

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
AUSTRALIAN LAW REFORM COMMISSION

Question No. 56

Senator Siewert asked the following question at the hearing on 14 February 2012:

At last Estimates I was told that a report by the Law Reform Commission (incl. stakeholder responses) should be with AG from November.

1. Has the 'unknowing failure to comply' waiver been included in this report?
2. How would this operate?
3. What happens now?

The answer to the honourable senator's question is as follows:

1. The ALRC examined the 'special circumstances' waiver under s 1237AAD of the *Social Security Act 1999* (Cth). This section provides that the Secretary may waive all or part of a debt if satisfied that:
 - a) the debt did not result wholly or partly from the debtor or another person knowingly
 - i. making a false statement or a false representation; or
 - ii. failing or omitting to comply with a provision of this Act, the Administration Act or the 1947 Act;
 - b) there are special circumstances (other than financial hardship alone) that make it desirable to waive; and
 - c) it is more appropriate to waive than to write off the debt or part of the debt.

We assume that this is the waiver provision the Senator is referring to.

This waiver provision was included in the report and is considered in Chapter 9 of the Final Report (see pages 237–243). Stakeholders indicated that this waiver provision was the one that was most difficult for victims of family violence. Recommendation 9–7 recommends amendment to s 1237AAD. Recommendations 9–8 and 9–9 recommend an amendment to the *Guide to Social Security Law*.

2. As section 1237AAD currently stands, the Secretary may decide not to waive a debt in circumstances where a person using family violence has coerced the victim into lying to Centrelink about their social security payment. This may be because the Secretary finds that:
 - a) there are no special circumstances;
 - b) that the victim (the debtor) knowingly made a false statement or representation; or
 - c) that the person using family violence knowingly made a false statement or representation.

The recommendations made in the final report were made to ensure that:

- a) family violence could be recognised as a 'special circumstance' under s 1237AAD (Recommendation 9–9);

- b) that family violence through duress and coercion does not necessarily constitute ‘knowledge’ on part of the debtor (Recommendation 9–8); and
- c) where the debt is incurred through duress or coercion in circumstances of family violence, the debt may be waived—removing the link that the person using family violence knowingly made a false statement or representation (Recommendation 9–7). As s 1237AAD currently stands, where *any other person* knowingly makes a false representation, misleading statement or fails to comply with the Act, the debt might not be waived. The ALRC heard of circumstances where a person using family violence might knowingly mislead Centrelink, therefore leaving the victim (the debtor) with an outstanding debt to Centrelink. (Paragraph 9.74 of the Final Report provides a case study). Therefore, the ALRC recommended narrowing the class of persons who might be ‘another person’ to those who are nominees acting on behalf of the debtor. This amendment would ensure that the knowledge of the person using family violence would not be taken into consideration by the Secretary in deciding whether or not to waive the debt.

These recommendations should be read in conjunction with Recommendation 5–4 which aims to ensure that different levels of verification of family violence may be required in different circumstances. For example, where waiver of debt is sought, higher proof of family violence may be required—to avoid manipulated or false claims of family violence to get out of paying a debt.

3. The final report, *Family Violence and Commonwealth Laws—Improving Legal Frameworks* (ALRC Report 117, 2011), was provided to the Attorney-General in November 2011 and tabled in Parliament on 7 February 2012. The recommendations contained in the report, including those relating to waiver of debt provisions in social security law, are with the Attorney-General for consideration.