

23 April 2013

Housing Payment Deduction Scheme Consultation
Housing Policy Branch (MSH 3)
Department of Families, Housing, Community Services and Indigenous Affairs
PO Box 7576
CANBERRA BUSINESS CENTRE ACT 2610

By email: HousingPaymentsDeductionScheme@fahcsia.gov.au

Dear Minister Macklin

Housing Payment Deduction Scheme

We refer to the Exposure Draft of the Social Security Legislation Amendment (Public Housing Tenants' Support) Bill 2013 (**Exposure Draft**) and to the Housing Payment Deduction Scheme (**Deduction Scheme**).

As an organisation that provides free legal services that aim to prevent eviction into homelessness, the PILCH Homeless Persons' Legal Clinic (**HPLC**)¹ would welcome a scheme that aims to 'prevent build-up of arrears and possible eviction from public housing'. In its current form, however, the Deduction Scheme operates much more broadly than just intervening early to prevent the escalation of public housing tenants' rental arrears.

The HPLC does not support the Deduction Scheme in its current form. Our seven key comments in relation to the Exposure Draft and the Deduction Scheme are summarised below:

1. **The Deduction Scheme goes too far** – As the Deduction Scheme recognises, early intervention is critical to tenants being able to address their arrears and avoid eviction into homelessness. However, the Deduction Scheme and the Exposure Draft go much further than compulsorily deducting tenants' rent to prevent eviction for arrears.
2. **Maintenance and other debts included** – The Deduction Scheme refers to money owing to the public housing lessor 'by way of rent or otherwise' and therefore includes a range of payments that are not arrears and do not necessarily place a public housing tenant's tenancy at risk (for example, maintenance, repairs or arrears debts for a previous public housing property).² The HPLC objects to the inclusion of any amounts other than arrears for a tenant's current property in the Deduction Scheme.
3. **'At risk of non-payment'** – The definition of 'at risk of non-payment' is extremely broad. A person or family's inability to keep up with rent or a maintenance debt for a previous tenancy should not be a reason to automatically limit that person or family's financial independence in a new public housing tenancy.
4. **Public housing authority must take 'reasonable action'** – A public housing authority must take 'reasonable action' to recover an outstanding amount from a tenant before requesting compulsory deductions, but there is no indication of what might constitute 'reasonable action'. Such guidance is extremely important if the Deduction Scheme is genuinely intended to be a last resort. With no guidance as to what constitutes 'reasonable action', there is no onus on public housing authorities to speak directly with tenants, link tenants to services or explore less restrictive means of addressing a tenant's arrears.

¹ Information regarding the HPLC is annexed to this submission.

² Where these amounts are required to be paid as part of the tenant's current lease (see draft para 5(1) of Schedule 6 of the *Social Security (Administration) Act 1999* (Cth); draft para 4(1) of Schedule 1 of *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth); and Department of Families, Housing, Community Services and Indigenous Affairs, *Fact Sheet 3: Operating the Housing Payment Deduction Scheme* (April 2013)).

5. **Lack of procedural fairness** – Tenants are not currently notified before the decision is made to include them in the Deduction Scheme. Tenants must be afforded procedural fairness (including a chance to reply) before making a decision to compulsorily divert their income toward public housing costs.
6. **Housing stress puts tenancies at risk** – It is poor public policy to impose financial obligations on public housing tenants at a level (i.e. up to 35% of a household's income) which is recognised as placing tenants under housing stress, creating a risk of tenancy failure and limiting households' ability to meet basic living expenses.
7. **Implementation by Centrelink** – An injection of support, training and resources would be required for Centrelink to implement the Deduction Scheme in an effective way so that administrative issues did not present a risk of eviction for tenants.

The HPLC also notes our concern about the scope of consultation in relation to the Exposure Draft and the Deduction Scheme. Limiting the length of submissions and providing such a short period for comment significantly constrains the Government's access to meaningful feedback. Given the magnitude of the consequences for thousands of public housing tenants, the scope of consultation is inadequate.

Eviction for arrears

Through our work as an organisation that provides pro bono legal services to Victorians experiencing or at risk of homelessness, the HPLC knows that eviction from public housing almost inevitably results in homelessness for vulnerable tenants.

In the last 12 months, the HPLC has assisted 48 tenants facing eviction for arrears (across public, community and private housing). Arrears are the single largest cause of tenancy problems for tenants that the HPLC assists (27% of the tenancy matters the HPLC assisted clients with in the last 12 months related to eviction for arrears).

In many cases, the HPLC can assist clients to avoid eviction through legal advice, advocacy and representation at the Victorian Civil and Administrative Tribunal (**VCAT**).

As the Deduction Scheme recognises, early intervention is critical to tenants being able to address their arrears and avoid eviction into homelessness. The HPLC is concerned, however, that the Deduction Scheme and the Exposure Draft go much further than compulsorily deducting tenants' rent to prevent eviction for arrears.

Our concerns with the current Deduction Scheme, which are informed by our expertise and experience as a legal service specialising in homelessness prevention, are set out below.

Operation of the Deduction Scheme under the Exposure Draft

Schedule 1 to the Exposure Draft is set out in two parts:

- Part 1 – draft amendments to the *Social Security (Administration) Act 1999* (Cth) (the main change being the insertion of a new Schedule 6, which introduces the Deduction Scheme); and
- Part 2 – draft amendments to *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) (the main change being the insertion of a new Schedule 1, which introduces the Deduction Scheme).

Important operative provisions of the Deduction Scheme are set out in six legislative instruments under the *Legislative Instruments Act 2003* (Cth) rather than in the Exposure Draft itself.

In summary, the Exposure Draft provides that a public housing lessor can request the Secretary to make a deduction from a public housing tenant's Centrelink income support (if it is classified as a 'divertible welfare payment'³ or is a Family Tax Benefit) if:

- an amount exceeding the 'minimum amount' is due and payable by the tenant to the public housing lessor and the lessor has taken 'reasonable action' to recover the amount from the tenant (**Minimum Amount Owing**). The Minimum Amount Owing is defined in the Draft Social Security (Public Housing Tenants' Support) Minimum Amount Specification (No. 1) 2013 (see below); or
- 'there is a risk that not all of the amounts that became or become due and payable by the person to the lessor under the lease before the time of the divertible welfare payment will have been paid by that time' (**Risk of Non-Payment**). What constitutes a Risk of Non-Payment is defined in the Draft Social Security (Public Housing Support) Risk of Non-Payment of Amounts Rules (No. 1) 2013 (see below).

Except in limited circumstances (for example, where a person is already subject to compulsory income management), the Secretary may make a compulsory deduction from the tenant's Centrelink benefit in accordance with the public housing lessor's request.

These provisions, and the HPLC's concerns with them, are discussed below.

Minimum Amount Owing – broader than rent arrears

The Minimum Amount Owing to justify a public housing lessor requesting a compulsory deduction is defined under the Draft Social Security (Public Housing Tenants' Support) Minimum Amount Specification (No. 1) 2013 as:

- \$100 (whether owing by way of rent or otherwise) if that amount has remained due and payable for at least four weeks; or
- if the amount has not been due and payable for at least four weeks, \$400 (whether owing by way of rent or otherwise).

It is not accurate to imply that the amount being compulsorily deducted under the Deduction Scheme will be limited to arrears for current tenancies and accordingly that the paramount aim of the Deduction Scheme is sustaining tenancies. The Deduction Scheme's reference to money owing to the public housing lessor 'by way of rent or otherwise' includes a range of payments that are not arrears and do not necessarily place a public housing tenant's tenancy at risk.

For example, a person may have a debt for maintenance, repairs or arrears for a previous public housing property.⁴

In the HPLC's experience, the Director of Housing in Victoria (**DOH**) has flawed policies and practices for calculating and seeking repayment of alleged debts for maintenance and repairs. Legal advice and advocacy by the HPLC and other free legal services frequently results in the amount payable by the tenant being significantly reduced from the amount initially claimed by the DOH (in one case by approximately \$10,000). In the absence of representation, it is common for the DOH to make 'ambit' claims for compensation, which include amounts attributable to fair wear and tear and damage that the tenant was not responsible for under the DOH's internal policies (because the damage was caused by, for example, family violence or criminal actions of a third party).⁵

³ The Draft Social Security (Public Housing Tenants' Support) Divertible Welfare Payments Specification (No. 1) 2013 defines 'divertible welfare payments' to include: widow allowance; youth allowance; austudy payment; newstart allowance; sickness allowance; special benefit; partner allowance; pension PP (partnered); age pension; disability support pension; wife pension; career payment; pension PP (single); bereavement allowance; widow B pension; double orphan pension; and ABSTUDY.

⁴ Where these amounts are required to be paid as part of the tenant's current lease (see draft para 5(1) of Schedule 6 of the *Social Security (Administration) Act* 1999 (Cth); draft para 4(1) of Schedule 1 of *A New Tax System (Family Assistance) (Administration) Act* 1999 (Cth); and Department of Families, Housing, Community Services and Indigenous Affairs, *Fact Sheet 3: Operating the Housing Payment Deduction Scheme* (April 2013)).

⁵ Department of Human Services Victoria, *Maintenance Manual: Tenant Property Damage* (October 2012) ch 5.1.3 (available at: <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/maintenance-manual>).

The current Deduction Scheme provides that tenants would be compulsorily signed up to repayment of these debts with little or no accountability from public housing authorities.

While the HPLC does not deny the importance of repaying legitimate debts to public housing authorities, it is not accurate to imply that these debts jeopardise a tenant's current tenancy. Repairs and maintenance debts are pursued through separate compensation claims and are not related to eviction for arrears.

The HPLC objects to the inclusion of any amounts other than arrears for a tenant's current property in the Deduction Scheme.

Risk of Non-Payment

The HPLC has serious concerns about the way in which the Exposure Draft defines 'at risk of arrears'. The Draft Social Security (Public Housing Support) Risk of Non-Payment of Amounts Rules (No. 1) 2013 currently provide that 'there is a risk that not all of the amounts that became or become due and payable by the person to the public housing lessor under the lease will be paid' where:

- a person has previously: been evicted; had a lease cancelled, terminated or not renewed; or abandoned the relevant property 'with an amount due under a residential lease remaining unpaid' (**Past Tenancy Provision**); or
- on three or more occasions in the previous year, a person has paid their rent more than one week late or paid insufficient rent to meet the rent due.

As currently drafted, this is an extremely broad definition. On the present drafting, it is not clear that the Past Tenancy Provision applies only to previous tenancies with the public housing lessor.

This is clearly problematic given that the reason tenants turn to the public housing system is because they are unable to sustain tenancies in the private rental market. Accordingly, many tenants will have been evicted or will have left a previous property with an amount 'remaining unpaid' and will therefore fall within the Deduction Scheme.

Even if this catch-all is limited, the HPLC's position is that a person or family's inability to keep up with rent or a maintenance debt for a previous tenancy should not be a reason to automatically limit that person or family's financial independence in a new public housing tenancy.

We also note that victims of family violence are likely to be disproportionately affected by the Deduction Scheme in its current form. People dealing with family violence are often required to flee tenancies to escape a violent partner. These victims, many of whom have children, will then be punished for this when accessing public housing.

The HPLC submits that any compulsory income deductions should be strictly limited to an identified risk of arrears in relation to a person's current tenancy.

'Reasonable action' to recover the amount owing

Under the Exposure Draft, a tenant's income can be compulsorily deducted if the Minimum Amount Owing (as defined under the legislative instruments and discussed above) is due and the public housing authority has taken 'reasonable action' to recover the amount from the tenant.

There is, however, no indication of what might constitute 'reasonable action' to recover the amount from the tenant.

This is extremely important if the Deduction Scheme is genuinely intended to be a last resort.

The Government's commentary on the Deduction Scheme refers to the Government's commitment to introducing compulsory rent payments under the White Paper on Homelessness, *The Road Home: A National Approach to*

Reducing Homelessness (White Paper). The White Paper states that: 'The Australian Government will work with states and territories to introduce compulsory rent payments from Centrelink payments for tenants in public housing at risk of eviction due to non payment of rent'.⁶

Firstly, as discussed above, the Deduction Scheme is much broader than the commitment in the White Paper (i.e. it spans beyond rent and goes further than tenants at risk of eviction due to non-payment of rent). Secondly, the Exposure Draft does not recognise that the White Paper made this commitment as part of a suite of recommendations aimed at preventing homelessness. It is not clear that the concomitant changes are being delivered with the Deduction Scheme and the HPLC is strongly of the view that compulsory acquisition of housing payments alone will not prevent homelessness.

In particular, the White Paper stated: '[s]uccessful tenancy support programs have been implemented for social housing tenants in some states to prevent evictions that lead to homelessness'. The White Paper refers to the programs that 'identify people who are in the early stages of rental arrears ... At-risk tenants are contacted face to face by a specialist worker, who can help to develop a plan of action and refer tenants to other services, such as financial counsellors, mental health services, education and parenting programs'.⁷

In Victoria, programs aimed at early intervention, such as the Social Housing Advocacy and Support Program (**SHASP**), are being reduced rather than strengthened. In this environment, there is a significant risk that the Deduction Scheme will be the first rather than last resort.

With no guidance as to what constitutes 'reasonable action', there is no onus on public housing authorities to speak directly with tenants, link tenants to services or explore less restrictive means of addressing a tenant's arrears.

The HPLC recommends that there are a set of required steps that constitute 'reasonable action', which must be taken by a public housing lessor before requesting that a tenant is subjected to the Deduction Scheme.

Procedural fairness – tenants' right to respond

As discussed above, the Exposure Draft provides that the public housing lessor can make a request for a deduction from a person's Centrelink benefit or Family Tax Benefit if it forms the view that there is the Minimum Amount Owing and the public housing lessor has taken reasonable action to recover the amount; or there is a Risk of Non-Payment.

The section in the Exposure Draft titled 'content of the request' provides that the public housing lessor's request must specify the maximum amount to be deducted. The amount requested must not be more than the amount claimed to be owed (for rent 'or otherwise') or more than the amount that the public housing lessor thinks is 'at risk of not being paid' (**Requested Deduction**). No other content is identified as being required in the request.

The Secretary may make the Requested Deduction if the Secretary is satisfied a request has been made and is in force.

There are limited circumstances in which the Secretary must not make the Requested Deduction, including where the tenant is subject to compulsory income management; or is a person covered by a determination in a legislative instrument by the Minister that 'deductions must not be made' from amounts 'payable to specified persons'.⁸ There does not yet seem to be a legislative instrument that identifies these 'specified persons'.

If the Requested Deduction is not made, the Secretary must notify the public housing lessor.

In short, the circumstances in which a compulsory deduction can be requested are very broad and the circumstances in which it will be refused are very limited.

⁶ Homelessness Taskforce, Department of Families, Housing, Community Services and Indigenous Affairs, *The Road Home: A National Approach to Reducing Homelessness* (2008) (**White Paper**) 25.

⁷ *Ibid.*

⁸ Draft para 6(3) of Schedule 6 in the *Social Security (Administration) Act 1999* (Cth) and draft para 5(2)(ii) of Schedule 1 to the *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth).

At no point is the Secretary required to put the Requested Deduction to the tenant. At no point does the tenant have the opportunity to provide a possible explanation of why they are not at risk of non-payment or why they should not be subject to the Deduction Scheme.

This absence of procedural fairness means that tenants are at significant risk of having the Deduction Scheme imposed arbitrarily or inappropriately.

The limited appeal right is not a substitute for affording procedural fairness to tenants before the decision is made to compulsorily deduct their income for public housing costs.

The HPLC encourages the Government to afford public tenants procedural fairness (including a chance to reply) before making a decision to compulsorily divert their income toward public housing costs.

Housing stress puts tenancies at risk

In Victoria, 86% of public housing households rely on Centrelink as their primary source of income.⁹

The Australian Council of Social Service (**ACOSS**) has identified low levels of income from social security payments as a major factor in increasing poverty,¹⁰ and has long called for payments to be increased (particularly allowances, which have not increased in real terms since the early 1990s).¹¹ ACOSS further identifies:

The maximum single rate of Newstart Allowance in December 2012 was just \$246 per week. The payment for unemployed young people living independently of their parents is \$201 per week. As the recent Senate inquiry into the adequacy of Allowance payments confirmed, this is not enough to meet the most basic essential costs such as housing, food, clothing and importantly, basic job search costs.¹²

The HPLC submits that it is important that Government keeps these levels of financial hardship in mind when developing the Deduction Scheme. Essentially, income support payments leave tenants with very little room to move. For tenants who are subjected to the Deduction Scheme, they will not have any ability to deal with emergency or unexpected expenses such as costs related to children or school, emergency car repairs or medical needs.

The amount that can be deducted from a tenant's income under the Deduction Scheme cannot exceed 35% of their income support payment. The Exposure Draft and the Draft Social Security and Family Assistance (Public Housing Tenants' Support) Disregarded Provisions Specification (No. 1) 2013 exclude certain payments from the base amount used to calculate the 35% cap (for example, pension supplements; remote area allowance; pharmaceutical allowance; and supplements for clean energy, program of work, language, literacy and numeracy and youth disability).

The HPLC points out that the accepted definition of 'housing stress' is that a household spends more than 30% of their income on housing costs.¹³

By setting the cap at 35% of a person's income, the Government will put low income families in housing stress. The Australian Institute of Health and Welfare identifies the risks of this approach:

Households experiencing socioeconomic disadvantage, particularly those in housing stress (that is, spending more than 30% of their household income on housing costs) are less likely than other Australian households to sustain their housing situation if the affordability of their housing deteriorates. Low-income households (those whose income is in the bottom two-

⁹ See State Government of Victoria, 'Pathways to a Fair and Sustainable Social Housing System' Public Consultation Discussion Paper (April 2012) 6 (**Consultation Paper**).

¹⁰ Australian Council of Social Service, *Poverty Report: October 2011 Update* (2011) 8–11.

¹¹ Australian Council of Social Service, *2013–2014 Budget Priority Statement* (2013) 28.

¹² *Ibid.*

¹³ See, eg, Australian Institute of Health and Welfare, *Housing Assistance in Australia* (2012).

fifths of the population) in housing stress are of particular concern, as the burden of high housing costs reduces their ability to meet their other living expenses.¹⁴

If public housing households' already limited incomes are put under further pressure, there is a risk that these households will be:

- unable to meet their living expenses; and
- less likely to sustain their housing.

This is contrary to the stated aims of the Deduction Scheme.

By way of example, we have included the fortnightly budget for a client who is living in public housing in Victoria. In addition to struggling with his mental health, Joseph developed a back injury in 2010, which meant that he was no longer able to work. From that point, he was reliant on Newstart Allowance as his sole source of income. An outline of Joseph's fortnightly expenses is set out below:

Expense	Amount per fortnight
Rent	\$115
Groceries and food	\$140
Personal mobile phone (capped)	\$15
Petrol	\$60
Electricity	\$30
Gas	\$20
Water	\$10
TOTAL	\$390

Joseph receives \$486 in Newstart per fortnight. As the above budget shows, this leaves him with approximately \$96 per fortnight for any other expenses (including clothing, healthcare and medication for his mental health condition, which costs approximately \$5.50 per script).

If up to 35% of Joseph's income was deducted to pay housing costs, his rent of \$115 would increase to 'rent and other housing costs' of up to \$170. This would add \$55 to Joseph's already extremely tight budget, leaving him with \$40 per fortnight for any unexpected expenses.

The HPLC suggests that it is poor public policy to impose financial obligations on public housing tenants at a level (i.e. up to 35% of a household's income) which is recognised as placing tenants under housing stress, creating a risk of tenancy failure and limiting households' ability to meet basic living expenses.

Implementation – concerns regarding Centrelink

The HPLC currently assists numerous tenants presenting with arrears problems because of administrative issues with Centrelink and Centrepay i.e. in some cases Centrelink is the cause of the arrears rather than the solution.

It is not clear that Centrelink will be able to implement the Deduction Scheme effectively in a way that diminishes rather than exacerbates the risk of eviction for public housing tenants.

The HPLC recommends that the Government considers the injection of support, training and resources that would be required for Centrelink to implement the Deduction Scheme in an effective way so that administrative issues did not present a risk of eviction for tenants.

¹⁴ Ibid 1.

Conclusion

In summary, in its current form, the HPLC does not support the Exposure Draft or the Deduction Scheme. For a mechanism that has such wide potential consequences for a significant number of public housing tenants, further consultation and consideration is required to avoid the risks we have identified in this submission.

In its current form the Exposure Draft and the Deduction Scheme do not present an effective strategy for homelessness prevention. It is an overly broad, blunt instrument that will catch too many public housing tenants in a net of compulsory income diversion. It risks imposing rather than alleviating disadvantage and should be avoided.

We would welcome the opportunity to discuss the Exposure Draft and the Deduction Scheme with you.

Please contact Lucy Adams on (03) 8636 4409 if you would like to discuss the content of this submission.

Yours sincerely



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Annexure – About the PILCH Homeless Persons’ Legal Clinic

The Public Interest Law Clearing House (Vic) Inc (**PILCH**) is a leading Victorian, not-for-profit organisation. It is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its mission, PILCH seeks to:

- address disadvantage and marginalisation in the community;
- effect structural change to address injustice;
- foster a strong pro bono culture in Victoria; and
- increase the pro bono capacity of the legal profession.

The HPLC is a project of PILCH. It is a specialist legal service that provides free legal assistance and advocacy to people who are homeless or at risk of homelessness.

Free legal services are offered by the HPLC on a weekly basis at eight outreach locations that are already accessed by people experiencing homelessness, including crisis accommodation centres and social and family services.¹⁵

Since its establishment in 2001, the HPLC has provided assistance to over 5000 people experiencing or at risk of homelessness.

In addition to providing legal services, the HPLC undertakes a range of law reform and public policy activities. These activities are intended to identify and seek to change laws and policies that impact in a disproportionate or discriminatory way on people experiencing homelessness.

The HPLC also conducts a range of capacity building activities, including community legal education and consumer participation activities.

In 2005, the HPLC received the national Human Rights Law Award conferred by the Human Rights and Equal Opportunity Commission in recognition of its contribution to social justice and human rights. In 2009 it received a Melbourne Award for contribution to community in the City of Melbourne.

¹⁵ Host agencies include Melbourne Citymission, Ozanam House, Flagstaff Crisis Accommodation, VACRO, HomeGround Housing Services, Northside Geelong, Central City Community Health Centre and Salvation Army St Kilda Crisis Contact Centre. Legal services are provided at our host agencies by volunteer lawyers from law firms: Allens Linklaters, Clayton Utz, Corrs Chambers Westgarth, DLA Piper, Herbert Smith Freehills, King & Wood Mallesons, Minter Ellison and Harwood Andrews.