



T 03 9607 9311

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Committee Secretary

Senate Community Affairs Legislation Committee
PO Box 6100
Canberra ACT 2600

Dear Committee Secretary,

Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016

The Law Institute of Victoria (LIV) welcomes the opportunity to contribute to the Senate Community Affairs Legislation Committee's review of the Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016 (the Bill).

The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing approximately 19,000 members. We advocate on behalf of our profession and the wider community, lead the debate on law reform and policy, lobby and engage with government and provide informed and expert commentary. The LIV is a constituent body of the Law Council of Australia. This submission is informed by contributions from the LIV's Administrative Law and Human Rights Section.

Outline of the Bill

The Social Services Legislation Amendment (Enhanced Welfare Payment Integrity) Bill 2016, if passed, will give the Secretary of the Department of Social Services the power to issue Departure Prohibition Orders (DPOs) on individuals travelling overseas who have unpaid welfare debt (under the family assistance, paid parental leave, social security and student assistance schemes) and have not made 'satisfactory arrangements' for repayment. If an individual breaches a DPO they may be subject to a criminal offence under the Bill with 12 months' imprisonment.

The Bill also removes the six year limitation period on the recovery of welfare debts.

The Explanatory Memorandum states that the purpose of the Bill is to encourage individuals to repay their welfare debts and to protect the integrity of welfare outlays.

LIV Concerns

1. *The Bill is not consistent with Australia's obligations under art 12 of the ICCPR*

The LIV shares the concerns of the Parliamentary Joint Committee on Human Rights¹ that the proposed powers under the Bill may limit the right to freedom of movement under article 12(2) of the *International Covenant on Civil and Political Rights*² without sufficient justification. The view of the LIV is that it is inappropriate to use such punitive measures for the purpose of recovering welfare debt. We are concerned that because the Bill applies to all social security debts, with no minimum requirements for the amount of debt or the length of time for which it has remained outstanding, it may unfairly

¹ Parliamentary Joint Committee on Human Rights, *Thirty-sixth Report of the 44th Parliament* (16 March 2016) 8-10.

² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

disadvantage vulnerable individuals who are unable to repay a welfare debt and impose a disproportionate limitation on the right to freedom of movement. This is particularly concerning because the Bill will make it a criminal offence (with 12 months' imprisonment) to breach a DPO.

Permissible restrictions on the right to freedom of movement under the ICCPR must be: provided by law, necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and consistent with other rights recognised in the ICCPR (art 12(3)). The United Nations Human Rights Committee has also noted that such restrictive measures:

...must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

... The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality. These conditions would not be met, for example, if an individual were prevented from leaving a country merely on the ground that he or she is the holder of 'State secrets', or if an individual were prevented from travelling internally without a specific permit. On the other hand, the conditions could be met by restrictions on access to military zones on national security grounds, or limitations on the freedom to settle in areas inhabited by indigenous or minorities communities.³

The LIV questions the proportionality of these proposed measures, given the impact they will likely have and the interests the Bill is intended to protect.

The LIV notes that DPOs are only issued where an individual has not made 'satisfactory arrangements' for repayments, and the Bill imposes a duty on the Secretary to have regard to the capacity of the individual to repay the debt and any previous actions or attempts to repay the debt. The statement of compatibility for the Bill also set out that provisions have been made for Departure Authorisation Certificates (DACs) to be granted on humanitarian grounds or where the person's travel may be in Australia's best interest.

However, whilst the above measures ameliorate to some degree the infringement on the right to freedom of movement, there is insufficient justification for the extensive limitations imposed by the Bill on the basis of recovering welfare debts.

The LIV acknowledges that in some circumstances proper government can require such intrusive limitations, for example where national security risks are present. The Law Council of Australia (LCA) raised similar concerns about the impacts on freedom of movement with regards to provisions in the Counter-terrorism Legislation Amendment (Foreign Fighters) Bill 2014 ('Foreign Fighters Bill').⁴ The Foreign Fighters Bill included powers to suspend travel documents for 14 days where ASIO was concerned that the person may leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country. Whilst the LCA acknowledged the necessity for such a power, it suggested a number of additional safeguards to ensure compliance with art 12 of the ICCPR including: a shorter period of initial suspension than 14 days; instituting a 'real and not remote

³ United Nations Human Rights Committee, *General Comment 27*, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

⁴ Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, 3 October 2014.

possibility' test for potential harmful conduct; that the decision to suspend the document take into account the person's age, language skills, mental capacity and other relevant factors; and a strict and limited number of multiple requests for suspension.⁵

The effect of the DPO imposed under this Bill and cancellation of documents under the Foreign Fighters Bill is effectively the same, particularly given that breach of a DPO is a criminal offence under the Bill with 12 months' imprisonment. However, the reasons for the laws are quite different, with one focused on protecting national security and the other on protecting Commonwealth revenue.

In the case of the Foreign Fighters Bill suspension of travel documents was limited to 14 days, whereas DPOs have no restriction on the length of time they are in force (clause 102D). The Parliamentary Joint Committee on Human Rights accepts the objective of the Bill, 'to encourage the repayment of social security debts by people who are no longer recipients of social welfare',⁶ however it is not clear how the extent of the limitations imposed by a DPO are reasonable and proportionate to achieve that aim.

In the view of the LIV, the provisions of the Bill constitute unjustifiable limitations on the right to freedom of movement.

2. The practical effect of the Bill requires clarification and appears to be disproportionately onerous

DPOs are only issued where an individual has not made 'satisfactory arrangements' for repayments (clause 102A(1)(b)). There is no explanation of what 'satisfactory arrangements' would entail under the Bill. This term requires greater clarification to provide certainty to people who have unpaid debts.

According to the LIV's members' experience, many clients in receipt of Centrelink benefits frequently move address or may not have a fixed address, or experience other barriers to communication such as illiteracy or mental health issues. While there are notification requirements under the Bill when a DPO is made, in the LIV's view these common barriers and difficulties are likely to mean that many people may not receive the DPO, or be able to understand it. The practical effect of these provisions may be to require people who have unpaid debts to contact the Department of Social Services before planning any travel to first arrange for such a plan or, if a DPO is imposed, to obtain a Departure Authorisation Certificate.

If the individual does not contact the Department, they may face the possibility of a DPO being imposed while they are overseas, and then face potential imprisonment on return if they are found to have been 'reckless as to whether the order is in force' (clause 102B(a)). This could potentially lead to imprisonment of people who were unaware of a DPO being placed on them.

The LIV is also concerned about the potential infringement on vulnerable individuals' privacy if they are required to inform the Department of details of their travel plans and personal circumstances or reasons for travel.

⁵ Ibid 27.

⁶ Parliamentary Joint Committee on Human Rights, Thirty-sixth Report of the 44th Parliament (16 March 2016) 10.

The Bill provides the Department with the power to issue DPOs in relation to all relevant social security debts, including where the debt has arisen as a result of a departmental mistake. It is therefore possible for someone to have their freedom of movement limited unjustifiably due to an administrative error on the part of the department.

The LIV is also concerned about the revocation of the six-year limit on debt recovery. This may impose an unnecessary burden on vulnerable individuals who have been unable to repay a debt over a significant period of time. The limitation period of six years exists to protect such potentially vulnerable individuals. It appears to the LIV to be unjustified to remove this and it would create a considerably different liability than that applying to private debts owed by other Australian citizens.

Conclusion

While the aim of the Bill is to increase welfare debt recovery and to protect welfare integrity, in the view of the LIV it may disproportionately infringe on individual liberties and freedoms, and expose vulnerable people to unfair restrictions.

For the reasons outlined above the LIV recommends that the Committee not support the Bill in its current form.

If the Committee does choose to support the Bill the LIV recommends amending the Bill to ensure it operates in the least rights restrictive manner to achieve its purpose. We suggest that this could be achieved by introducing greater protections, including: restoring the six year limitation period on the recovery of debt; introducing minimum thresholds for the amount of debt and the length of time it has remained unpaid; clarifying the practical effect of the Bill and the definition of 'satisfactory arrangements'; and restricting the power to issue a DPO where a welfare debt has arisen as the result of a departmental error.

The LIV would welcome the opportunity for further consultation if the Committee is considering recommending amendments to the Bill. If the Committee has any questions about this submission please contact Josephine Polak

Yours sincerely,

Steven Sapountsis

President

Law Institute of Victoria