



JF3610
8 July 2010

Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Ms Dennett,

Please find attached the submission from the Welfare Rights Centre, Sydney, to the Legal and Constitutional Affairs References Committee review of Government compensation payments. We acknowledge the lateness of this submission and appreciate the Committee's acceptance of this submission.

Our submission provides a brief discussion on the terms of reference related to debt waiver provisions and the scheme for Compensation for Detriment caused by Defective Administration.

We would welcome the opportunity to provide additional feedback to the Committee in its important deliberations.

Should you require any additional information please contact me on

Yours sincerely,
Welfare Rights Centre

Jackie Finlay
Acting Director

Introduction

The Welfare Rights Centre, Sydney is a community legal centre which specialises in Social Security and Family Tax Benefit law, and any problems people may have with Centrelink in obtaining their Social Security entitlements. It provides free advice and representation on these matters and is entirely independent of Centrelink.

The Centre also undertakes research and analysis, develops policies and position papers, advocates for reforms to law, policy and administrative practice and participates in campaigns consistent with its aim to reduce poverty, hardship and inequality in Australia.

The following analysis draws from the Centre's extensive casework and policy experience.

The Welfare Rights Centre is a member of the National Welfare Rights Network (NWRN). Proposals in this submission draw on suggestions in a discussion paper, *Redressing the balance of risk and responsibility through active debt prevention strategies*, May 2009. A meeting on debt issues was held in Canberra with NWRN members (including three staff members from the Welfare Rights Centre, Sydney) with Centrelink, the Department of Families, Housing, Community Services and Indigenous Affairs, the Department of Employment, Education and Workplace Relations, Centrelink, the Department of Veterans Affairs and the Department of Human Services.

Response to the terms of reference on the debt waiver provisions

The Welfare Rights Centre is of the view that the current debt waiver provisions are unbalanced and unfair, and in a number of aspects lead to perverse and unintended onerous outcomes which can leave individuals and families in significant financial hardship.

Over the last 15 years, governments have tightened the Social Security legislative provisions relating to the raising and recovery of debts. Whereas 15 years ago, not all overpayments were actually recoverable debts, now regardless of the cause almost all are recoverable debts.

This has been part of the massive shift in the balance of risks and responsibilities in the Social Security system. Such an approach has not been conducive to good public administration because it has also encouraged Centrelink to be less efficient and far more careless than it should be.

The Welfare Rights Centre supports legislative reform in this area, and below we outline directions for change.

Proposal 1:

Remove “solely” from Section 1237A of the *Social Security Act 1991*

Section 1237A of the *Social Security Act 1991* (“SSA”) requires a person to prove that their debt was ‘solely’ caused by administrative error in order to have it waived.

This means that Centrelink can be 99% responsible for the debt but it will not be waived because of the 1% contributory error of the individual. The result of which has been even when Centrelink acknowledges it has erred, the balance of risk rests almost entirely with the individual because any slight contributory error on their part makes them liable to repay the debt. Invariably Centrelink relies on the small print on the backs of notices to argue that the person has also contributed to the debt.

The following case studies are illustrative of the unfairness and inequity of taking such an approach.

Case study 1 Centrelink error caused large debt for Mr B

Mr B claimed Parenting Payment (PP) and Family Tax Benefit (FTB) on 10 March 2003. He lodged claim forms for both payments on that day. On the claim form for PP, Mr B advised that he had separated from his ex-partner and that he worked full time earning \$560 per week. He advised on the FTB claim form that he expected his income to be about \$28,000 for this year.

Despite providing information about his income and being employed full time, Centrelink granted PP to Mr B at the maximum rate from the date of his claim. The first Centrelink review form Mr B received was about 28 months after he applied for PP. He had no interviews with Centrelink in the interim. When he lodged the review form he again advised Centrelink of his income. This led to Centrelink raising the debt and referring the matter to the DPP. The DPP did not

proceed with prosecution action, presumably because Mr B had always notified Centrelink of his income and Centrelink error was the cause of the debt.

However it is highly unlikely that Centrelink will accept that the debt be waived as it will maintain that the debt was not solely due to Centrelink error, as Mr B did not contact Centrelink to advise it that the information it had on the back of the Centrelink notices about his income was incorrect.

Case study 2 Centrelink failed to transfer income

Ms Z was in receipt of Parenting Payment (PP) and Family Tax Benefit (FTB). She was advised that she has a PP debt of just over \$17,000 as Centrelink did not take into account her income from employment. During the debt period, Ms Z advised Centrelink of her income.

Centrelink does not dispute this. However, Centrelink's Original Decision Maker did not waive the debt on the basis that Ms Z advised the FTB section of Centrelink of her income but not the PP section. Centrelink's view was that Ms Z contributed to the debt.

The best way to improve the quality of administration within Centrelink is to once again make Centrelink at least partially responsible for its own errors. This could be achieved through removing 'solely' from s1237A of the SSA and requiring Centrelink to waive any debt which was caused 'substantially' by administrative error. Alternatively, 'solely' could be replaced with 'wholly or predominantly'.

The example highlighted in Case study 2 occurs all too frequently. For many years the Welfare Rights Centre has been urging governments to address the profound unfairness experienced by many people who have debts raised against them notwithstanding that they notified one 'limb' of Centrelink (for example, the family payments section) and believed that in doing so this information would be provided to all other 'limbs' (for example, the pensions section).

At many levels government understands that there is significant confusion among Social Security recipients and they recognise that recipients expect that this information will be shared, yet it fails to put in place processes where there will be automatic swapping and checks of relevant information.

The government should take immediate action to waive this class of debts which have arisen because of its failure to put in place adequate processes to update information provided by Social Security recipients.

Proposal 2:

Replace 'received in good faith' with 'acted in good faith' in section 1237A of SSA

For a debt to be waived, it is also necessary for any overpayment to have been 'received in good faith'. Where a person is on the record as having contacted Centrelink to query their payment or to check that it is correct, Centrelink will not accept that any subsequent overpayment was 'received in good faith' even though, at the time of the inquiry, Centrelink had checked the payment and categorically assured the person that they were receiving the correct amount. Again, this provision shifts all responsibility to the customer and simply condones a 'no responsibility, no care' approach by Centrelink which is contrary to sound administrative practice. If the provision was changed to 'acted in good faith' Social Security recipients would not have to carry unfair debt burden and Centrelink would be held accountable.

Proposal 3:

Remove 6 week rule in section 1237A of the SSA

For a debt to be waived under section 1237A of the SSA a final requirement is that it must not have been raised within 6 weeks of the overpayment occurring. This means any debt 'picked up' within 6 weeks of the overpayment occurring cannot be waived under this provision. This rule permits Centrelink to fail to act on an administrative error during a period in which a person is most likely to act in reliance on the original decision and spend the money. As many people live from payment to payment the Welfare Rights Centre recommends the rule ought to be deleted or reduced to 14 days.

Proposal 4:

Remove inconsistent provisions for Family Tax Benefit debt waiver

The equivalent administrative error waiver provision for Family Tax Benefit (FTB) debts is contained in section 97 of the *Family Assistance (Administration) Act 1999*. Section 97 includes an additional, significant requirement that the person must also prove that they "would suffer severe financial hardship" if the debt is not waived.

The additional requirement contained in section 97, unnecessarily limits the operation of the administrative error provisions to the extent that innocent recipients of FTB are expected to foot the bill for Centrelink's administrative mistakes.

Numerous Family Tax Benefit debts occur each year through Centrelink's sole administrative error. The "severe financial hardship" test has been set at a very high threshold test and even a family that only receives Social Security income may not qualify as being in "severe financial hardship". Again, why should Centrelink bother to get it right when it can simply raise a debt with no care or responsibility if it gets it wrong. To achieve greater care, accuracy and efficiency and to shift the emphasis to debt prevention rather than debt recovery where it is now, this additional requirement needs to be removed. Alternatively it should be amended so that debts must be waived for any family on income support or where "financial hardship" exists.

Proposal 5:

Remove words "or another person" from section 1237AAD of the SSA

Every year numerous Social Security debts are raised where a woman has received payments at the single rate, yet Centrelink later determines they were a member of a couple.

The Welfare Rights Centre too regularly is contacted by women who have been pressured by an abusive partner to claim a Social Security payment as a single or not declare the correct amounts of their earnings. Social Security debt waiver laws make no allowance for this kind of duress. In criminal law it has been recognised that serious domestic violence can induce what has been called "battered women's syndrome", a condition that robs women of the ability to make decisions for themselves due to "learned helplessness" (see Patricia Eastal, Kate Hughes and J Easter: 'The Reasonable Battered Woman and Duress': *Educating the Judiciary* (1993) 18(2) *Alternative Law Journal*, p.139).

In some of the cases the Welfare Rights Centre sees, the woman did not receive any financial benefit from the payments yet they are required to repay significant debts and face prosecution long after the relationship has ended.

Section 12377AAD of the SSA provides circumstances in which a debt can be waived if "special circumstances" exist to warrant waiver. However, waiver is

precluded if the debt resulted wholly or partly from the debtor or another person knowingly making a false statement or knowingly omitting to comply with the Act.

This means that the discretion cannot be used where a debt is attributable, even in part, to knowingly false statements or failures to comply by a third party.

In battered wives syndrome cases, the false statements and/or failures to comply are almost always attributable to the abusing male. An example of this would be when the male insists that his partner not report his true income or employment circumstances, or insists his partner not declare his presence in the family home.

Case study 3

Watson v Secretary, Department of Family and Community Services [2002] AATA 311 (6 May 2002)

Mrs Watson was subjected to horrendous verbal and physical abuse from her partner. She was assaulted repeatedly to 'keep her in line', on several occasions ending up in hospital with bruising and broken bones. When she attempted to leave her partner, he told her that 'If you leave I will kill you and your children.' The marriage broke up only when Mr Watson was imprisoned for Social Security fraud. His offence had been to claim Social Security benefits without declaring that he was employed.

Mrs Watson had been receiving social security benefits of her own. These benefits were higher than they should have been because of her husband's undeclared income, and when Mr Watson's fraud became known a substantial overpayment debt was raised against her. Mrs Watson sought waiver under section 1237AAD of the SSA but this was refused because of Mr Watson's knowingly false statements.

We believe that paragraph section 1237AAD of the SSA should be amended to read:

The Secretary may waive the right to recover all or part of a debt if the Secretary is satisfied that (a) the debt did not result wholly or partly from the debtor or another person acting as an agent for the debtor knowingly...etc.

In our view, this amendment would cover the situation where the debtor was instrumental in procuring the false statement or representation or the failure or

omission to comply with the relevant legislation, but would not capture a wife or partner who was acting under duress.

Debt recovery policy

Once Centrelink determine that a person owes a debt, they will commence debt recovery action. If a person is in receipt of Social Security payments, Centrelink policy is to deduct 15% of their payment each fortnight. This commences even when a person is appealing against a debt, for example, seeking debt waiver. As the Department of Families, Housing, Community Services and Indigenous Affairs points out at page 6 of its submission, a person can seek a lower rate of debt recovery if they are experiencing financial difficulty.

However, from 1 January 2011 people repaying Centrelink debts at a rate below the standard rate of 15% will be subject to a review of their circumstances every three months. The Welfare Rights Centre understands that around 70 percent of those with a Centrelink overpayment currently pay less than the standard rate of 15%. The quicker rate of recovery is expected to result in \$42 million of debts repaid sooner.

The convention has been that the recovery of debts should not place Centrelink recipients in financial hardship – but this is exactly what this change may result in.

This change should not go ahead on its scheduled commencement date of 1 January 2011, as there is not a clear understanding of the nature of indebtedness amongst those on welfare payments. Not enough is known about how households cope with debt repayments when they owe multiple debts to organisations such as the Australian Taxation Office, child support, state debt recovery officer, utilities and credit card providers, as well as Centrelink. There should be less focus on Centrelink meeting its debt recovery “key performance indicators” and more energy put into exploring how Australian households experience debt and financial hardship.

Response to the terms of reference on the scheme for Compensation for Detriment caused by Defective Administration

The Welfare Rights Centre advises people about making claims under the scheme for Compensation for Detriment caused by Defective Administration (CDDA) and Act of Grace scheme. We would welcome the opportunity to discuss

our experiences with these schemes. However, we place on record our strong support for the submission from the Acting Commonwealth Ombudsman to this review.

In particular, we draw attention to the Acting Commonwealth Ombudsman's comments highlighting the faults in the administration of the CDDA scheme, including its lack of visibility, lack of assistance to claimants in accessing the scheme and making a claim, poor communication with claimants, and a defensive and legalistic approach to CDDA decision making.

The Acting Ombudsman highlights the blurring of responsibilities and service gaps in relation to the inability to access the CDDA scheme where the defective administration is committed by a contracted service provider. Given the increasing contracting out of government services, the resolution of these gaps is a priority.

Additionally, there is an urgent need to consider the interactions between various government agencies and to clarify which agency should take responsibility if there is defective administration that is shared between a number of agencies.

This is an important task which should be built into service delivery reform at the outset as we see the move to more integrated service delivery across all government agencies, as articulated by the Government's service delivery reform announced on 16 December 2009 and under its banner *Works for You*.