Lf7607

13 September 2007

Mr John Carter
Committee Secretary
Senate Standing Committee on Employment, Workplace Relations and Education
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Email: eet.sen@aph.gov.au

Re: Committee Inquiry – Social Security Amendment (2007 Measures No. 2) Bill 2007

Dear Mr Carter,

The National Welfare Rights Network (NWRN) is pleased to be able to provide the following brief comments for the consideration of the Committee. The National Welfare Rights Network (NWRN) is a network of 14 community legal centres throughout Australia which specialise in Social Security law and its administration by Centrelink. Based on the experience of clients of NWRN members, the Network also undertakes research and analysis, develops policies and position papers, and advocates for reforms to law, policy and administrative practice.

NWRN member organisations provide casework assistance to their clients in the form of information, advice, referral and representation. NWRN member organisations also conduct training and education for community workers, they produce publications to help Social Security recipients and community organisations understand the system and maximise their clients' entitlements.

Given the short time-frame for submissions, our comments are necessarily brief, and we have concentrated on items which are of greatest concern to us.

We trust that the Committee will give due attention to the issues raised in our submission.

Yours sincerely

Michael Raper
President, National Welfare Rights Network

1. Items 7 and 15- participation exemptions to principal carers

1.1 Definition of "family law order"

These items extend participation exemptions to principal carers who are relatives, but not parents, of children. The principal carer person must be a relative of the child, but not the parent of the child, the child must be directed to live with the person under either a parenting order made under the *Family Law Act* 1975, a state child order, or overseas child order which is registered under the *Family Law Act* 1975.

We support the extension of this exemption. However, we are concerned that the extension is too narrow. Principal carers should be in a position to seek an exemption from participation requirements without the existence of a "family law order" as defined in item 7.

There exist many circumstances where a relative of a child may become a principal carer without court orders being made. The narrow scope of the definition as detailed in this item undermines the utility and appeal of parenting plans that include non-parents, and stands in direct contrast to the current policy and legislative drive towards parenting plans and family relationship centres as alternatives to the Family Courts.

Solicitors see many parents who are fearful of formalising parenting agreements where a relative is providing care for their children, because they feel it may be difficult for the child to return to their care when their circumstances change and they are in a position to care for their children again. The scope of the definition of "family law order" is too narrow. It should be widened to include situations such as where a child lives with their grandparent because their parent is unable to care for them for an indefinite period. Without such broadening, the grandparent, if in receipt of an activity-tested payment, will still need to meet onerous activity requirements, if there are no formal parenting orders in place.

Recommendation 1

That the definition of "family law order" be extended to include parenting plans and other less formal care arrangements.

2. Items 8 and 36- 46 - changes to Disability Support Pension

2.1 Mandatory guidelines

Section 94 of the Act provides the main qualification criteria for Disability Support Pension (DSP). Item 8 of the Bill introduces into this section a new Ministerial power to make guidelines by legislative instrument:

8 After subsection 94(4)

Insert:

(4A) The Secretary **must** comply with the guidelines (if any) determined and in force under subsection (4B) in deciding the following:

(a) whether paragraph (1)(b) applies to the person;
(b) whether the Secretary is satisfied as mentioned in subsection (2) or (4).

(4B) The Minister may, by legislative instrument, determine guidelines to be complied with by the Secretary in making a decision referred to in subsection (4A). (emphasis added)

The legislative guidelines are to apply to the determination of whether or not a person has a "continuing inability to work" and to the assessment of a person's impairment rating under Schedule 1B of the *Social Security Act* 1991 (the Act). In making a decision about these two key qualification criteria, the Secretary will have no choice but to comply with the guidelines.

The NWRN has not been made aware of the proposed content of these legislative guidelines. The NWRN does not know if the legislative guidelines will mirror what is currently in the Department's oft-amended policy, "*The Guide to the Social Security Law*."

We also do not know if the legislative guidelines will reflect the current content of the *Job Capacity Assessment Service Provider Guidelines*, which have been provided to the NRWN. It is therefore impossible for us to comment on the likely effect of this provision.

Recommendation 2

That, if in the future the Minister intends to introduce a legislative instrument that differs in content from the current content of "The Guide to the Social Security Law", then further public consultation on the proposed changed content should take place before any such instrument is tabled in Parliament. Without such public consultation, the guidelines contained in the proposed legislative instrument will lack credibility and transparency.

2.2 Administrative review powers

In light of this year's Budget announcements regarding Tribunals' powers with regard to assessing impairment ratings and work capacity, the NWRN has concerns that the legislative guidelines may limit the type of evidence that the Secretary and appeal bodies may take into account when making decisions about a person's entitlement to DSP.

We further propose that it would be inappropriate for the legislative guidelines to fetter in any way the ability of the Secretary and the Tribunals to take into account opinions and assessments made by medically trained professionals, when reviewing decisions made under section 94 of the Act. Without this authority the AROs' and Tribunals' function in relation to a DSP appeal becomes recommendatory only.

Recommendation 3

That, as there will be instances where the medical evidence before an Authorised Review Officer (ARO) or Tribunal will indicate that the assessor's conclusions are untenable, the authority of AROs and Tribunals to come to a conclusion different to that of an assessor should be maintained.

2.3 Quality of assessments

The NWRN is aware that Job Capacity Assessors are currently performing the function of assessing a person's impairment rating and deciding whether or not a person has a continuing ability to work.

The NWRN has, on other occasions, expressed its concern that decisions about a person's eligibility for DSP are made be Job Capacity Assessors in the first instance. Job Capacity Assessors come from a wide range of allied health professions. They are not necessarily medically trained. This often leads to situations where, say, a person with qualifications in social work makes important assessments about the work capacity and impairment of a person with a severe bowel condition or a severe mental illness. Although Job Capacity Assessors can arrange for further assessments by specialists, they are discouraged from doing so.

We understand that impairment rating assessments will continue to be performed by Job Capacity Assessors with no medical qualifications, regardless of what ensues in relation to this Bill. This makes it all the more important that the proposed legislative guidelines are credible and transparent, and that they allow for the Secretary and appeal bodies to independently consider a wide range of medical opinions and evidence in conjunction with the Job Capacity Assessor's report. The fact is that a flawed assessment in relation to a DSP claim can lead to a person with a significant disability or chronic health problem being exposed to the rigours of activity testing, and potentially being compelled to seek work that their own doctor, in their considered judgement, considers they should not undertake.

For example, one of the NWRN's member organisations recently assisted a 61 year old man who only had effective vision from one eye and who lived with long-term severe depression. A Job Capacity Assessor had determined that he no longer had a continuing inability to work, and recommended that his DSP be cancelled. We assisted this man in an appeal to an Authorised Review Officer. The Authorised Review Officer spoke to the man's treating doctor, and re-instated the man's DSP as a result of the doctor's evidence.

It is only because the Authorised Review Officer had the power to seek evidence beyond the Job Capacity Assessor's report that our client's DSP could be quickly reviewed and re-instated.

The Explanatory Memorandum to this Bill states that determining the impact of impairments of conditions on a person's work functionality requires knowledge and experience in occupations and the types of interventions that may increase capacity. This knowledge and expertise is, of course, relevant to the determination of whether or not a person has a continuing ability to work. However, the assessment of a person's impairment rating under the Impairment Tables is more suitably performed by a medical professional.

The Impairment Tables are replete with complex and detailed references to multifarious medical conditions. Points under the Impairment Tables are given according to the actual impairment caused by an identified medical condition. They are not given according to their likely impact in the workplace. It therefore makes more sense that a person's impairment rating be assessed by that person's treating doctor or by another medical professional.

Recommendation 4

That the power of the Secretary and of all review bodies to make independent decisions as to a person's impairment rating and ability to work be maintained.

3. Item 47 – amendment to section 12 of the SSA Act

Item 47 of the Bill repeals current section 12 of the *Social Security Administration Act* 1999 (the Administration Act) and substitutes a new section 12.

Our primary concern with the proposed amendment to s12 of the Act is that it imposes a limit on its application to thirteen weeks prior to the determination date. This means that no more than thirteen weeks of arrears would be payable.

3.1 Application of section 12

Section 12 of the Act as it now stands allows for a person to be retrospectively transferred from one Social Security entitlement to another, for a period prior to the date the claim for their current payment was lodged. This means that where a person is, for example, transferring from Newstart Allowance to Carer Payment today, in respect of a recently lodged claim for Carer Payment, they can be back-paid Carer Payment to the date they first qualified for Carer Payment while in receipt of Newstart Allowance. Under current section 12, there is no restriction on the backdating period, and the person is effectively put in the position, financially, that they would have been had they lodged the Carer Payment claim earlier.

This provision is thus a practical means of ensuring that people are not disadvantaged by failing to recognise earlier that they could or should transfer to a more appropriate payment. There is a wide array of Social Security payments with complicated eligibility criteria, and it is not surprising that recipients and Centrelink officers alike may not recognise the benefits or transferring to anther payment at some point.

We appreciate that such retrospective determinations of eligibility can be difficult – especially for payments like Carer Payment or Disability Support Pension – but this is not sufficient reason to restrict back-dating. If it is so difficult in a particular case to establish past eligibility, section 12 would not apply anyway. We cannot understand why there should be a thirteen limit imposed on its application.

3.2 Application of Section 12 in respect of debts

Section 12 can also be utilised to reduce or eliminate a person's debt where the debt is due to the person either ceasing to be eligible for the payment they formerly received, or where the payment ceased to be payable due to their income or assets.

Although the Explanatory Memorandum does not give any rationale for introducing a thirteen week limitation, it is apparent to us from our advocacy work in representing clients in appeals, that the Department of Employment and Workplace Relations (DEWR) is concerned that section 12 can be applied so as to reduce or cancel Social Security debts where recovery cannot be waived under the waiver provisions of the *Social Security Act* 1991. The concern seems to be that this application is in some way perverting the intention behind the introduction of section 12, and that its application in this way is a back-door means of effectively waiving recovery of debts that "should" be recovered.

We do not deny that applying section 12 can be a means of relieving a person of their Social Security debt. We propose this to be quite reasonable, however, because there are many instances where recovery of large debts is intrinsically unfair – where recovery cannot be waived because of the absence of notional entitlement waiver in all but very limited circumstances.

As the waiver provisions now stand, recovery can generally only be waived if:

- the debt was solely caused by "administrative error" and received "in good faith" (section1237A of the *Social Security Act*); or

- there are "special circumstances" to warrant waiving recovery, AND the debt did not result from the debtor or anther person "knowingly" making a false statement or representation (section 1237AAD of the *Social Security Act*).

We believe that the waiver provisions are flawed in several ways. We have sought amendment to address these flaws over the years, and we shall continue to do so. In the meantime, these flaws mean that many people are left with intrinsically unfair debts despite the fact that they would clearly have been entitled to an alternative payment over the period had they claimed it, and despite the fact that recovery of the debt effectively leaves them without income support for the debt period. There may be interpretative issues as to whether Centrelink error was the “sole” cause of the debt, or whether the person received the overpayments “in good faith”, but by far the most contentious issues relate to the question of whether the debtor or any other person “knowingly” incurred the debt.

As advocates we regularly deal with clients with large debts who may have been aware they were not entitled to the payments they were receiving, but who were unable – due to disability, circumstance or ignorance – to contact Centrelink and arrange to claim another payment. For such people, the application of section 12 is an entirely reasonable means of relieving them of the debt.

We propose that such an application in no way circumvents Parliament's intentions regarding section 12 or the waiver provisions. Relieving a person of a debt that they would not have incurred had they claimed an alternative payment earlier is merely a useful application of beneficial legislation. It puts the person in the position they would have been if not for their lack of knowledge or other circumstances (see below), and the Commonwealth is thereby not out of pocket by applying the legislation in this way, as the following examples demonstrate.

Case study – Bob

Bob initially contacted Welfare Rights for advice regarding contact from Centrelink's Prosecution Unit in respect of an Austudy debt of over $5,000. Bob explained to us that the debt was due to his failure to maintain full-time study. He explained that he was "sick" at the time. With some reluctance, he finally disclosed his "sickness" was major depression.

In the course of attempting to dissuade the DPP from proceeding against Bob, we consulted with several of his doctors and other health professionals who were aware of Bob’s circumstances and background. From our discussions, it became apparent that Bob had been severely mentally ill since for the entire debt period, that he had isolated himself from social contacts and that he was at risk of self-harm.

DPP did not withdraw the charges against Bob, but in view of the evidence provided to DPP regarding the severity of Bob’s psychiatric disability, the Court discharged Bob without proceeding to conviction.

While assisting Bob to gather evidence to assist him with regard to the prosecution matter, we discussed with his health professionals whether he should apply for DSP. The consensus was that he should indeed be on DSP, and that he should have been on DSP for some time as he was unable to fulfil activity test requirements of Austudy or NSA, despite his best intentions to do so. We advised Bob to claim DSP, as did his treating doctor.

Due to Bob’s fragile mental state and the fact that he had to deal with the stress of the DPP matter, he did not lodge the DSP claim for another six months. He finally lodged the claim and payment was granted promptly, there being no doubt as to the severity of his psychiatric disability.

As it was clear that Bob would have been eligible for DSP during the Austudy debt period had he lodged a claim, we submitted to Centrelink that he be paid arrears of DSP from the earliest date that he could be shown to have met the DSP eligibility criteria, and he still qualified for Austudy (i.e., still engaged in full-time study), and medical evidence indicated that he met the qualification criteria.

On appeal to the Social Security Appeals Tribunal, section 12 was applied so as to transfer Bob

from Austudy to Disability Support Pension from just prior to the beginning of the debt period. This effectively relieved him of the Austudy debt because it was recovered from the Disability Support Pension arrears payable to him. As such, Centrelink is in no way out of pocket, and a man with severe disability is relieved of a debt that would not have occurred had he been able to claim Disability Support Pension earlier.

Case study - Annie

Annie is a sole parent with a long-term severe psychiatric disability. She has little insight into her condition, and due to this has been resistant to seeking treatment. She has had periods of homelessness and lost the custody of her child, as her child was considered to be at risk by the state welfare authority. Annie failed to advise Centrelink that her child had left her care and she continued to be paid Parenting Payment (single) for four years after her child had left her care.

Annie's reasons for failing to advise Centrelink that her child had left her care are complex. Although it could potentially have been argued that given the severity of her psychiatric disability the debt was not "knowingly" incurred, and recovery waived, establishing this would have been fraught with difficulty because Annie was mentally ill and emotionally unstable -both during the debt period and at the time we represented her.

Instead of seeking waiver, we argued that under section 12 of the Act, Annie's Disability Support Pension claim should be backdated. DEWR appealed to the Administrative Appeals Tribunal but was unsuccessful.

As with Bob, Annie was relieved of the debt – the debt she would not have incurred had she had the insight, knowledge and social support to transfer from one pension type to another when she lost the care of her child.

3.3 Summary

We have outlined these cases in some detail to emphasise the fact that these are difficult cases involving subtle considerations. Applying section 12 of the Administration Act in such cases is not straight-forward because establishing qualification for a payment at a particular time in the past requires categorical evidence that the person would have met the qualification criteria from a particular day in the past had they claimed.

We propose that given the restrictions on arrears for new claims for payment, and given the *Social Security Act's* restrictive waiver provisions, the current provision for unlimited application of section 12 is entirely reasonable.

Recommendation 5

That the 13 week restriction on the application of section 12 of the Social Security Administration Act be removed from the Bill.