



NATIONAL
WELFARE RIGHTS
NETWORK

Submission to Senate Community Affairs Legislation Committee
Social Services Legislation Amendment
(Interest Charge) Bill 2016

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About the National Welfare Rights Network

The National Welfare Rights Network (**NWRN**) is the peak community organisation in the area of social security and family assistance law, policy and administration. Our member organisations are community legal centres and other legal services which provide free and independent information, advice and representation in the area of social security and family assistance law.

There are NWRN member organisations in each State and Territory. This includes two Associate Members in the Northern Territory, the Central Australian Aboriginal Legal Aid Service (**CAALAS**) and the North Australian Aboriginal Justice Agency (**NAAJA**).

The NWRN draws on its member organisations' experience providing legal services to current and former recipients of social security and family assistance payments to develop proposals for legislative, policy or administrative reform, make submissions to government and advocate for the rights of people who need the support of the social security and family assistance system.

Summary of this submission

The *Social Services Legislation Amendment (Interest Charge) Bill 2016 (the Bill)* introduces a common legislative framework into social security, family assistance, veterans' entitlements, paid parental leave and ABSTUDY legislation for imposing an interest charge on certain debts owed under this legislation.¹ Under this framework, an interest charge is applied to outstanding debts if the debtor is not receiving a fortnightly social security or family assistance payment and has not made an acceptable repayment arrangement or is not complying with such an arrangement. The interest rate will be based on the interest charge applied to unpaid tax debts, which is the 90 day Bank Accepted Bill rate plus 7%, about 9% at current rates. The Bill is to commence from 1 July 2016 and apply to debts outstanding on or after that date.

The NWRN had a very useful briefing on the bill from the Department of Social Services, which resolved a number of our concerns. However, we continue to have fundamental concerns about this scheme and do not support the Bill in its current form.

Our members regularly provide information and advice to current and former recipients of social security and family assistance payments about debts. Many have relatively small debts below \$3000, which are nonetheless a significant burden for them due to their low incomes. Most are willing to repay their debts and do so steadily, although it may take some years for them to repay even small debts. Despite this, many of them miss repayments and repayment deadlines at times. This is for a range of reasons, such as mental health, homelessness and financial hardship. Although in many of these cases, the person might be eligible to have their debt repayments suspended for a period (known as "write-off" in social security and family assistance law) or negotiate a lower rate of

¹ The Bill gives effect to a measure announced in the Mid-Year Economic and Fiscal Outlook 2015-16. See Mid-Year Economic and Fiscal Outlook 2015-16, Appendix A: Policy decisions taken since the 2015-16 Budget, Revenue Measures, accessible at http://budget.gov.au/2015-16/content/myefo/html/10_appendix_a_revenue.htm (accessed 30 March 2016).

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repayment, in our experience the same circumstances which lead to them missing payments often lead to them not advising DHS of their situation.

We believe there is a real risk that a significant number of these debtors will get caught up in the new interest charge regime, incur interest and end up with larger debts, further impoverishing them. Although some will respond to the threat of an interest penalty, others under pressure of the circumstances referred to above will continue to miss repayment deadlines and incur interest.

We note that the experience of our members appears consistent with advice given to this Committee in 2013 in relation to a Bill containing a similar measure applying an interest charge to debts, but limited to student payment debts.² The Australian Greens, in their dissenting report, noted that the Department of Social Services had advised that it anticipated that only about half of the debtors impacted by the interest charge would begin to repay their debt when threatened with the penalty.³ While some of these debtors may be wilfully avoiding repayment, others will be the vulnerable group of debtors we describe above.

This is an unfair outcome. Repaying an overpayment to which a person was not legally entitled is appropriate in most cases. Applying an interest charge, however, means that the person will end up repaying more than the original overpayment. This should only occur in clear-cut cases where the person has capacity to repay and is deliberately avoiding their obligation to do so. The Bill needs significant amendment to ensure the interest charge only applies in these clear-cut cases.

We provide examples of the common scenarios where people may miss deadlines for repayment of debts and unfairly incur interest under the new scheme below. We also highlight some technical issues with the drafting of the current Bill.

Overview of the Bill

Currently, a person who owes a debt under social security or family assistance legislation does not have interest applied to an unpaid debt, even if they are not repaying it. There is an existing interest regime in social security and family assistance legislation (but not the *Student Assistance Act 1973* (Cth), the legislative framework for ABSTUDY) but it is not currently used. Recent attempts to introduce a penalty interest regime for student debts have not been approved by the Parliament.⁴

The Bill seeks to introduce a common legislative regime for penalty interest into social security, family assistance, paid parental leave and ABSTUDY legislation. The aim is to provide an incentive for debtors to repay their debts, or enter into and keep to repayment arrangements to avoid the accrual of interest charges. As the Minister for Social Services put it in his second reading speech:

² *Social Services and Other Legislation Amendment Bill 2013* (Schedule 5).

³ Australian Greens' Minority Report, Senate Community Affairs Legislation Committee, *Inquiry into the Social Services and Other Legislation Amendment Bill 2013 [Provisions]*, December 2013, p 33, accessible at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Social_Services/report/index (accessed 30 March 2016).

⁴ *Social Services and Other Legislation Amendment Bill 2013* (Schedule 5); *Social Services and Other Legislation Amendment (Student Measures) Bill 2014* (Schedule 1).

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... not only is there insufficient incentive for former recipients who are no longer dependent on the welfare payment system to repay their debts the reality is that some proportion of ex-recipient debtors actively avoid repayment.

*The application of an interest charge will provide a very significant incentive for the responsible self-management of debts and will encourage debtors to repay their debts in a timely manner where they have the financial capacity to do so.*⁵

The main features of this legislative framework, using social security legislation as the example, are as follows.

The interest charge applies if a person has been given a notice informing them about the debt and the date it is due and payable (28 days after the date the notice is issued) and does not enter into a repayment arrangement by the due day.⁶ The notice must warn them that the interest charge will apply if they do not enter into a repayment arrangement by the due date.⁷ Interest accrues daily for every day until the person enters into a repayment arrangement and makes a payment.⁸

This differs from the current legislative scheme. It provides that if a person does not make a repayment arrangement by the due date, a further notice may be issued giving them a further 28 days to pay and warning them that interest may be applied if they do not make a repayment arrangement by then. Interest is applied only after this further notice is not complied with, although the legislation does allow DHS to avoid the requirement for a further notice by including the warning about interest in the original debt notice, so in practice the two schemes could operate similarly.⁹

The Bill also contains provisions which deal specifically with a person who has a repayment arrangement but the arrangement is terminated, or they fail to keep to it. If a person has a repayment arrangement in place and fails to make a payment, then they must pay interest for each day until they catch up their payments.¹⁰ If a repayment arrangement is terminated,¹¹ then the person has 14 days to enter into a new repayment arrangement, otherwise the interest charge applies until they do so and make a payment.¹²

The main exemption to this scheme is for a person currently receiving a social security payment or family tax benefit by instalments.¹³ As a result of existing provisions dealing with the meaning of “receiving” a payment, this exemption extends generally to circumstances when a person is eligible

⁵ Social Services Legislation Amendment (Interest Charge) Bill 2016, Second Reading Speech, p 5, accessible at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bid=r5633 (accessed 22 March 2016).

⁶ Schedule 1, item 35 (proposed s 1229A).

⁷ Schedule 1, item 33 (proposed s 1229(1)(ea)).

⁸ Schedule 1, item 35 (proposed s 1229A(2)(b)).

⁹ Sections 1229, 1229A, *Social Security Act 1991* (Cth).

¹⁰ Proposed s 1229B(1), (2).

¹¹ Under existing provisions, a repayment arrangement can be terminated at the debtor’s request, or with 28 days’ notice by DHS or without notice, if DHS believes the person has concealed important information about their financial affairs and capacity to repay the debt. See section 1334(4), *Social Security Act 1991* (Cth).

¹² Proposed s 1229B(4), (5).

¹³ Schedule 1, item 35, (proposed section 1229E(1)).

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for a payment, but is not currently being paid it such as during a suspension applied under the compliance system for job seekers.¹⁴ It does not, however, apply to a person who has taken up paid work and whose rate of payment is reduced to \$0. Although a person in this situation (known as a “nil rate period”) is regarded as continuing to be eligible for their payment for certain purposes, these must be specified in the legislation and do not presently include the application of interest to a debt.¹⁵ The Minister may also specify other circumstances in which a person is not liable to pay the interest charge by legislative instrument.¹⁶

A person may also be exempt from paying the interest charge in relation to a period where they had a reasonable excuse for failing to enter into, or keep to, a repayment arrangement.¹⁷ A similar provision applies in relation to the compliance system for job seekers, and it is reasonable to assume that the DHS will administer this provision in accordance with a similar policy.¹⁸

Some common scenarios where the proposed interest charge may apply unfairly

Exempting current recipients from the interest charge is an important protection. However, there are many former recipients of social security and family assistance payments who remain in vulnerable circumstances. In this section of the submission, we provide some common scenarios which are frequently encountered by our members and which could lead to the person unfairly incurring an increased debt due to the interest charge.

People are often afraid to respond to the notice of a debt and delay contacting DHS past the due date

It is very common for people who receive a debt notice to be frightened or worried, including being afraid that they might have to pay the whole amount back at once, that their payment might be suspended as well until they repay the debt or that they might be prosecuted. This very human and understandable response can be exacerbated by the person’s circumstances, such as mental health problems or financial stress. This causes them to delay contacting DHS about the notice. In many cases, our members are able to explain the situation, including that they can make a repayment arrangement if they can’t afford to pay the whole amount, and encourage the person to contact DHS. But this may be after the due date has passed due to the person delaying seeking advice.

Under the proposed scheme, the person will begin to accrue interest from the 28th day after the date on the notice, increasing the level of their debt, even though the reason for the delay was not that the debtor was deliberately seeking to evade their obligations.

¹⁴ Sections 23(2), 23(4), *Social Security Act 1991* (Cth).

¹⁵ Sections 23(4A), 23(4AA), *Social Security Act 1991* (Cth).

¹⁶ Schedule 1, item 35, (proposed section 1229E(2)).

¹⁷ Schedule 1, item 35, (proposed section 1229F).

¹⁸ See Guide to Social Security Law, 3.1.13.90 (Reasonable Excuse), accessible at <http://guides.dss.gov.au/guide-social-security-law/3/1/13/90> (accessed 30 March 2016).

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An additional factor in this scenario is the DHS debt notice. The NWRN has long expressed concern that the wording and format of the notice does not make it clear enough that people do not have to pay the whole amount back at once if they cannot afford it. The debt notice should be urgently reviewed if the proposed interest charge scheme were to go ahead, including consultation with the NWRN and other stakeholders.

People often do not understand why they have the debt or disagree with the debt, and think that if they begin to repay the debt that means they are acknowledging that it is correct

It is very common for our members to speak to people who do not understand why they have the debt, as the debt notice usually contains only a brief explanation for it. Many people delay responding to a debt notice if they are unsure if the debt is correct or disagree with it, believing that if they do begin to repay it this means they will be taken to have accepted the debt. Our members are able to explain to most people in this situation that, even if they appeal, they are generally obliged to begin repaying the debt and encourage them to contact DHS but, again, this often means that these people miss the deadline.

Under the proposed scheme, the person will begin to accrue interest from the 28th day after the date on the notice, increasing the level of their debt, even though the reason for the delay was not the person seeking to evade their obligations.

Vulnerable people frequently do not exercise their right to seek a temporary suspension of their obligation to repay a debt or a reduction in their rate of repayment

A person who is temporarily struggling to meet their repayments can request that the debt be “written-off” for a period due to financial hardship, which means that they do not have to make any repayments. They can also seek to renegotiate a lower rate of repayment. In our members’ experience, the most vulnerable people are less likely to contact DHS about their circumstances and seek to change their repayment arrangements. They often miss payments for a few weeks, while they struggle to meet other commitments (such as a large one-off household expense).

Under the proposed regime, a person in this situation may be able to retrospectively assert that they had a reasonable excuse for failing to make repayments on time. But this may not occur. First, the same factors that mean vulnerable debtors do not try to renegotiate repayment arrangements may also mean that they do not advise DHS of circumstances which might lead to the application of the reasonable excuse exemption. Second, in the administration of reasonable excuse provisions there is an inevitable tendency for decision-makers not to accept that a person has a reasonable excuse when they failed to advise DHS of their circumstances or make use of options available to them.

People in remote locations or who lack stable accommodation may not receive the debt notice in a timely way

Our members who provide services to people in regional or remote areas report that, in some cases, mail from DHS can be significantly delayed. Similarly, a person without stable accommodation may

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not receive mail in a timely fashion because they are using a friend or relative’s address as their postal address.

In these cases, they are deemed to have received the notice at the time it would have been delivered in the ordinary course of the post, if the notice was sent to their last known address.¹⁹ This presumption cannot be rebutted by evidence to the contrary. Interest will therefore begin to be charged if they do not enter into an arrangement within 28 days, even if they have not in fact received the notice.

Another situation where this may occur is when DHS raise a debt when a person is no longer receiving a payment. DHS may send a notice to their last known address when they were receiving payment, even though the person may no longer live there and had no reason to update DHS if they moved. Again, the operation of the deemed notice provision appears to mean the interest will begin to run 28 days after the notice is deemed to have been received.

Under the proposed regime this is a situation where a person may be exempt from the interest charge on the basis that they did not receive the notice in a timely fashion and therefore have a reasonable excuse for not entering into a repayment arrangement.²⁰ But in our experience it can be difficult to persuade DHS decision-makers of this (it is inherently hard to prove a negative, for one thing) and the most vulnerable tend not to raise issues like this or exercise their rights of appeal.

In short, in our submission the proposed interest charge may apply in a number of cases where the person does not in reality fall into the Minister’s target group of people actively avoiding repaying their debts despite having financial capacity to do so.

Additional technical problems with the Bill

Although our view is that the Bill should not be passed, should it proceed we also note the following technical issues with the Bill which should be addressed.

1. Under the Bill’s provisions, if a person does not enter into a repayment arrangement by the due date, interest runs until they enter into an arrangement and make a payment.

In our view, this is unduly harsh. The main aim of the scheme should be to encourage people to contact DHS and enter into arrangements to repay debts. Once a repayment arrangement is made, interest should stop running. The person may need a week, for example, to get their affairs sorted and begin making repayments. If they have made an agreement to begin making payments from this point in time, interest should not continue to accrue.

We recommend that the Bill be amended so that interest runs only until a repayment arrangement is made (or, where an existing one has been terminated, until a new arrangement is made).

¹⁹ Section 237, *Social Security (Administration) Act 1999* (Cth); sections 28A, 29, *Acts Interpretation Act 1901* (Cth).

²⁰ This is the approach taken under Department of Social Services policy in relation to the compliance system. See note 18.

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2. Under the Bill’s provisions, a person who gets a job and whose payment is reduced to nil by employment income (a “nil rate period”) may be liable to an interest charge.

Although we do not understand it to be the intention to apply the interest charge during a nil rate period, the Bill does allow this. It should be amended so that a person in a nil rate period (which can be up to 12 weeks long) continues to be exempt from the interest charge regime until their payment is cancelled at the end of that period. People in a nil rate period because they have a job are often going through a difficult period of trying to re-enter the workforce and are also often in financial hardship after a period without work. If they are in insecure work, they may find themselves back on a social security payment before the end of the nil rate period, which is one of the practical reasons for having a nil rate period (it means that their payment can be restored without the need for a fresh claim). This is the kind of stressful and difficult period when they may fail to respond to a notice or to enter into a repayment arrangement in a timely fashion.

Seeking to apply an interest charge in this period may also lead to inefficiency. It is pointless for DHS to issue a debt notice to the person during a nil rate period to trigger the interest charge regime, if the person begins to receive a payment again within a few weeks and becomes exempt from the interest charge regime again.

We recommend a provision be added to the Bill to amend s 23(4AA) of the *Social Security Act 1991* by inserting the interest charge regime as an additional circumstance where a person in a nil rate period because of employment income is still treated as receiving a social security payment.

3. Under the Bill’s provisions, a person whose repayment arrangement is terminated by DHS begins to incur the interest charge after 14 days, without any obligation on DHS to provide further notice (although it may do so).

The Bill should be amended to oblige DHS to issue a fresh debt notice at this point, warning of the application of the interest charge and allowing 28 days to re-enter a repayment arrangement. This is a reasonable additional protection for vulnerable debtors who may have received the original debt notice years earlier and may not realise they will begin to incur interest.

4. Under the Bill’s provisions, a person who fails to keep to a repayment arrangement incurs interest until they catch up with the missed payment.

In our view, this is unduly harsh. It is a fairer and more balanced scheme for interest to run only until the person makes their next payment in accordance with the agreement. Making the next scheduled payment is evidence of an intention to repay the debt and should be sufficient for the interest charge to stop. Catching up a missed payment may take a substantial period of time for a person on a low income and it is unfair for them to incur interest until that happens, if they are complying with the arrangement again.

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Conclusion

This Bill is not a fair and proportionate response to the problem of debtors avoiding repaying social security and family assistance debts. It is not sufficiently targeted to ensure that it applies only to debtors who are deliberately evading their obligation to repay their debts. At a minimum, any fresh Bill should restrict the application of the interest charge to situations where the Secretary is satisfied that the former payment recipient has persistently and deliberately failed to enter into a repayment arrangement.²¹

²¹ Such a provision could be modelled on the provision in s 42M of the *Social Security (Administration) Act 1999*, which limits the circumstances in which a serious (8 week) failure may be applied under the compliance framework for job seekers.

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