

# DSS Changes to non-economic loss: update

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## Introduction

As part of last year's budget, the Government proposed changes to the treatment of lump sums and damages for non-economic loss received by Social Security recipients. The resulting *Social Security and Veteran's Entitlements Legislation Amendment Bill 1999* is now before Federal Parliament.

The stated aim of the original budget proposal was to encourage Social Security recipients to choose periodic payments or "structured settlements" instead of lump sum payments. According to the Second Reading speech, the Bill is designed to encourage greater "self reliance through the security of a steady income stream". This is seen to be necessary because of the "many cases" in which lump sums received by injured people are "quickly dissipated."

## An outline of the Bill

The *Social Security Act 1991* already makes provision for repayment of Social Security benefits or for the application of preclusion periods in cases where a lump sum of damages or compensation includes a component for loss of earnings or earning capacity. The Bill does not affect these provisions.

The proposed amendments apply to any lump sum payment of damages or compensation in respect of an "injury or disease", whether at common law or under a statutory scheme, that does *not* include an amount in respect of lost earnings or capacity to earn.

The Bill envisages a scheme whereby the amount of any "one off" non-economic loss lump sum in excess of \$10,000 would be treated as "ordinary income" spread over 26 fortnights. This income would then be taken into account in assessing the entitlement of the recipient to a means tested benefit or allowance.

For compensation or damages of more than \$10,000, the provisions are only avoided if the compensation or damages is paid in periodic instalments, with

the initial instalment less than \$10,000 and the total of instalments in each subsequent 28 day period less than \$2,000.

Any amount of the initial payment in a series of payments that is in excess of \$10,000 is treated as "ordinary income" spread over 26 fortnights. The whole of any subsequent payment in a series of periodic payments for a 28 day period in excess of \$2000 is also treated as "ordinary income".

The constraints of statutory schemes or the unwillingness of insurers to manage periodic payment of damages will mean that most recipients of compensation or damages will not have an opportunity to receive payments in periodic instalments. Under the proposed amendments, these recipients can only avoid the provisions by using their lump sum to purchase, from a private fund, an "income stream" that complies with the scheme for payment of periodic payments outlined above.

No provision is made in the proposed amendments for exemption of expenditure on medical and rehabilitation needs or other expenditure, such as payment of a mortgage. It has been claimed that the department will be given discretion to exempt payments in certain circumstances, however no detail has been provided as to the guidelines that would govern the exercise of this discretion.

The proposed amendments will apply to any payment received after the commencement of the section, regardless of the date of the injury, claim or commencement of litigation.

Similar provisions are proposed in respect of benefits under the *Veterans Entitlements Act 1986*.

## Progress of the Bill

The Bill was passed by the House of Representatives on 25 March 1999 and is currently before the Senate.

The Community Affairs Committee of the Senate has considered the Bill and they have received submissions from APLA, Injuries Australia, the Law

Council of Australia, veterans groups and welfare groups. All non-departmental submissions expressed concern about the proposals. Both the Democrats and the ALP appear unlikely to support the Bill in its present form.

## APLA submissions

APLA's submission to the Committee pointed out the illogicality and unfairness of treating lump sum payments for non-economic loss as ordinary income in the manner proposed by the Bill. The submission also questioned the need for the amendments and in particular the basis for the Government's assertion that Social Security recipients unwisely "dissipate" lump sums. There appears to be little basis for this assertion other than the usual anecdotal evidence. Our objections were supported by both Democrat and Labor minority reports to Parliament.

## Conclusion

The government has estimated that about \$12 million per year will be saved in Social Security payments if the amendments are implemented. These estimates indicate that a substantial number of compensation recipients (50% on the Department of Family and Community Services estimates) will not have the option or the incentive to avoid the effects of the proposed amendments.

It seems that the real purpose of the proposed amendments is not so much the furtherance of a policy of encouraging the take up of structured settlements as a crude attempt to raise revenue at the expense of some of the least well off in our community. APLA members should be ready to contribute to the debate about the proposals and to ensure that individuals and organisations which share their concerns are informed of the effect of the amendments. ■

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