Australian Government

Attorney-General's Department

Secretary

10/27447

22 December 2010

Dr Shona Batge
Senate Standing Committee on Education, Employment and Workplace Relations
Parliament House
CANBERRA ACT 2600

Dear Dr Batge

The Education, Employment and Workplace Relations Legislation Committee is currently inquiring into the Social Security Amendment (Income Support for Regional Students) Bill 2010.

The focus of the inquiry is on the impact of the proposed changes to the current entitlements to youth allowance payments. I understand that officials from the Department of Education, Employment and Workplace Relations and Centrelink appeared before the Committee on the substantive policy issues in the Bill on Friday 17 December 2010. I am writing to provide the Committee with some observations about the constitutional matters raised. In making these observations, I enclose a copy of a letter from the Attorney-General, the Hon Robert McClelland MP to Senator the Hon Chris Evans dated 15 November 2010 drawing attention to constitutional problems with the introduction of the Bill (**attached**).

The Attorney-General's letter reflects the long-established view of the House of Representatives and successive Governments that 'proposed laws appropriating money' include not only laws that contain a clause formally appropriating the Consolidated Revenue Fund, but also laws that, while not themselves containing words of appropriation, have the effect of increasing, extending the objects or purposes of, or altering the destination of, the amount that may be paid out of the Consolidated Revenue Fund under existing words of appropriation (see: *House of Representatives Practice*, 5th Edition, p. 409; *The Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs: The Third Paragraph of Section 53 of the Constitution*, November 1995, p. 81).

The effect of the Bill is to increase public expenditure by approximately $272 million to 2013-14.

I hope this submission provides some assistance to the Committee.

Yours sincerely

for Elizabeth Kelly
A/g Secretary

ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

10/27447

15 NOV 2010

Senator the Hon Chris Evans
Minister for Tertiary Education, Skills,
Jobs and Workplace Relations
Parliament House
CANBERRA ACT 2600

Dear Minister

I am writing to you about the Social Security Amendment (Income Support for Regional Students) Bill 2010 (**the Bill**) introduced in the Senate on 28 October 2010 by Senator Nash. As you know, it seeks to change the entitlement for youth allowance payments, a matter within the scope of your ministerial portfolio responsibilities. I wish to draw your attention to constitutional problems with the introduction of the Bill in the Senate and to seek your assistance in drawing these problems also to the attention of the President of the Senate.

Under Australia's constitutional arrangements the Government of the day is responsible for the management of public revenue and the budget. The Government therefore initiates all financial initiatives in the Parliament. This is reflected most clearly in sections 53 and 56 of the Constitution, which deal with proposed laws for the appropriation of revenue or moneys. Section 53 states that such laws shall not originate in the Senate. Section 56 states that such laws shall not be passed unless the purpose of the appropriation has been recommended by message of the Governor-General to the House of Representatives, where they must originate. The Governor-General's message can only be given on the advice of the Government of the day. The House of Representatives Standing Orders reflect the Government's constitutional responsibilities.

In short, a proposed law that would appropriate revenue or moneys cannot originate as a private member's bill. A bill for such a law cannot, in any event, originate in the Senate.

In this case, it is quite clear the Bill would, if enacted, significantly affect public revenue, and appropriate revenue by clearly increasing what would be paid under a standing appropriation. It follows that the Bill could not properly have been introduced in the Senate and cannot properly be passed by the Senate. It is worth mentioning, I think, that these are matters which are bound to be taken into account by the Speaker of the House of Representatives, and by the Clerk, should the question arise whether the Bill could properly be considered by the House. The Government would of course make its position clear should that question arise.

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I have set out in some greater detail below the legal and constitutional analysis that underpins the position I have just outlined. As you will see, that analysis acknowledges that the Senate's view as to the relevant application of sections 53 and 56 has not always reflected the view of the House. However, as indicated, I think there is a sound basis for concluding that on any view the Bill should not have been introduced in the Senate, and could only be introduced in the House by a Minister.

The Bill

The Bill proposes to amend the *Social Security Act 1991* (**SS Act**). The SS Act currently deals with persons regarded as 'independent' for the purposes of certain aspects of the social security law. In summary, section 1067A of the SS Act applies to determine whether a person is independent, and it is relevant in part to this determination whether the person's family home is 'in a location categorised under the Remoteness Structure as Outer Regional Australia, Remote Australia or Very Remote Australia'. The Bill proposes to insert the words 'Inner Regional Australia', so that persons whose family home is within such a region may more easily be 'independent'.

In summary, the assessment whether a person is 'independent' affects whether he or she is eligible for youth allowance, as well as the manner in which entitlement is calculated. A person may be able to access youth allowance at a younger age, for example, if he or she is independent. Different rates may also apply if a person is independent. Entitlement may be reduced for a person who is *not* independent as a result of the application of the parental income means test and the family actual means test.

Payments of youth allowance are, in formal terms, made under the standing appropriation in the *Social Security (Administration) Act 1999* (**SS Administration Act**), which relevantly provides that payments 'are to be made out of the Consolidated Revenue Fund, which is appropriated accordingly'.

The Bill would increase the amount of youth allowance payments made from the Consolidated Revenue Fund under the standing appropriation in the SS Administration Act. The Explanatory Memorandum to the Bill suggests the financial impact would be approximately $90 million per annum; that is, if the Bill were enacted, an additional amount of approximately $90 million would be appropriated from the Consolidated Revenue Fund on an annual basis. I am advised the estimated increase in appropriation to 2013-14 would be $272 million.

Constitutional issues

The first paragraph of section 53 of the Constitution is as follows:

> **53 Powers of the Houses in respect of legislation**
>
> Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

...

Section 56 of the Constitution is as follows:

> **56 Recommendation of money votes**
>
> A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.

There is no material distinction for present purposes between the expressions 'proposed laws appropriating revenue or moneys' and 'proposed law for the appropriation of revenue or moneys'.

The requirements under sections 53 and 56 are not confined to laws containing a clause explicitly appropriating the Consolidated Revenue Fund. Laws that cause money to be expended under a standing appropriation are also covered. Thus, a law that alters the purposes for which money may be expended under a standing appropriation (for example, by increasing the categories of person entitled to a benefit, or changing the formula by which that benefit was calculated to increase the amounts that could be paid out) is covered.

This was the view adopted by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its 1995 Report on *The Third Paragraph of Section 53 of the Constitution*. In the context of considering the first paragraph of section 53, the Committee concluded that 'a bill which increases expenditure under a standing appropriation should not be originated in the Senate' (Recommendation 4 at p 82 of the Report).

More recently, in *Pape v Federal Commissioner of Taxation*,[1] Gummow, Crennan and Bell JJ, after noting that the Court needed to be careful not to adjudicate on the operation of section 53, nevertheless cited the statement in the *House of Representatives Practice* (5th ed, 2005) at p.409 that an appropriation bill includes one which:

> while not in [itself] containing words of appropriation, would have the effect of increasing, extending the objects or purposes of, or altering the destination of, the amount that may be paid out of the Consolidated Revenue Fund under existing words of appropriation in a principal Act to be amended, or another Act.

In opinions dated 20 February 1962 and 26 November 1962 Garfield Barwick, as Attorney-General, set out this view in relation to s 56, by reasoning equally applicable to section 53. He stated in the 26 November 1962 opinion:

> Benefits under the Social Services Act are ... payable out of the National Welfare Fund. Section 5 of the National Welfare Fund Act provides that there is payable out of the Consolidated Revenue Fund, which is appropriated accordingly, for the purposes of the National Welfare Fund, in each financial year, an amount equal to the amount of moneys paid out of the National Welfare Fund in that financial year. Having regard to this provision, I have expressed the view in the House of Representatives that section 56 of the Constitution makes a Governor-General's message necessary to the passage of a Bill to increase benefits under the Social Services Act **or to liberalize the conditions under which such benefits are payable**. [emphasis added]

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[1] (2009) 238 CLR 1 at 70-71.

> ... the inconvenience resulting from my view must be considered in relation to the important constitutional principles involved, affecting on the one hand the position of the Government as the constitutional organ responsible at the one time for the planning of the expenditure of the Commonwealth and the raising of the revenue necessary to meet that expenditure and on the other hand the special responsibilities of the House of Representatives as the organ of the Parliament responsible for the initiation of financial proposals.

It is clear that the purpose and natural consequence of the Bill in this case would be to liberalize the conditions under which youth allowance benefits are payable, and thereby to increase the amount of youth allowance payments paid from the Consolidated Revenue Fund under the standing appropriation in the SS Administration Act. In this case there is no doubt the Bill would have this effect.

I should note that the Senate's view of section 53, and the restraints that it imposes on the *Senate's powers in relation to appropriation bills, has not always corresponded to that of the* House. Indeed, Odgers' Australian Senate Practice 12th ed appears to suggest (at 290) that a bill which amended an Act in such a way as to increase expenditure under an appropriation prescribed by that Act would not be a proposed law appropriating revenue and moneys for the purposes of section 53.

For the reasons given above, I do not think that view is correct. Moreover, the Senate appears to have accepted that it cannot by virtue of the third paragraph of section 53 of the Constitution amend a proposed law so as to increase expenditure under an existing appropriation. Accordingly, acceptance of the view outlined in Odgers' would result in the Senate being able to initiate laws that it cannot amend.

In practice, the main difference between the approaches of the House and the Senate to appropriation laws seems to have centred on the degree to which it must be apparent that a bill will increase expenditure under an appropriation before that bill may be treated as a proposed appropriation. Odgers' suggests (at 296), in the context of the third paragraph of section 53, that a bill should not be regarded as an appropriation unless it would 'clearly, necessarily and directly cause an increase in expenditure' under an existing appropriation. The better view, I think, is that it is sufficient if such an increase in expenditure is reasonably likely. Whatever view is taken as a matter of principle, as indicated it seems clear that the necessary consequence of the Bill in the present matter is to increase expenditure under an existing appropriation.

It follows that the Bill is a proposed law for the appropriation of revenue or moneys within the meaning of section 53 of the Constitution and, as a result, could not properly have been introduced in the Senate and cannot properly be passed by the Senate.

On the same basis, the Bill is a proposed law for the appropriation of revenue or money within the meaning of section 56 and, as such, requires a message from the Governor-General to pass through the House of Representatives.

It is clear the underlying purpose of section 56 of the Constitution is to ensure that the Government of the day retains control over legislative initiatives for public expenditure. Attorney-General Barwick in his opinion of 20 February 1962 noted that 'the very purpose of section 56 of the Constitution is to deny to private members any right to initiate measures for the expenditure of the public revenue'. He went on to quote the description of the

constitutional principle underlying section 56 in Quick and Garran's *Annotated Constitution of the Commonwealth* at 681, which in turn quoted Hearn's *Government of England* at 376-7, which sets out:

> It is ... a fundamental rule of the House of Commons that the House will not entertain any petition or any notice for a grant of money, or which involves the expenditure of money, unless it be communicated by the Crown. We are so accustomed to the general practice, and the deviations from it have been so inconsiderable, that its importance is scarcely appreciated. Those, however, who have had the experience of the results which followed from its absence, of the scramble among the members of the Legislature to obtain a share of the public money for their respective constituencies, of the 'log-rolling', and of the predominance of local interests to the entire neglect of the public interest, have not hesitated to declare that 'good government is not attainable while the unrestricted powers of voting pubic money and of managing the local expenditure of the community are lodged in the hands of the Assembly.'

Consistent with this view, the *Final Report of the Constitutional Commission*[2] saw section 56 as reflecting the well established principle of Westminster parliamentary government that:

> ... financial initiatives are the preserve of the Crown. The Executive Government is charged with management of the public revenues and other public moneys and it alone may request parliamentary authorisation of expenditures. This request is formally communicated to the House by message from the Governor-General.

Further, as the High Court noted in *Combet v Commonwealth*[3]:

> ... it is the Executive Government which begins the process of appropriation. This the Executive Government does by specifying the purpose of the appropriation by message to the House of Representatives.

Standing order 180 of the *House of Representatives Standing Orders* reflects that understanding and relevantly provides that:

> (a) All proposals for the appropriation of revenue or moneys require a message to the House from the Governor-General recommending the purpose of the appropriation in accordance with section 56 of the Constitution.
>
> (b) For an Appropriation or Supply Bill, the message must be announced before the bill is introduced.
>
> (c) For other bills appropriating revenue or moneys, a Minister may introduce the bill and the bill may be proceeded with before the message is announced and standing order 147 (message recommending appropriation) applies.
>
> (d) A further message must be received before any amendment can be moved which would increase, or extend the objects and purposes or alter the destination of, a recommended appropriation.

The expression 'Appropriation Bills' is defined in standing order 2 as 'bills which appropriate money to fund annual government expenditure (other bills may appropriate money for special purposes)'; the expression 'Supply Bills' is defined as those that 'appropriate money to fund government expenditure on an interim basis until Appropriation Bills have passed (now rarely necessary)'.

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2 Volume 1 (1988), at 243-247.
3 (2005) 224 CLR 494 at 570.

While the Bill in this case would not be an Appropriation or Supply Bill as just defined, it would be an 'other' bill appropriating revenue or money. Standing order 147 covers such bills appropriating revenue or moneys and provides that, immediately after the second reading of a bill, 'the Speaker shall announce any message from the Governor-General in accordance with section 56 of the Constitution recommending an appropriation in connection with the bill'. The House of Representatives Standing Orders thus link the requirement for a message under section 56 for a bill appropriating moneys and the introduction of any such bill by a Government Minister. There is an assumption that only Ministers may introduce such bills. This is, of course, entirely consistent with the conventional constitutional understanding that the Governor-General's power to recommend money bills under section 56 is exercisable only on the advice of the Government of the day.

I would be grateful if the Government's concerns in relation to the Bill could be drawn to the attention of the President of the Senate, with a view to further steps being taken in the Senate to ensure the Bill does not proceed.

Yours sincerely

Robert McClelland