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Social Security and Other Legislation Amendment (Technical Changes No.2) Bill 2025

Senate Standing Committee on Community Affairs Legislation Committee

Submission by the Commonwealth Ombudsman, Iain Anderson

September 2025

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Introduction and summary

I welcome the opportunity to contribute to the Senate Standing Committee on Community Affairs' inquiry into the Social Security and Other Legislation Amendment (Technical Changes No. 2) Bill 2025 (the **Bill**).

A key purpose of the Bill is to implement measures to address the unlawful use of income apportionment to calculate social security payments by Services Australia and its predecessor the Department of Human Services over the period of 2003–2020. The use of income apportionment for this purpose was the subject of 2 own motion investigations (OMIs) conducted by my Office in 2023. In the first investigation, I found income apportionment was against the law. In the second investigation, I found the agencies had not yet done enough to fix the problem. I made a total of 12 recommendations to Services Australia and the Department of Social Services (DSS).

While the proposals in the Bill appear to have been informed by the recommendations and findings of the 2 OMIs,¹ my Office was not directly consulted in the development of the reform package and the Bill.

The measures in the Bill would go some way to providing legal certainty and compensation for those impacted by unlawful debt calculations. However, it will not capture all circumstances. In particular, the Bill does not appear to directly address the issue of remediation for people who have been criminally convicted in relation to debts that were invalidly calculated using income apportionment.

Background

The purpose of the Office of the Commonwealth Ombudsman (**the Office**) is to:

- provide assurance that the agencies and entities we oversee act with integrity and treat people fairly; and
- influence systemic improvement in government administration.

¹ [Explanatory Memorandum to the Social Security and Other Legislation Amendment \(Technical Changes No.2\) Bill 2025](#), pages 38 to 43 outline the Department's consideration of my recommendations from the OMI's my office undertook on the use of income apportionment.



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We aim to achieve our purpose by:

- independent and impartial consideration of complaints and disclosures about government administrative action
- influencing government agencies to be accountable, lawful, fair, transparent, and responsive, and
- providing a level of assurance that law enforcement, integrity and regulatory agencies are complying with legal requirements when using covert, intrusive and coercive powers.

Our investigations and findings

My Office was first informed by Services Australia and DSS of issues arising from the use of income apportionment to calculate social security payments in February 2023. Early estimates from Services Australia had suggested that approximately 100,000 debts could be impacted by unlawful or incorrect income apportionment calculations prior to the cessation of the policy on 7 December 2020. This included both instances of potential overpayment (causing debt to the Government) and underpayment (causing money to be owed to the person).

Given the scale, significance and impact of the error, I decided to conduct two OMIs focused on:

1. the **lawfulness** of the agencies' approach to income apportionment, and
2. the approach and effectiveness of the agencies' **administration** of income apportionment decisions, communication with customers, handling of complaints, internal reviews and engagement with tribunal or Federal Court appeals.

In August 2023, I released the report on my first OMI and I made 4 recommendations centred on pressing Services Australia and DSS to determine a clear legal position on income apportionment and resolution strategy as soon as possible.² I found that although agencies took steps to seek legal advice, there were significant delays in finalising the advice which hindered efforts to develop remedies and provide those

² Commonwealth Ombudsman, '[Lessons in Lawfulness](#)', August 2023.



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affected with legal certainty. At this time, the agencies still had no clear picture of the scale of the issue.

In December 2023, I released the report on my second OMI and I made a total of 8 recommendations: 3 recommendations focused on strengthening the agencies' responses to historic unlawful decisions and a further 5 recommendations aimed at improving the agencies' communications with customers and complaint handling.³ During this investigation, my Office found a continued lack of action in:

- assessing the potential impact unlawful income apportionment had on payment rates between 2003 and 2020
- developing a remediation strategy for affected customers
- developing systems to manage paused debt reviews consistently and appropriately
- developing a communication plan and products to appropriately explain the issue to affected customers
- ensuring they were capturing and reporting on complaints about income apportionment decisions and communications.

One of my key recommendations was for the agencies to develop a strategy to sample potentially affected historic debts, underpayments, tribunal decisions and debts that had been referred to the Commonwealth Director of Public Prosecutions (CDPP) so that they could assess the scale and impact of unlawful income apportionment. This recommendation, amongst others, was accepted. Following better sampling, agencies now estimate that approximately 5.5 million social security debts of 3 million people could be potentially affected by income apportionment.⁴ Further, approximately 97% of these debts have already been repaid and sampling indicates that only 37% would **not** be affected if recalculated.

³ Commonwealth Ombudsman, '[Accountability in Action: identifying, owning and fixing errors](#)', December 2023.

⁴ [Explanatory Memorandum to the Social Security and Other Legislation Amendment \(Technical Changes No.2\) Bill 2025](#), p 63 of 118.



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The Bill and next steps

I have examined the Bill against my findings in the two investigations. The measures in the Bill would stop short of the large-scale debt waiver that I had suggested may be the fairest option for the public in my second report.⁵ I suggested that this may be fairer than a process of reviewing each individual matter if that would take several years longer, given the amount of time those affected had already had uncertainty hanging over them about their debts and about paused debt review processes. The impact analysis on the Resolution Approach to Income Apportionment attached to the Explanatory Memorandum states that ‘waiving all potential affected debts would create inequities with people with social security debts unaffected by income apportionment and other Commonwealth debts who are required to repay their debts’.⁶ This comparison does not acknowledge the distinction between people whose debts are affected by agency failure to comply with the law and people whose debts are unaffected by unlawful agency actions. It may be fair to treat people in two such groups differently, given the impact that unlawful agency actions and an extended period of uncertainty can have, particularly on economically vulnerable people. Indeed, the analysis does note this when it considers the option of partial waiver⁷.

However, I acknowledge the establishment of a compensation scheme would go some way to providing economic relief to economically vulnerable members of the community.

The introduction of legislation to retrospectively validate the calculations would also provide some legal certainty to those impacted. However, it does not address all legal risks and impacts of the invalid decisions on some individuals.

Firstly, the Bill and Explanatory Memorandum do not appear to have directly addressed remediating cases where income apportionment has wrongfully resulted in or impacted on a criminal prosecution.

⁵ Commonwealth Ombudsman, [‘Accountability in Action: identifying, owning and fixing errors’](#), December 2023, p 9.

⁶ [Explanatory Memorandum to the Social Security and Other Legislation Amendment \(Technical Changes No.2\) Bill 2025](#), p 79 of 118.

⁷ [Explanatory Memorandum to the Social Security and Other Legislation Amendment \(Technical Changes No.2\) Bill 2025](#), p 75 of 118.



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The potential impact of income apportionment on criminal matters was raised in both my investigations. In the first investigation, my Office found there was no clear strategy at the time between the agencies and the CDPP on how to handle matters that may be impacted by income apportionment.⁸ This was essential as Services Australia is empowered to refer briefs of evidence to the CDPP regarding allegations of fraud or obtaining financial advantage. Miscalculations due to the use of income apportionment could mean that people have been convicted with respect to monies they did not in fact receive. The impact analysis notes in a number of places that sampling suggested that in most instances a debt would still exist had it been calculated lawfully rather than using income apportionment, even if it was a debt of a different amount. At the same time, however, the criminal justice system requires the prosecution to prove all material facts beyond reasonable doubt. The risk that people may have been convicted for receiving a specified amount of benefits when that amount was in fact incorrect, because it was calculated using income apportionment, is not hypothetical. During my second investigation, Services Australia advised they had received notice from the CDPP in November 2023 that there were two people convicted for matters involving income apportionment who remained subject to current custodial sentences.

Item 3 of Schedule 3 to the Bill would provide for the Minister to make legislative instruments relevantly determining, 'criteria for a person to be entitled, or not entitled, to be paid a resolution payment'.⁹ The Explanatory Memorandum states that such flexibility is required 'because of the complexity and a variety of debts (directly and indirectly) potentially affected by income apportionment over the relevant period)' and in this context, the Minister could determine 'that a person is not entitled to a resolution payment if the debt (which is the subject of the application) arose because of fraud following a prosecution.'¹⁰ However, the Explanatory Memorandum does not provide further detail in relation to addressing circumstances where criminal prosecutions for fraud may have been mistakenly commenced or where the amount involved in the offence was miscalculated due to the use of income apportionment.

⁸ Commonwealth Ombudsman, '[Lessons in Lawfulness](#)', August 2023.

⁹ Item 3(1)(f) of Schedule 3 of the [Social Security and Other Legislation Amendment \(Technical Changes No.2\) Bill 2025](#).

¹⁰ [Explanatory Memorandum to the Social Security and Other Legislation Amendment \(Technical Changes No.2\) Bill 2025](#), p 47 of 118.



OFFICIAL

Secondly, it is not clear what interaction, if any, the Resolution Scheme could have with the Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme). While an acceptance of the resolution would 'release the Commonwealth from all liability against any future claims that arising as a result of income apportionment in respect of the entitled person'¹¹ this would not necessarily preclude the Minister from making a payment under the CDDA Scheme.

Lastly, I note the proposal is to have the Resolution Scheme open for only 12 months. There is a risk that this may not be sufficient time to reach or notify all those who may be eligible for the Scheme. It will be important of the agencies to put in an effective communication strategy at the very least to minimise this risk.

I will maintain an interest in the progress of both Services Australia and DSS in implementing the recommendations I have made and resolving this error that has affected millions of Australians. As my recommendations were made prior to the development of this Bill, not all of them will 'map' exactly in technical detail. However, I expect Services Australia and DSS to keep working in the same spirit of the relevant recommendations.

For example, in my second investigation, I recommended Services Australia and DSS make changes to their communication materials to ensure people were kept updated about what the agencies were doing. This was done at the time. However, agencies will still need to ensure communication materials are maintained and ensure people are kept informed as these remediation measures are implemented.

My Office will continue to formally communicate with both Services Australia and DSS in relation to my expectations and their progress on recommendations which I consider to still be relevant.

¹¹ [Explanatory Memorandum to the Social Security and Other Legislation Amendment \(Technical Changes No.2\) Bill 2025](#), p 49 of 118.

