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Student Assistance Legislation Amendment Bill 2005

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Social Policy and Law and Bills Digest Sections

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Student Assistance Legislation Amendment Bill 2005

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House: House of Representatives

Portfolio: Education, Science and Training

Commencement: Royal assent, except for Schedule 1, Part 2 and Schedule 2, Part 3, which commence on 1 July 2006

Purpose

To amend relevant legislation to reflect the closure of the Student Financial Supplement Scheme (SFSS) to new applications for loans and to align repayment thresholds and indexation arrangements for outstanding loans with those that apply under the Higher Education Loan Program.

Background

Closure of the Student Financial Supplement Scheme

The scheme was closed administratively from 1 January 2004.[1] The Government had tried to close the scheme through legislation in 2003. The Student Assistance Amendment Bill 2003 and the Family and Community Services (Closure of Student Financial Supplement Scheme) Bill 2003 together would have closed the scheme to new applicants, while continuing the arrangements for repayment of existing loans. The Student Assistance Amendment Bill 2003 also included an amendment to remove the need to make regulations under the *Student Assistance Act 1973* to reflect changes to the ABSTUDY and Assistance for Isolated Children schemes guidelines. However the Bills did not proceed beyond a second reading in the Senate due to the opposition of the non-government parties.

This Bill contains similar provisions to those in the earlier Bills to close the scheme to further applicants.

The Bills Digest for the *Family and Community Services (Closure of Student Financial Supplement Scheme) Bill 2003* gives background material on the scheme and the debate over its closure.

New repayment thresholds

Proposed new section 1061ZZFD of the *Social Security Act 1991* will have the effect of linking the SFSS repayment thresholds to those of the Higher Education Loan Program (HELP) under the *Higher Education Support Act 2003*. However, the percentage of income payable will remain at the old SFSS levels. The following table shows the SFSS repayment thresholds for 2005–06 with those of HELP.

SFSS Taxable Income (TI) Thresholds for 2005–06	2005–06 HELP Repayment Thresholds	Repayment Rates
Below $39 218	Below $36 185	Nil
$39 218 - $44 567	$36 185 to $44 427	2 per cent of TI
$44 568 - $62 396	$44 428 to $63 062	3 per cent of TI
$62 397 and above	$63 063 and above	4 per cent of TI

The net effect of these changes on those with SFSS debts is not substantial. For example, a person with a taxable income of $70 000 will pay an additional $55 p.a. under the HELP thresholds.

Main provisions

The proposed legislation contained in this Bill will make amendments to the *Social Security Act 1991* (SSA) and the *Student Assistance Act 1973* (SAA). The proposed measures can be categorised as measures closing the SFSS and measures concerning the repayment of accumulated financial supplement debts.

Schedule 1, Part 1 proposes amendments to the SSA which will close the SFSS. Whilst already closed administratively, the statutory closure of the SFSS will be achieved by virtue of **item 4,** which will insert **proposed new subsection 1061ZY(2)** into the SSA. Under this new provision, students cannot become eligible for the financial supplement after the proposed legislation contained in this Bill receives royal assent.

Schedule 1, Part 2 proposes changes to those provisions in the SSA which deal with the repayment of accumulated financial supplement debts. **Items 6–20** contain changes to definitions set out in subsection 19AB(2) of the SSA. **Item 21** will add **proposed new section 1061ZZEYA** into the SSA. This section will impose upon the Commonwealth an

obligation to repay, under certain circumstances, monies which have been paid to it under Division 4 of Part 2B.3 of the SSA. The obligation to repay arises where the repaid amount exceeds the total amount:

- required to discharge the Commonwealth debt, and
- required to discharge the person's primary tax liabilities under Part IIB of the *Taxation Administration Act 1953* (TAA)

Item 22 will repeal the existing Division 5 of Part 2B.3 of the SSA and replace it with a new one. Central to this new Division is **proposed new section 1061ZZEZ**. This section will create the liability to repay the Commonwealth to reduce a 'repayable debt' as well as the circumstances in which this liability arises. Under **proposed new subsection 1061ZZEZ(1)** this liability arises if:

- a person's so called 'repayment income' exceeds the specified 'minimum repayment income' for the income years beginning with the year 2006–07 **(proposed new paragraph 1061ZZEZ(1)(a)**, and
- that person had at a particular day an 'accumulated financial supplement debt' **(proposed new paragraph 1061ZZEZ(1)(b)**.

Proposed new subsection 1061ZZEZ(2) provides for specific exemptions to this liability.

The Bill further defines the technical terms 'repayment income', 'minimum repayment income' and 'repayable debt' for the purposes of this proposed new Division.

Under **proposed new section 1061ZZFA**, 'repayment income' will be comprised of four elements, including a person's:

- taxable income (proposed new paragraph 1061ZZFA(1)(a))
- rental property loss (proposed new paragraph 1061ZZFA(1)(b))
- reportable fringe benefits total (proposed new paragraph 1061ZZFA(1)(c)),
- exempt foreign income (proposed new paragraph 1061ZZFA(1)(d)).

Proposed new section 1061ZZFB defines the term 'minimum repayment income', linking the amount to section 154-10 of the *Higher Education Support Act 2003* (HESA), which currently stipulates as minimum repayment income for the 2005–06 income year an amount of $36,184 (with later years to be calculated as indexed under section 154-25 HESA).

The term 'repayable debt' is defined in **proposed new section 1061ZZFC** and will mean the person's:

- accumulated financial supplement debt in relation to a financial year
- remaining debt where money has already been paid towards reducing the debt, or

- the assessed debt where the Commissioner of Taxation has made an assessment under section 1061ZZFH.

Proposed new section 1061ZZFD provides the basis for calculating the amounts a person will be liable to pay towards reducing the repayable debt. The amount will be calculated on the basis of a percentage of the person's income. The proposed section contains a table which sets out different percentages for several circumstances.

Item 23 inserts various new provisions which create connections between the SSA and the penalty provisions in the TAA. Similar provisions have been included in the HESA (see for example Subdivision 154-D HESA). According to the Explanatory Memorandum, **proposed new section 1061ZZFGA** will provide that:

> … Part 4-25 in Schedule 1 to the *Taxation Administration Act 1953* has effect as if any compulsory repayment amount of a person were income tax payable by the person in respect of the income year for which the assessment of that debt was made, and Part 2B.3 were an income tax law. Part 4-25 in Schedule 1 to the *Taxation Administration Act 1953* deals with charges and administrative penalties imposed on taxpayers for failing to meet obligations.[2]

Similarly, **proposed new subsections 1061ZZFGB** and **1061ZZFGD** will import pay-as-you-go withholding and instalments measures from the TAA into the SSA.

Schedule 2, Part 1 of the Bill will make certain amendments to the SAA relating to the closure of the SFSS. **Item 4** of this Schedule will insert **proposed new subsection 12C(1A),** providing the statutory basis for the closure of the scheme.

Schedule 2, Part 2 contains amendments which, if passed through Parliament, will provide the Department of Education, Science and Technology (DEST) with broader regulation-making powers under the SAA. **Item 10** will add **proposed new subsection 48(2)** which will remove the limitation in section 14 of the *Legislative Instruments Act 2003* (LIA). Under certain circumstances, section 14 permits regulations to apply, adopt or incorporate (to make reference to) other legislative provisions, disallowable instruments or any other instrument or written document as in force at a particular point in time. However, with respect to making reference to such other instruments or written documents, subsection 14(2) prohibits such references unless the contrary intention is specifically expressed in the primary legislation. This contrary intention will be given by virtue of proposed new subsection 48(2).

As a result, the substance of section 48, and consequently the related offence provision contained in section 49 of the SAA, can be contained in, for example, guidelines drawn up by DEST, to which the regulations can then refer.[3] This will lead to a less bureaucratic mechanism to change the substance of section 48. The Explanatory Memorandum explains that this amendment will eliminate the need for DEST:

> to make new regulations under the Act whenever guidelines for the non-statutory ABSTUDY and Assistance for Isolated Children schemes are altered.[4]

However, this amendment:

- will limit the parliamentary scrutiny of important aspects of the obligations set out in section 48 and the connected penalty provision, and
- can create a certain vagueness of the law which may be impermissible from a constitutional perspective.

This issue is further discussed below as part of the *Commentary*.

Schedule 2, Part 3 of the Bill proposes to make amendments to the SAA concerning the repayment of accumulated financial supplement debts. **Items 12–22** will add further definitions to section 3(1) of the SAA. **Item 23**, proposed new section 12ZJA is the equivalent to Schedule 1, item 21, inserting proposed new section 1061ZZEYA, discussed above. **Item 24** proposes to introduce **proposed new Subdivision C of Division 6, Part 4A** of the SAA. According to the Explanatory Memorandum, the individual provisions in this proposed new subdivision mirror the changes in relation to the SSA, and the reader is referred to the discussion of the individual provisions above.[5]

Commentary

As indicated during the discussion of the main provisions, **proposed new subsection 48(2)** warrants some further remarks.

Section 48 of the SAA, as it currently stands, creates an obligation to notify Centrelink when certain so-called 'prescribed events' occur. These prescribed events are currently set out in the Student Assistance Regulations 2003 (the Regulations) and include, for example, events where the recipient of the assistance:

- does not enrol in the course to which the amount relates by the end of the enrolment period (Schedule 1, Part 1, item 101)
- cancels his or her enrolment in the course to which the amount relates (item 103)
- changes the address of his or her place of residence or permanent home (item 115), or
- ceases to be an Australian citizen (item 119).

In addition, this section provides that a notification under this section must occur within 14 days in accordance with the procedure set out in these Regulations.

To ensure compliance, the obligation section is matched by an offence provision which stipulates that a contravention of the obligation constitutes an offence. Under section 49, a

person may be liable to imprisonment for 12 months unless there is a reasonable excuse for the contravention of section 48.[6]

Under the current regime, the Regulations enliven the obligation (and, as a result, the offence provision). These Regulations are subject to parliamentary scrutiny and disallowance procedures.

Under the proposed changes, the Regulations can make reference to other instruments and written documents. These may not be subject to parliamentary scrutiny, but rather may be an emanation of the will of the Executive. These instruments or documents, which could, for example, include guidelines issued by a department, will then contain the essential details of the obligation.

The crucial question will be: what may such instruments or documents contain? It seems likely that their possible content will strongly depend upon how the term 'notifying' in the proposed amendment may be understood. Of particular relevance is whether this term is construed to include or exclude the specification of the 'prescribed events'. Two different interpretations seem to be possible, including:

- if 'notifying' is taken to *exclude* 'prescribed events' (the narrow view)—then the broadening of the regulation-making power will not extend beyond prescribing *how* a person may notify Centrelink (for example by providing that the notification must occur in writing or by using a specified form—notification procedure), or
- if 'notifying' is taken to *include* 'prescribed events' (the broad view)—then the power is not restricted to prescribing *how* a person may notify the Centrelink, but extents further and includes *when* or under which *circumstances* a person has to notify Centrelink.

Plainly, the narrow view appears to be unobjectionable and will give DEST merely an administrative tool to make less bureaucratic changes to the notification procedure as necessary.

However, an adoption of the broad view would enable DEST to make changes not only to the notification procedure, but also to the 'prescribed events'. In other words, DEST may change the circumstances in which a person must notify Centrelink *as* and *when* it wishes.

Such a broad, and seemingly rather unrestricted, discretion could raise the following issues because section 48 cannot be seen in isolation—after all, this section creates obligations the contravention of which is punishable with 12 months imprisonment under section 49.

The amendment may deprive Parliament of the opportunity of expressing its intentions

The penalty imposed by section 49 for breaching the obligation in section 48 can result in a significant curtailment of a person's individual rights. The Constitution demands

Parliament's, not the Executive's, clear intention that a particular conduct shall be punished. In the recent High Court case *Al-Kateb v Godwin* [2004] HCA 37, Chief Justice Gleeson argued that:

> Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.[7]

Arguably, under the proposed amendment, it is the intention of the Executive, not Parliament, which will enliven the obligation under section 48 and, as a result, the offence under section 49 of the SSA.

The amendment may erode the rule of law

The Executive is able to change administratively the content of guidelines at any time. Linking the content of the obligations to the content of the guidelines would have the same result—the Executive could change the obligations at any time administratively.

This could raise issues such as how accessible any changes made to the guidelines, and consequently the law, will be. Similarly, the possible ad-hoc character of the decision-making process underlying any changes to the guidelines could raise similar accessibility concerns. These issues must be viewed in the context of the possible significant consequences of non-compliance with an obligation.

The possibility of administratively changing the content of obligations, where non-compliance can lead to imprisonment, could result in a reduction of the certainty of the law. Such certainty is a fundamental aspect of the rule of law, as only certainty will be able to ensure that the law effectively guides human behaviour.[8] It applies specifically to laws, such as those containing offence provisions, which curtail individual rights.[9] In the Canadian context, this principle has been given the status of a:

> […] principle of fundamental justice… [according to which] a statute is 'void for vagueness' if its prohibitions are not clearly defined. A vague law offends the values of constitutionalism. It does not provide sufficiently clear standards to avoid arbitrary and discriminatory applications by those charged with enforcement. It does not provide reasonable notice of what is prohibited so that citizens can govern themselves safely.[10]

Professor Cheryl Saunders and Katherine Le Roy identified the core principles of the rule of law, one of which is that the law must be governed by general rules which are made in advance.[11] The authors continued, stating that:

> More can be said about each of these principles, in order to secure their purpose. There is no point in laying rules down in advance unless they operate prospectively,

> are publicly available, can be understood, are susceptible of obedience, individually and collectively, and are not changed unreasonably often.

These principles apply because the laws in Australia are made under, and consistent with, the Australian Constitution, which assumes the existence of the rule of law.[12]

Concluding comments

The changes to section 48 of the SAA will modify the way in which notification obligations are to be defined. Under the new regime, the scope of the obligation can be defined by the Executive. These changes have an immediate influence upon the offence provision, section 49. Accordingly, the proposed amendment in **Schedule 2, Part 2, item 10** is not without difficulties. In particular, should the broad view be followed, the proposed amendment could:

- remove parliamentary scrutiny with respect to the scope of the obligation and, as result, of the offence, and
- erode the rule of law because it has the potential to remove certainty from the obligation and the matching offence.

Parliament may want to consider whether the proposed law should be amended to put beyond doubt that the expansion of the regulation-making power does not include the determination of 'prescribed events', but is limited to the prescription of the notification process.

Endnotes

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1 The Hon. L. Anthony, *Student Financial Scheme will close*, media release, 9 December 2003. See for full text: http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=PRESSREL&Criteria=CITATION_ID:C64B6%3B

2 Explanatory Memorandum, Student Assistance Legislation Amendment Bill 2005, p. 8.

3 The Explanatory Memorandum at p. 12 uses the term 'guidelines' in the context of this provision.

4 ibid.

5 ibid., p. 14.

6 Note that a person making false statements or providing false or misleading information may be committing a criminal offence under sections 135.2, 136.1, 137.1 or 137.2 of the Commonwealth's *Criminal Code 1995*.

7. *Al-Kateb v Godwin* [2004] HCA 37, paragraph [19], http://www.austlii.edu.au/au/cases/cth/HCA/2004/37.html.

8 G. de Q. Walker, *The Rule of Law: Foundation of Constitutional Democracy*, Melbourne University Press, Melbourne, 1988, p. 315.

9 P. Prince and R. Jordan, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004, Bills Digest, No. 13, Department of Parliamentary Services, Canberra, 2004-5, p. 20.

10 P. Hogg, *Constitutional Law of Canada*, 3rd edition, Carswell, Scarborough, Ontario, 1992, p. 864.

11 C. Saunders and K. Le Roy, 'Perspectives on the Rule of Law', in C. Saunders and K. Le Roy (eds), *The Rule of Law*, Federation Press, Melbourne, 2003, p. 5.

12 M. Gleeson, Chief Justice of the High Court, 'Courts and the Rule of Law', in C. Saunders and K. Le Roy, op. cit., p. 182, referring to the High Court's decision in the *Australian Communist Party and ors v The Commonwealth* (1951) 83 CLR 1.

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