Australian Labor Party Senators' Dissenting Report

1.1 Labor referred this bill to a Senate Inquiry to ensure that it was given proper scrutiny.

1.2 Labor Senators welcome the recommendations of the majority report to further consider issues relating to the Automatic Rental Deduction Scheme, but believe amendments should be made to the bill to address these and other issues.

Schedules 1 and 2 - Automatic Rental Deduction Scheme

1.3 This bill creates an Automatic Rental Deduction Scheme which allows States and Territories the option of automatically deducting an amount from a social housing tenants' income support payment to cover rent, utilities and an amount for damage to the property.

1.4 Labor Senators note that the Parliament has previously considered legislation to enable the deduction of social housing rent from income support payments in the *Social Services Legislation Amendment (Public Housing Tenants' Support) Bill 2013* ('Public Housing Tenants' Support bill').

1.5 The previous Labor Government introduced the Public Housing Tenants' Support bill to act on a recommendation from *The Road Home* homelessness white paper that the former Labor Government commissioned.

1.6 Labor Senators on the Committee acknowledge that automatic rent deductions can play a role in preventing homelessness.

1.7 Labor Senators on the Committee are concerned that the voluntary nature of the existing rent deduction scheme is not sufficient to protect some groups. An example of this may be a tenant who is pressured to stop using the voluntary deduction scheme to make cash available to a partner with drug or alcohol abuse issues.

1.8 The Public Housing Tenants' Support bill included a number of safeguards that are not included in this bill, such as:

- The amount deducted from an income support payment for rent in the Public Housing Tenants' Support bill was able to be varied in accordance with changes in rental and utility amounts provided the tenant was notified. The current bill does not require that the tenant be notified of changes made to the amount dedicated.
- The Public Housing Tenants' Support bill limited the costs that be deducted to rent, rental arrears and household utilities. The current bill also allows for an automatic rent deduction to include an amount to compensate for loss of, or damage to, the rental property.

1.9 The Senate Inquiry heard evidence from a number of community organisations that the proposed scheme is unnecessarily broad.

1.10 Witnesses told Senators that the proposed scheme is 'A disproportionate response. It doesn't address some of the critical causes of homelessness'[1] and that it would 'generate other problems for tenants across the board.'[2]

1.11 Labor Senators on the Committee agree with the Department of Social Services statement that although the proportion of social housing tenants evicted annually as a result of rental arrears is small, the impacts of this can be significant.

1.12 However, Labor Senators on the Committee share the concerns of many of the witnesses who provided evidence at the Public Hearing that the scheme proposed in the bill goes too far, is too broad and could be detrimental if applied as written in the bill.

Financial Pressures on Tenants

1.13 Adrian Pisarski of National Shelter explained to Senators that 'overwhelmingly public housing tenants are very good payers of rent. Some 99.5 per cent are recorded every year up until 2017 as paying their rent.'[3]

1.14 Genevieve Bolton from the National Social Security Network argued that the proposed scheme 'goes too far beyond its stated object, which is to prevent tenants from accumulating rental arrears, ultimately resulting in their eviction and potential homelessness.'[4]

1.15 The Committee also heard that 'the bill enables a greater proportion of a person's Centrelink payments to be deducted to meet a liability in situations where an amount has not been paid during their suspension period… This is likely to push people into further poverty and severely compromise their ability to meet essential day-to-day expenses.'[5]

1.16 Joni Gear from the National Social Security Rights Network explained that this could result in a 'significant reduction of their actual benefit.'[6]

Notification of tenants

1.17 In their submission to the Senate Inquiry, National Shelter recommended that the bill be amended to require the Secretary to notify a tenant in advance if the amount of deduction was to change.[7]

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1 Ms Genevieve Bolton, Chairperson, National Social Security Rights Network (NSSRN), *Committee Hansard*, 14 November 2017, p. 2.

2 Mr Roland Manderson, Deputy Director, Anglicare Australia, *Committee Hansard*, 14 November 2017, p. 2.

3 Mr Adrian Pisarski, Executive Officer, National Shelter, C*ommittee Hansard*, 14 November 2017, p. 6.

4 Ms Genevieve, Bolton, Chairperson, NSSRN, C*ommittee Hansard*, 14 November 2017, p. 1.

5 Ms Genevieve, Bolton, Chairperson, NSSRN, C*ommittee Hansard*, 14 November 2017, p 2.

6 Ms Joni Gear, Legal Project Officer, NSSRN, C*ommittee Hansard*, 14 November 2017, p. 5.

7 National Shelter, *Submission 3*, p. 4.

1.18 Labor Senators welcome the recommendation of the majority report that the Government consider including a provision in the automatic rental deduction scheme guidelines for notifications to be provided to tenants when lessors make a request of the Secretary regarding a deduction.

Setting a cap on the amount deducted

1.19 In their submission to the Senate Inquiry, the Salvation Army expressed cautious support for the bill as a means to prevent 'some individuals from needlessly exiting social housing through eviction and being subject to the consequent rotation through homelessness services.'[8]

1.20 The Salvation Army recommended that the rate of compulsory deductions should be capped below 30 per cent of income.[9]

1.21 A number of other submitters recommended that a cap be placed on the amount of deductions, including Micah Projects; National Shelter; and the National Social Security Rights Network.

1.22 Labor Senators on the Committee welcome the recommendation of the majority report that the Government consider imposing a cap on the amount deducted; however recommend that this be addressed now through an amendment to the bill.

Property Damage

1.23 The Committee heard a range of other community concerns regarding the proposed automatic rent deduction scheme, including concerns about allowing an amount to be deducted to cover damage to the rental property.

1.24 Ms Bolton explained that the National Social Security Rights Network 'are very concerned that the bill allows for deductions other than the payment of rent, including amounts owing by the tenant for alleged property damage. In our experience…this is often a highly contentious and fraught area, where liability is often in question.'[10]

1.25 Mr Pisarski told the Committee that allowing an amount for the damage of property to be deducted from a tenants' income support payment may especially disadvantage women who had experienced domestic violence. Mr Pisarski referred to a report by the Victorian ombudsman and explained:

> One of the things the ombudsman in Victoria points to…is the case where people, especially women, have suffered domestic violence and their property has been damaged by a partner in a family violence incident where they are clearly not liable for that. But in the Victorian ombudsman's

8 Salvation Army, *Submission 7*, p. 1.

9 *Submission 7*, p. 3.

10 Ms Genevieve, Bolton, Chairperson, NSSRN, C*ommittee Hansard*, 14 November 2017, p. 1.

> experience, those women…have been pursued for maintenance and repair claims for that damage.[11]

1.26 Labor Senators on the Committee are concerned about the impact of allowing an amount for property damage to be automatically deducted and recommend that the bill be amended so that deductions can only cover amounts relating to rent and utilities**.**

Impact on Income Management

1.27 Additionally the Committee heard that the bill could potentially further reduce the amount of cash that is available to a participant of the cashless debit card trials or a person participating in a scheme of income management.

1.28 Ms Gear explained to the Committee that for a cashless debit card trial participant, this bill:

> …removes the description of the unrestricted portion of a person's benefit. Currently the legislation says that that unrestricted portion, which is typically around 20 per cent, can be used at the person's discretion, and the bill seeks to remove that provision. The explanatory memorandum explains that that's to really allow for the possibility of automatic deductions to be taken from this unrestricted portion.[12]

1.29 Roland Manderson of Anglicare Australia raised a concern that applying a further deduction to the discretionary portion of an income managed income support recipients payment could have a significant impact on their quality of life:

> what does that say about our attitude to those people, that we are actually quite happy for them to have no discretionary income or no say in how they live their life and manage their finances?[13]

1.30 Labor Senators on this Committee share the concerns raised by witnesses about the additional impact this bill would have on income managed income support recipients, by further limiting their discretionary income.

1.31 Labor Senators welcome the recommendation that the government clarify how the proposed rental deduction scheme will interact with other forms of income management, but believe that this needs to be addressed now through amendments to the bill.

Recommendation 1

Labor Senators on this Committee recommend that the Social Services Legislation Amendment (Housing Affordability) Bill 2017 be amended to:

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11 Mr Adrian Pisarski, Executive Officer, National Shelter, C*ommittee Hansard*, 14 November 2017, p. 10.

12 Ms Joni Gear, Legal Project Officer, NSSRN, C*ommittee Hansard*, 14 November 2017, p. 6.

13 Mr Roland Manderson, Deputy Director, Anglicare Australia, *Committee Hansard*, 14 November 2017, p. 5.

- **only allow an amount to cover rent and utilities to be deducted,**
- **ensure that where the tenant is also part of an income management scheme or a cashless debit card trial, deductions may only be taken from the quarantined portion of the income support payment, not the unrestricted portion,**
- **set a cap for a maximum amount to be deducted,**
- **not allow an amount for rental arrears as a result of the suspension of a payment to be deducted in a single fortnightly payment, and**
- **include a provision to require the lessor to inform the tenant of a change in the amount of payment to be deducted.**

Schedule 3 - Amendments to the National Rental Affordability Scheme Act 2008

1.32 Schedule 3 of the bill makes changes to the administration of the National Rental Affordability Scheme (NRAS) to:

- remove ambiguity in relation to the calculation of below market rents in any one year;
- provide flexibility in the way maximum periods of vacancy are prescribed;
- provide express legislative authority to the Secretary of the Department of Social Services to make variations to the conditions attached to incentive allocations; and
- give express legislative authority for the NRAS Regulations to allow for the transfer of an NRAS allocation from one dwelling to another in certain circumstances and where to do so would reduce the risk of the dwelling being taken out the Scheme.

1.33 Labor Senators support the provisions in Schedule 3 that provide flexibility in the way maximum periods of vacancy are prescribed and which give express legislative authority for the NRAS Regulations to allow for the transfer of an NRAS allocation from one dwelling to another.

1.34 These provisions are uncontroversial and are supported by submitters to the inquiry.

1.35 There are however two provisions in Schedule 3 about which submitters indicated their support in principle but raised concerns over the way in which they are drafted and undesirable consequences which could arise.

1.36 These concerns are in relation to Item 1 of Schedule 3 which prescribes how rent on an NRAS dwelling is to be calculated and Item 3, which would allow the Scheme to provide for the variation of conditions attached to an allocation, including an allocation that has already been made.

Calculation of Rent

1.37 The intent of Item 1 of Schedule 3, which prescribes how rent on an NRAS dwelling is to be calculated and charged that each time rent is charged, it must be at

least 20 percent below the market value rent for the dwelling. It is not intended that an approved Scheme participant can charge a higher rent for part of the year, then a lower rent for part of the year to compensate.

1.38 Submitters to the Senate inquiry support the change but raised a practical problem that can arise in circumstances where an unintentional overcharge of rent occurs due to a market rent valuation on the NRAS property which results in a rent reduction in order to keep the rent at least 20 percent below market rent.

1.39 National Affordable Housing Providers Ltd (NAHP) is a representative peak body whose members are NRAS Approved Participants holding over 50 percent of NRAS allocations.

1.40 NAHP provided further evidence of circumstances in which unintentional rent overcharges can occur.

> Approved Participants are required to do market rent valuations (MRV) to determine the market rate to calculate the 20% discount. These MRVs are undertaken in Year 1 of the NRAS incentive and at the end of Years 4 and 7 (effectively in Years 5 and 8) and coincide with the dwelling's 'available for rent anniversary' (AFRA) date. The MRVs are the most accurate assessment of the market rent since they are done on the individual dwellings. During the other years, the rents are adjusted according to the NRAS Index.
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> …Rent reductions are not uncommon following an MRV. A significant number of NRAS properties were built in those now declining mining communities precisely to deal with the lack of affordable housing several years ago. In other communities, even a small market downturn can result in a slight decrease in an MRV and any reduction in rent, even a few dollars, must be implemented immediately.
>
> There are a few ways that Approved Participants can run afoul of the 20% rule. NRAS Regulations require that a rent reduction resulting from an MRV must take effect no later than the AFRA. NRAS Regulations also permit an MRV to be undertaken within a 26 week period around the AFRA, i.e. 13 weeks on either side of the AFRA. That becomes a problem when the MRV is done during the allowable 13 week period after the AFRA. If the MRV unexpectedly results in a decreased valuation that triggers a rent reduction the Approved Participant is now non-compliant because the AFRA date has already passed. The Approved Participant is prohibited from rectify *(sic)* this unavoidable overcharge with a refund or credit and will lose a portion of their incentive.
>
> A more common situation that can result in rent overcharges concerns rent payments in advance. Tenants often pay their rent at least a fortnight in advance (it is required in some jurisdictions) and sometimes pay their rent several months advance. Where there is a decreased MRV resulting in a rent reduction, the Approved Participant may be noncompliant even if they actioned the rent reduction on the AFRA date: the tenant may have already paid the higher rent weeks before because they paid in advance. Again, because the Approved Participant cannot rectify the unintended overcharge

> with a refund or credit, they are in jeopardy of losing a portion of their entitlement to a full incentive.[14]

1.41 It is no simple matter to provide a tenant with a refund or credit of unintentional rent overcharges.

1.42 In relation to unintentional rent overcharges, NAHP said in its submission:

> DSS has generally interpreted the '20% at all times' legislation as prohibiting rent rebates or credits when an unintentional overcharge has occurred. In the last year, DSS has allowed for some refunds due to minor errors such as rounding mistakes and these are approved by the Delegate on a case-by-case basis. However it is unclear what constitutes a 'minor error' other than the rounding example and guidelines on acceptable rent charging errors would be acceptable.[15]

1.43 At the public hearing, NAHP elaborated on their submission:

> The bigger issue is the prohibition on refunds and credits. The legislation does not explicitly prohibit this, but the legislation on the 20 per cent at all times has been interpreted in that way. We assert that they should be permitted, if applied within a reasonable time frame. We propose that refunds or credits be allowed, if the correction and compensation is completed when the next rent payment is due. In this way, the tenant would only be paying the older higher rent for no more than one payment period, which usually is a fortnight, before the new lower rate would take effect, and it would also receive compensation for that overcharge with a refund or a credit in a timely manner.[16]

1.44 The NSW Federation of Housing Associations also submitted that it holds concerns about the rigidity of the how the requirement that the rent on an NRAS dwelling must be at least 20 percent below the market rent for the dwelling at all times.

1.45 The Federation indicated it would support amendments to the bill to allow for refunds of unintentional rent overcharges in circumstances where a market rent valuations has resulted in a rent overcharge and there is a minor delay in charging the reduced rent to the tenant.[17]

1.46 Labor Senators accept that to the extent that NRAS is administered in such a way that refunds and credits of rent overcharges are generally not permitted in circumstances where a rent overcharge is due to a reduced market rent valuation, a more desirable result would be to provide an exception to a strict application of the '20% at all times' rule so that refunds or credits of rent overcharges may be made in a timely manner and the Secretary is notified.

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14 *ibid*, pp. 3-4.

15 National Affordable Housing Providers Ltd (NAHP). *Submission 4*, p.3.

16 Ms Carol Croce, Policy Officer, NAHP, *Committee Hansard*, 14 November 2017, p.11.

17 New South Wales Federation of Housing Associations, *Submission 24*, p. 9.

Recommendation 2

That the bill be amended to provide an exception to the '20% at all times' rule in paragraph 7(2)(b) in circumstances where:

- **there is an unintentional rent overcharge as a result of a reduced market rent valuation; and**
- **the overcharge does not persist for more than one rental payment period; and**
- **the Approved Participant has notified the Secretary of the overcharge; and**
- **the Approved Participant has refunded the rent overcharge.**

Variations to conditions of NRAS allocations

1.47 The intent of Item 3 of Schedule 3 is to allow the Scheme to provide for the variation of a condition of allocation, including an allocation already made. While there is currently scope in the Act to attach conditions to allocations, there is no express authority to vary the conditions of allocations once made.

1.48 According to the Explanatory Memorandum, the bill provides a clear legislative basis for varying conditions of allocations to enable the Scheme, 'to continue to respond to emerging issues that arise from time to time. Conditions of allocation may be varied where it is necessary or appropriate to give effect to the objects of the Scheme.'

1.49 The Explanatory Memorandum also states that, 'The ability to implement new and varied conditions of allocations are important to further the objects of the Scheme, and to protect eligible tenants and ensure the safety and viability of dwellings.'

1.50 The drafting of the proposed subsection 7(4) provides that the NRAS may provide for the variation of a condition of an allocation (other than prescribed conditions) 'in certain circumstances.' The drafting of the bill provides a much wider scope for conditions to be varied than the circumstances described in the Explanatory Memorandum.

1.51 Representatives of NRAS approved participants who made submissions to the Senate inquiry raised concerns over the breadth and lack of particularity of the discretion to vary conditions the subsection would provide to the Secretary. There is also no requirement for the Secretary to consult with approved participants over either the circumstances giving rise to the need for the variation or the nature of the variation.

> In NAHP's discussions with DSS they have reported that this legislative authority is necessary to afford them the powers to address significant emerging risk. However, the amendment does not limit the scope of that authority to varying conditions in order to mitigate risk. Nor does the amendment provide any caveats that reflect the intention in the Bill's explanatory notes that the conditions be imposed to deal with emerging issues and circumstances. The amendment simply states 'a condition provided for by the National Rental Affordability Scheme may be imposed

> on an allocation after the allocation is made'. It appears to be a 'catch-all' authority to impose any condition not already specifically articulated in the Act.
>
> NAHP believes this broad authority will result in investor uncertainty and distress if there is an ongoing possibility that the conditions of allocation can be varied and imposed at any time. Compliance with the new conditions of allocation could result in unanticipated costs and possibly a partial loss of the incentive if it proves difficult to comply with the new conditions in a timely manner.
>
> NAHP acknowledges that DSS needs some flexibility to address situations that pose a risk to NRAS tenants and the overall operation of the Scheme. NAHP recommends that some parameters be included in the Legislation that indicate when it is appropriate to significantly vary the conditions of the allocation; and that there be established procedures for negotiation on any variations with Approved Participants and investors.[18]

1.52 The Department's submission to the inquiry states:

> These new provisions will reduce risk to the Commonwealth when varying or imposing new conditions on allocations, such as provisions to protect NRAS investors for the first time.[19]

1.53 Further evidence was heard by the Committee in relation to emerging risks related to an approved participant failing to pass on incentives to investors, allegedly engaging in conduct in breach of consumer protection laws and making false and misleading representations about the NRAS Act to investors.[20]

1.54 Regulations made on 16 November 2017 will hopefully address these issues by providing that investors may now apply to the Secretary for an allocation held by the investor to be transferred to another approved participant if any of the grounds in new Regulation 21A are met, namely:

- The approved participant has failed to comply with a condition of the allocation.
- The approved participant has provided false or misleading information to an investor.
- The approved participant has contravened a consumer protection law by for example, engaging in misleading or deceptive conduct or engaging in unlawful anti-competitive conduct such as third party forcing or exclusive dealing.
- The approved participant has claimed a tax offset they were not entitled to claim.

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18 NAHP, *Submission 4*, p. 5–6.

19 Department of Social Services, *Submission 1*, p. 4.

20 Mr Paul Donovan, Director, MDS Legal and Mr Neil Henson, Director, Henson Property Management Pty Ltd, *Committee Hansard*, 14 November 2017, pp.14-18.

- The approved participant is subject to pending deregistration as a company.
- The approved participant has provided false or misleading information when making an application under the Regulations.

1.55 Labor Senators accept that the legislation should be amended to allow for the conditions attached to allocations to be varied to meet emerging risks.

1.56 However, in order to allay approved participants' and investor concerns over the breadth of the discretion to vary allocation conditions, it would be desirable to amend the bill to confine the discretion to circumstances where it is necessary to mitigate a risk to tenants, approved participants, investors or the integrity of the Scheme.

1.57 Labor Senators are also of the view that it would also be desirable to amend the provision to impose an obligation on the Secretary to consult with approved participants over the circumstances giving rise to the need for a variation to the conditions of an allocation and the nature of the variation to be made. There is no such requirement in the bill.

Recommendation 3

That the bill be amended to provide that legislative authority to vary conditions attached to allocations is confined to circumstances where a variation is necessary to mitigate an emerging risk to:

- **a tenant of an NRAS dwelling; or**
- **an NRAS approved participant; or**
- **an NRAS investor; or**
- **the integrity of the Scheme.**

Recommendation 4

That the bill be amended to provide that the Secretary must consult with an approved participant in relation to a proposed variation to a condition attached to an allocation, the circumstances giving rise to the need for a variation and the nature of the variation proposed.

Senator the Hon Lisa Singh **Senator Murray Watt**

Senator the Hon Doug Cameron