

Patrick Hodder
Senate Finance and Public Administration Committee

Sent by Email: fpa.sen@aph.gov.au

Governor-General Amendment (Cessation of Allowances in the Public Interest) Bill 2023

Dear Committee

Thank you for your correspondence of 24 July 2023 offering the opportunity to respond to comments made by others in their evidence or submissions.

I write in response to the evidence of the Government representatives:

Department of Finance:

- Mr Scott Dilley, First Assistant Secretary, Governance Division
- Mr Neil Robertson, Assistant Secretary, Funds and Superannuation Branch

Attorney General's Department

- Ms Alice Linacre, First Assistant Secretary, Courts Tribunals and Commercial Division
- Mr David Lewis, General Counsel, Office of Constitutional Law

Beyond Abuse had been looking forward to hearing quality and constructive contributions from the departmental representatives. The bill seeks to address a policy issue that impacts deeply on a large number of Australians:

- Survivors of sexual abuse, particularly in institutional settings or by powerful and connected people or where the perpetrator has been protected;
- Every Australian tax payer whose money is being spent on former Governor General luxury allowances.

Given the wide reach of the policy objectives it is reasonable to expect that the senior public servants would have taken appropriate care and diligence to be across the policy and the bill and make necessary preparation to contribute in a meaningful way to the Senate hearing.

Therefore we were disappointed when it appeared that the departmental representatives had failed to adequately prepare for the Senate hearing and then appeared to provide information that was inaccurate or misleading.

Their conduct appeared to demonstrate they:

- had not done due diligence;
- had not undertaken any, or adequate, research;
- had not bothered to watch the evidence of the preceding stakeholders at hearing;
- were ill-prepared, including for even the most basic of questions from Senators;
- didn't understand or care about the policy or the bill;
- gave incorrect, or otherwise improper, evidence to the Senate.

Incorrect or improper evidence

The following evidence provided by the government representatives is of concern:

- Senior public servants advised the Senate that the *Crimes Superannuation Benefit Act 1989* was an existing mechanism for misconduct of a former Governor General to be grounds to strip them of public funded allowances, such as allowances paid pursuant to section 4 of the *Governor General Act 1974*. This is untrue and very obviously untrue.
 - The *Crimes Superannuation Benefit Act 1989* (the Act) has no express application to Governors General. To seek to make it apply would likely be a stretch, very open to challenge.
 - The Act applies to Superannuation; whereas the allowances paid to former Governors General are not superannuation, they are very specifically called, in the legislation, an "allowance" (section 4 *Governor General Act 1974*).
 - The Act applies to Australian Government employees – the Departments have previously advised that the Governor General is *not* an employee.
 - The Act requires criminal conviction – and a 12 month custodial sentence – to apply. It does not expressly apply in cases of misconduct or serious misconduct or even where disciplinary offences have been committed.

To suggest the Act as an existing mechanism for resolving misconduct of former Governors General is incorrect and misleading to the Senate Committee.

One can envisage that if Beyond Abuse were to approach the Departments to formally lodge a complaint about any former Governor General under the *Crimes Superannuation Benefit Act 1989* the Departments would respond citing all the reasons why that legislation does **not** apply. So why tell the Senate Committee the opposite?

- Beyond Abuse have been advised that the payment to former Governors General after they have left office is not a “pension”, it is an allowance, and is referred to as an “allowance” in the *Governor General Act 1974*:

GOVERNOR-GENERAL ACT 1974

Section 4

Allowances

(1) Subject to subsection (4) and subsections 4AE and 4AG, where, after the commencement of this Act, a person ceases to hold office as Governor-General, an allowance is payable under this section to him or her during his or her life-time at such rate as is from time to time payable under paragraph (3)(a).

...

(3) The rate of the allowance payable to a person under this section at any time is:

(a) in the case of a person who has held office as Governor-General—60% of the rate of the salary payable to the Chief Justice of the High Court of Australia at that time

Beyond Abuse are advised that referring to the allowance as a “pension” is incorrect and is not supported in law. It is an allowance arising from an isolated Act of Parliament and it can be ceased, amended, or cancelled by an Act of Parliament.

- The senior departmental representatives stated or implied that Governors General are 'Commonwealth employees' for the purposes of pay and awards and misconduct matters.

However, previous advice from various Departments is that Governors General are *not* considered Commonwealth employees, but are 'Vice-Regal Appointments'. So why would the departmental representatives make such incorrect or misleading submissions to the Senate in this way?

It would likely be a positive accountability improvement if Governors General were treated as 'Commonwealth employees' and subject to the Public Service Code of Conduct. However, we are advised that they are not. Previous advice from various Departments is that there is NO code of conduct to which a Governor General is currently bound to comply while in office.

- Various provisions of the Australian Constitution were raised by some departmental representatives, in particular section 3 and section 51. It is our understanding that this was misleading and disingenuous as we are advised that the Australian Constitution has no specific relevance to the policy or the bill.

Section 3 does not in any way have any relevance to allowances paid after a Governor General departs the office. It only provides for a salary while in office. The Constitution of Australia makes no requirement for a Governor General to be paid anything after they have left the office. This is merely via an Act of Parliament.

Similarly, section 51 appears to have no relevance to the bill. It is understood that the reference to section 51 was to s51(xxxi) specifically.

As the Committee would be aware, s51(xxxi) states:

Australian Constitution

51. Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xxx) acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws

We are advised that the ceasing of an allowance into the future is hardly the “acquisition of property”.

The money is the property of the Australian tax payer or the Australian Government up to and until it is paid to a former Governor General.

Money that has not yet been transferred in ownership remains the property of the Australian Government. Section 51 has no automatic relevance.

If there was some perceived statutory right to the payment that could be interpreted as it being property even though it had not yet been received, this statutory right is able to be limited or extinguished such as by terms in the legislation placing limits or conditions on the statutory right (for example requirement not to commit misconduct) as a condition of eligibility).

In any event, if s51(xxxi) were to apply at all, it applies merely to affirm that the Australian Government has the power to make laws in such matters. Just terms would presumably include that the Australian Government may impose a condition of good conduct to remain eligible for the payment of an allowance including that breaching the standard of conduct may result in ceasing to be eligible to receive the allowance. This is hardly controversial or in breach of the Australian Constitution.

It is unclear why the Attorney General’s Department sent a representative from the Office of Constitutional Law when the policy and the bill have nothing to do with the Constitution, but the Department did not send anyone who made any meaningful contribution from an administrative law or disciplinary law perspective.

- Finally, there was repeated reference to allowances paid to former Governors General being “offset”. However, the departmental representatives did not appear to expressly inform the Senate that this offset does not apply in relation to private superannuation or pensions. It only applies to other offices of profit under the Crown. They correctly gave examples of the various ex-military Governor Generals in receipt of ADF Superannuation or pensions.

They neglected to mention that any former Governor General in receipt of a *privately* sourced superannuation or pension is permitted to ‘double dip’; ie they continue to receive the tax-payer funded ex-Governor General allowance in full PLUS their private superannuation / pension. For example, if the individual is in receipt of:

- Self Managed Super Fund (SMSF);
- Pension from non-government source; eg church pension for an ex-Archbishop or Bishop.

In the interest of full and accurate evidence, it would have been appreciated for this to have been made clear to the Senate.

Beyond Abuse had been looking forward to the evidence of the departmental representatives and was hoping it would be constructive, meaningful and might have helped to advance dialogue about the policy objectives and the bill. As it was, we were disappointed by the poor quality of contribution on the day and the lack of respect shown by them to the Senate, to the issue and to the Australian people.

It was not their finest hour as individuals and we hope that they please reflect upon their conduct, and the impact that their conduct has on others, with a view to improving their knowledge, their level of engagement with the policy and their respect for the issues that the bill is seeking to address – as well as respect for the Australian tax payer (who pays their wages) who is footing the bill for the luxury Governor-General allowances and also for proceedings such as the Senate Hearing.

Beyond Abuse remains open to working with senior departmental representatives in advancing the policy and any legislation that appropriately addresses the policy objectives, and we welcome the opportunity for them to re-engage with this matter more constructively.

We offer our services to assist them in this.

Yours sincerely

Steve Fisher
CEO
Beyond Abuse

28 July 2023