or similar) who is granted the legal right within that

jurisdiction to make personal and/or health decisions on behalf of, usually, an adult with impaired decision-making capacity. Guardianship is administered by each State and Territory separately under their own legislation and usually a time limited Order that is subject to review is issued.

Guardianship Orders are regarded within the disability community as a form of substituted or supported decision-making, and as such are subject to scrutiny under Article 12 of the United Nations Protocol for the Rights of Persons with Disabilities (The Convention) which was ratified by Australia in 2008 followed by Australia's ratification of the Optional Protocol in 2009. The Convention reaffirms the human rights and fundamental freedoms of all persons living with a disability.

Decisions on the application of Guardianship Orders require State and Territory authorities to balance an individual's right to self-determination against the need to ensure the protection of that person's other rights noting their high level of vulnerability of these people. The legal orders made by a Guardianship Tribunal (or similar) significantly impact on the rights of citizens.

Guardianship Orders are not very common. For example, in 2008-09 the NSW Guardianship Tribunal received 6,436 new applications of which 2,638 related to the appointment of a guardian. Approximately 60 per cent of cases related to people 65 years or older with the most frequently recorded disability in applications being dementia. Approximately 42 per cent of applications before the Tribunal were conciliated or withdrawn, prior to or at hearing, or dismissed without the need for a formal order.

Definition of severely disabled

A definition of severely disabled is provided at section 23.4(B) of the *Social Security Act, 1991*. A DSP recipient is assessed as 'severely disabled' by Centrelink if the impairment prevents them from doing any work, for 8 hours per week or more for the next two years, and not benefiting from training, education or rehabilitation to the extent of being able to work at least 8 hours per week or more or if they are permanently blind.

This definition is currently used for DSP eligibility under International Social Security Agreements and for people assessed for unlimited portability if they have a terminal illness, are severely disabled and returning to their country of origin or to be with their family for care and support (s1218AA of the Social Security Act 1991).

It is estimated that 38% per cent or 300,000 of the current DSP population would be classified as severely disabled if a medical assessment was made. However, of those DSP recipients who were classified as severely disabled, with either an intellectual disability or acquired brain impairment and as a result most likely to have some form of assisted decision making, only 39 travelled overseas for more than 13 weeks during 2009-10.

It is estimated that many in this DSP group who would otherwise be assisted by the proposed changes under consideration by the Committee may not necessarily have a formal Guardianship Order in place.

It is acknowledged that the participation prospects of people with a Severe Disability, such as those subject to Guardianship Orders are generally constrained, however the Government is committed to supporting their economic and social participation in Australia, and provides a range of support, in addition to increases to DSP levels, for this to occur. These include the following measures:

- Australian Disability Enterprises, which employ people with a disability, often in specialist working environments called supported employment;
- Supported Wage Scheme, which allows employers to pay less than the minimum wage by matching a person's productivity with a fair wage;
- Disability Employment Services, which help people to prepare for and find a job through help with education, training, building confidence, rehabilitation and job search; and
- The National Disability Agreement is a partnership with State and Territory Governments, providing a wide a framework of support measures.

Discussion

The department believes that the use of Guardianship Orders to allow portability would be restrictive and not appropriate.

- Many people with impaired decision-making capacity are cared for by family and friends with support by Government and non-Government organisations without the need for a legal Order. Supported and substituted decision-making arrangements do not require a formal guardian appointed by order of a tribunal or court. Limiting portability to those people that have a legal guardian will not recognise these non-formal care arrangements and may force people to seek formal arrangements where previously they were not deemed necessary.
- Such a requirement would be perceived as unfair to the large population of Severely Disabled DSP recipients in non-formal care arrangements and may place a further burden on the often fragile care arrangements. The Government values the enormous social and economic contribution of carers all over Australia and would not seek to place unnecessary pressure on them.
- The use of Guardianship Orders in this way may work contrary to the principles of State/Territory Guardianship Tribunals. Tribunals actively encourage the use of non-formal arrangements and seek to explore and work within non-formal care to provide the least restrictive outcome

for the person with disabilities. Formal Orders are seen as a last resort arrangement.

- If portability for DSP recipients with a severe disability and a legal guardian was included in the Bill before the Committee it is estimated that none of the 1,000 DSP recipients who travel overseas regularly would benefit.
- If Guardianship was used as a method of determining a person's qualification for DSP overseas, it would be complex for Centrelink to administer and require changes to Centrelink assessment processes. This would include more than just acknowledgement that a Guardianship Order existed for the DSP recipient. Guardianship is a State/Territory based responsibility and different types of Orders occur across jurisdictions. It will be difficult for Centrelink to make consistent and equitable assessments nationally. Given that DSP recipients may already be overseas, Centrelink may be required to also assess Guardianship Orders or their equivalent issued by another country.
- Guardianship Orders are granted for a limited time. This would require Centrelink to track changes or variations to current orders as these will now impact on a severely disabled recipient's eligibility for payment overseas noting that the Guardianship Orders are a State and Territory responsibility. This mechanism is not focussed on the level of disability or their potential to re-engage economically or socially.
- As mentioned above Guardianship Orders are not recorded by Centrelink, however it is estimated that less than 10,000 are granted annually across Australia, with most for people above 65 years of age with age related mental illnesses.
- The main purpose of DSP is to assist people with the cost of living in Australia and support their social and economic participation. If a DSP recipient is living overseas then the DSP payments funded by Australian taxpayers are not helping them in this way.
- The 13 week portability rules allow DSP recipients sufficient time to attend to personal business that might be arise from time to time overseas or to holiday. Current exemptions provide a sound basis for ensuring that the social security system is fair and equitable to all.

RECOMMENDATION

The matter of portability before the Committee is not connected to the *FaHCSIA and Other Legislation Amendment (Budget and Other Measures) Bill 2010* and the Department recommends to the Committee the amendments proceed. The proposed start date for this measure is 1 January 2011.