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## Chapter 2 - Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on 1 September 2014. The committee has concluded its examination of these matters on the basis of responses received by the proponents of the bill or relevant instrument makers.

### **Business Services Wage Assessment Tool Payment Scheme Bill 2014**

### **Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014**

*Portfolio: Social Services*

*Introduced: House of Representatives, 5 June 2014*

#### **Purpose**

2.1 The Business Services Wage Assessment Tool Payment Scheme Bill 2014 (the bill) was introduced with the Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014. The bill responds to the Federal Court's decision in *Nojin v Commonwealth of Australia*, which found the application of the Business Services Wage Assessment Tool (BSWAT) to be discriminatory. BSWAT measures not only work productivity but also competency, and the competency aspect of BSWAT was found to have a discriminatory effect on employees with an intellectual disability or impairment. The bill establishes a payment scheme for eligible current and former employees of Australian Disability Enterprises.

#### **Background**

2.2 The committee reported on the bill in its *Ninth Report of the 44<sup>th</sup> Parliament*.

#### **Committee view on compatibility**

##### ***Right to an effective remedy***

##### *Payment amounts and structure*

2.3 The committee sought the advice of the Minister for Social Services as to:

- whether the proposed scheme payment amount is compatible with the right to an effective remedy.
- what steps are being taken in accordance with the AHRC exemption, and the likely timeframe for transition to the Supported Wage System or an alternative tool approved by the Fair Work Commission; and

- whether the proposed release and indemnity provisions are compatible with the right to an effective remedy.

### **Assistant Minister's response**

#### ***1.14 The committee therefore seeks the advice of the Minister for Social Services as to whether the proposed scheme payment amount is compatible with the right to an effective remedy***

*The Committee's states at 1.12 that 'while the statement of compatibility states that the scheme provides an 'effective remedy' for eligible workers, it does not provide any substantive analysis of how the scheme payment rates may be regarded, for human rights purposes, as an effective remedy, understood as being fair and reasonable compensation for the breach of human rights suffered by affected individuals as a result of unlawful discrimination'.*

The Bill is only one of the options available for people with intellectual disability. Amongst other things, instead of accepting an offer under the scheme, such persons may remain in the representative proceeding (Duval-Comrie v Commonwealth VID1367/13) or commence their own legal proceedings against the Commonwealth if they think they have been unlawfully discriminated against. Individuals can freely choose whether they accept a payment under the BSWAT Payment Scheme or pursue a remedy through the courts.

Part 2, clause 8 of the Bill provides details as to the determination of the payment amount. While the Scheme provides a payment, and not compensation, the process for determining the payment amount:

- Broadly reflects the amount that is 50 per cent of the excess (if any) of a productivity-scored wage over an actual wage (paragraph 8(3)(a));
- Includes an increase to the payment amount to take into account expected tax (paragraph 8(3)(b));
- Will provide payment of \$100 after tax if the amount worked out for the person is more than \$1 but less than \$100.

The Bill would provide an effective remedy in the following manner:

- The Australian Government has established a scheme to make payments to a broad cohort of persons who have had their wages assessed under the BSWAT (not just those with intellectual disability – but intellectual impairment, which includes intellectual disability, autism spectrum disorder, dementia, and impaired intellectual functioning as a consequence of an acquired brain injury) – the Australian Government has decided to make a payment to these persons despite the fact that there has been no finding by the Court (other than in relation to Messrs Nojin and Prior) that the use of the BSWAT to assess the wages of these workers was discriminatory.

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- Messrs Nojin and Prior did not receive any monetary compensation. A claim for financial compensation was abandoned during the hearing of the appeal before the Full Federal Court. However, while they now have no entitlement to compensation, both Messrs Nojin and Prior may register and apply for a payment under the BSWAT Payment Scheme.

- If the Court was to find that it was unlawful to use the BSWAT to assess wages of any other intellectually disabled employees, depending on the circumstances, some employees may only be entitled to an amount less than the amount of the Scheme payment (or not entitled to any compensation at all). Assessing compensation in matters of this kind and turns on the particular circumstances of the case. A general compensatory principle exists in domestic law to the effect that a person should only be compensated for losses caused by the act in question. This requires comparison between (i) what actually flowed from the act in question (in this case, using the BSWAT); and (ii) what would have happened if the act in question had not taken place (ie if the BSWAT was not used). For instance, if, instead of using the BSWAT to assess wages, ADEs were required to use a productivity only tool, many ADEs would have been required to pay significantly increased wages to those employees which could not have been sustained by the income received from the business operations of those ADEs. Those ADEs may have had to close their businesses (meaning their employees would be out of a job) or restructure their businesses so as to not employ intellectually disabled employees needing a greater amount of support. In these circumstances, those employees may not be entitled to any compensation because, if the BSWAT was not used, they would have been out of a job.<sup>1</sup>

***1.19 The Committee therefore seeks the advice of the Minister for Social Services as to what steps are being taken in accordance with the AHRC exemption, and the likely timeframe for transition to the Supported Wage System or an alternative tool approved by the Fair Work Commission.***

*It is noted that 'the extent to which scheme payments constitute an effective remedy is particularly difficult to assess in the absence of a government decision as to the appropriate tool for the assessment of the wages of persons with a disability'. It is also noted that the Committee considers is unlikely that 'the Bill could be assessed as providing an effective remedy while affected individuals continue to be paid wages assessed using the BSWAT'.*

- The Australian Government continues to consider next steps in relation to the future of wage determination in supported employment.

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1 See Appendix 1, Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, dated 14 August 2014, p. 4.

- New wage assessments using the BSWAT were suspended in December 2012. No further wage assessments using the BSWAT have been conducted since that time.
- The Department of Social Services is set to provide the Australian Human Rights Commission with the first quarterly report mid-August 2014. The exemption means wages are being paid in accordance with the award.
- The Australian Government continues to consider next steps in relation to the future of wage determination in supported employment.<sup>2</sup>

***1.25 The committee therefore seeks the further advice of the Minister for Social Services as to whether the proposed release and indemnity provisions are compatible with the right to an effective remedy***

*It is noted that in the committee's view, the release and indemnity provisions, and the positing of the scheme as not being 'compensatory in nature' may limit the effectiveness of the remedy provided under the Bill, notwithstanding the characterisation of the scheme as 'proportionate' in the statement of compatibility. Taken together, in light of the Federal Court finding that the BSWAT constituted unlawful discrimination, the release and indemnity provisions; the expressing of offers as payments rather than compensation; and the refusal to make admissions of liability give rise to a concern that the scheme does not contain the requisite elements of an effective remedy to the unlawful discrimination found to have taken place. The committee also notes that the proposed release and indemnity provisions would appear to be able to operate so as to bar a person from accessing a legally effective remedy'.*

- The Australian Government has established a scheme to make payments to a broader cohort of people with disability (not just those with intellectual disability – but intellectual impairment, which includes intellectual disability, autism spectrum disorder, dementia, and impaired intellectual functioning as a consequence of an acquired brain injury) despite the fact that discrimination to workers with disability other than Messrs Nojin and Prior has not been found.
- People with disability are free to choose to accept a payment from the BSWAT Payment Scheme, or to remain in the representative proceeding. That is, if people with intellectual disability do not accept a payment under the Scheme they will remain in the representative proceeding and can pursue a legal remedy through the representative proceeding or through other legal proceedings commenced by them against the Commonwealth. People with

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2 See Appendix 1, Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, dated 14 August 2014, pp 6-7.

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disability have the choice and control to choose the option that best suits their preferences and personal circumstances.

- If a supported employee accepts a payment under the Scheme, he or she will automatically cease to be a group member in any representative proceeding, and will be unable to make any further claims in relation to the assessment of wages using the BSWAT.
- It should be noted that, if any settlement is reached in the representative proceeding and a group member is provided with an amount of money, this would result in the extinguishment of the group member's right to (a) accept a payment through the BSWAT Payment Scheme, and (b) to take any or further action against the Commonwealth or their employer in relation to wages paid using the BSWAT (assuming that a standard "release from liability" clause was a term of the settlement).<sup>3</sup>

### **Committee response**

#### **2.4 The committee thanks the Assistant Minister for Social Services for his response.**

2.5 The committee acknowledges the Minister's view that assessing compensation in matters of this kind is complex and turns on the particular circumstances of each case.

2.6 However, the Minister's response does not address the central question of why an amount of 50 per cent of what an individual would have received if their wages had been assessed using only the productivity element of BSWAT is reasonable. On its face (and in the absence of any further information), the payment amount under the bill is effectively a 50 per cent discount on a possible compensation award (that is, on an amount calculated by reference to a (non-discounted) productivity component-based wage). In the committee's view, such a discount would require a substantial justification in order to be compatible with the right to an effective remedy.

2.7 As a part justification, the response notes that the proposed payment is to be made to a wide class of individuals in a context where there has been no finding of discrimination other than in relation to Messrs Nojin and Prior. However, the committee considers this to be an overly technical distinction, particularly as the findings in *Nojin v Commonwealth* are of broad application. The broader application of the court's findings is demonstrated through the resulting class action that has been brought against the Commonwealth, and the government seeking an exemption to the *Disability Discrimination Act 1995* from the Australian Human Rights Commission to continue to pay wages based on a BSWAT assessment.

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3 See Appendix 1, Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, dated 14 August 2014, pp 7-8.

2.8 More broadly in relation to the Minister's response, the committee acknowledges that difficult policy questions have arisen as a result of the court decision in *Nojin v Commonwealth*. However, the committee considers that the Minister's analysis of the impact on the business of Australian Disability Enterprises (ADEs)—in particular the potential for closure of ADEs if they had had to pay non-discriminatory wages—does not reflect the full context of ADE business operations. Those operations continue on the basis of a subsidy payable and determined by the Commonwealth. The viability of ADEs, and the amount they are able to pay their employees, is therefore significantly a function of these subsidies. In this context, the committee does not consider the cost to business to be a determinative factor in establishing whether an amount of compensation would represent an effective remedy for losses arising from the calculation of wages using a tool that discriminates against persons with an intellectual disability or impairment.

2.9 Further, the committee notes the Minister's view that the fact that Messrs Nojin and Prior would be eligible for payment under this bill (as they decided to forego compensation in their case against the Commonwealth) supports an assessment of the bill as providing an effective remedy. However, in the committee's view, the decision to forego compensation and instead pursue a declaration in the context of the litigation is not relevant to an assessment of whether or not the payment amount under this bill represents an effective remedy in relation to individuals affected by the use of the BSWAT tool.

2.10 On the question of what is the appropriate tool to be used in future to calculate the wages of individuals with an intellectual disability or impairment working in ADEs, the committee notes that the Minister's response provides no further information. Accordingly, the committee reiterates that the extent to which scheme payments constitute an effective remedy is particularly difficult to assess in the absence of a decision as to the appropriate tool for the assessment of the wages of persons with an intellectual disability or impairment.

2.11 Moreover, while there have been no new wage determinations using BSWAT, the committee remains concerned that, based on the information provided, individuals are continuing to be paid wages that were previously assessed using the discriminatory BSWAT tool.

2.12 In relation to the release and indemnity provisions, the committee notes the Minister's view that people with a disability are free to choose to accept a payment from the BSWAT Payment Scheme, to remain in the current representative proceeding or to commence their own legal action. However, in the committee's view, the characterisation of the scheme as facilitating the ability of people with a disability to choose the option that best suits their preferences and personal circumstances is not reasonable in circumstances where the only alternative to accepting a scheme payment is contested litigation against the Commonwealth (particularly where the BSWAT tool has already been found to be discriminatory in relation to two plaintiffs).

2.13 The committee notes that the Commonwealth has a duty to act as a model litigant in litigation. This reflects the fact that the Commonwealth is not an ordinary civil litigant and is required to act only in the public interest. In this respect, the Minister's response does not articulate why it is in the public interest to contest the representative proceedings in light of the court's findings in *Nojin v Commonwealth*. As this question is central to an assessment of whether the indemnity and release provisions in the bill are consistent with the right to an effective remedy, the committee considers that this issue has not been adequately addressed in the response.

2.14 The committee notes that the bill represents the government's response to the court findings in *Nojin v Commonwealth*. As such, for human rights purposes, the bill represents the remedy offered by the state to those individuals with an intellectual disability or impairment who have been indirectly discriminated against by the use of the BSWAT.

2.15 In summary, in light of the preceding discussion, the committee considers that a payment of 50 per cent of what an individual would have received if their wages had been assessed using only the productivity element of BSWAT is incompatible with the right to an effective remedy. Further, the committee considers that the release and indemnity provisions; the expressing of offers as payments rather than compensation; and the continued payment of wages calculated by BSWAT are incompatible with the right to an effective remedy.

**2.16 Accordingly, the committee considers that the bill is incompatible with the right to an effective remedy.**

#### *Lack of effective review mechanisms for persons excluded from the scheme*

2.17 The committee sought the advice of the Minister for Social Services as to whether the lack of effective review mechanisms for persons who have received an 'alternative amount' is compatible with the right to an effective remedy, and particularly:

- whether the bill in this respect is aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

#### **Assistant Minister's response**

*It is noted that the Committee raises concerns that 'there appears to be no internal or external review provisions for people deemed ineligible for the scheme due to having received 'an alternative amount'...the bill provides no assessment of the compatibility of this apparent limitation on the right (to an effective remedy)'.*

- An ‘alternative amount’ is defined, for the purposes of this bill as follows:
  - ‘There is an alternative amount for a person if:
    - (a) The person has accepted an amount of money, otherwise than under this Act, in settlement of a claim made in relation to a matter referred to in subsection 10(2); or
    - (b) An amount of money is payable to the person in accordance with a court order that is in effect in connection with a claim made in relation to in subsection 10 (2).
- Subsection 10(2) provides:
  - ‘The matters are the following, to the extent to which they relate to the use of a BSWAT assessment to work out a minimum wage payable to a person:
    - (a) Unlawful discrimination;
    - (b) A contravention or breach of, or failure to comply with, a law, whether written or unwritten, of the Commonwealth, a State or Territory;
    - (c) Any other conduct or failure on the part of the Commonwealth, an Australian Disability Enterprise, or any other person, that might give rise to a liability of the person’.
- An individual who has:
  - accepted an amount of money in a settlement of claim they may have relating to the use of the BSWAT to assess their wages (see para (a) of the definition of “alternative amount”); or
  - obtained a court order for payment of compensation to them in relation to the use of the BSWAT to assess their wages (whether this be through the representative proceeding or another legal proceeding) (see para (b) of the definition of “alternative amount”);has already received an effective remedy through those actions.
- The Bill operates so that where a person has already received an effective remedy in relation to the use of the BSWAT to assess their wages, they cannot also receive a payment under the Scheme. This prevents people receiving two payments.
- The BSWAT payment scheme provides people with disability with choice and control. Ultimately, the choice as to whether to take a payment from the scheme or to pursue other action (and therefore



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to achieve a remedy that suits them best) rests with the eligible person with disability.<sup>4</sup>

### **Committee response**

**2.18 The committee thanks the Assistant Minister for Social Services for his response.**

2.19 However, while the committee acknowledges the legislative intent that affected individuals be prohibited from receiving two payments, the committee notes that merits review of administrative decision making is an important check on, and corrective to, administrative error. Whilst determining whether someone has received an alternative amount may seem straightforward, the committee considers that, in the absence of a significant justification for excluding merits review, administrative decisions should generally be subject to independent merits review.

**2.20 Accordingly, the committee considers that the lack of effective review mechanisms for persons who have received an 'alternative amount' is likely to be incompatible with the right to an effective remedy.**

### **Committee view on compatibility**

#### *Secretary-appointed external reviewer*

2.21 The committee sought the advice of the Minister for Social Services as to whether the approach of a secretary-appointed external reviewer, as opposed to allowing access to the Administrative Appeals Tribunal, is compatible with the right to an effective remedy, and particularly:

- whether the bill in this respect is aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

### **Assistant Minister's response**

*It is noted that the Committee identifies that the 'external review mechanisms provided do not enable a person to seek merits review through the Administrative Appeals Tribunal,' and that the statement of compatibility, 'does not provide an explanation for why this approach is preferable to a right of review through the Administrative Appeals Tribunal'.*

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4 See Appendix 1, Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, dated 14 August 2014, pp 7-8.

- International law does not specify how external merits review should take place. The important point is that there is an external review mechanism in place, which the Scheme has.
- External reviewers will review (if required) two decisions of the Secretary under the BSWAT Payment Scheme. The first decision relates to eligibility; the second to the amount of the payment amount offered.
- The external reviewer system of review to be established under the BSWAT Payment Scheme was preferred for the following reasons:
  - Acceptance of a payment under the scheme is voluntary. The ultimate decision is the supported employee's decision to accept an offer of a payment under the BSWAT Payment Scheme.
  - The BSWAT Payment Scheme has been established for a limited time only to deal with a non-ongoing issue, related to particular circumstances faced by particular supported employees. The review process required for this Scheme is better established as a tailored and dedicated arrangement, rather than in a permanent review body such as the Administrative Appeals Tribunal. Establishing dedicated arrangements ensures an external review process which is tailored to the needs of the scheme, namely being flexible, accessible, efficient and with little or no formality. This is especially important given the potential number of persons who may be eligible to receive a payment under the Scheme (such number being more than 10,000 persons).
  - External reviewers that may be appointed have to be individuals who are either retired judges or legal practitioners with at least 10 years enrolment (subclause 27(2)). This ensures that appointed external reviewers have adequate professional expertise and experience which assures confidence in their decisions.
  - Individuals can seek judicial review of the decisions of external reviewers if they are dissatisfied with them.<sup>5</sup>

### **Committee response**

**2.22 The committee thanks the Assistant Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

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5 See Appendix 1, Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, dated 14 August 2014, pp 10-11.

## Committee view on compatibility

### *Adequacy of remuneration*

2.23 The committee sought the advice of the Minister for Social Services as to whether the basis for the calculation of the payment amount using these principles will allow for adequate remuneration compatible with the right to just and favourable conditions of work, and particularly:

- whether the bill in this respect is aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

### Assistant Minister's response

*It is acknowledged that the, 'committee notes that, to the extent that the payments provided for by the scheme would have been less than what an affected person would have been entitled to had their wages been assessed by a non-discriminatory method, the Bill may represent a limitation on a person's right to receive fair and just compensation for their work'.*

- It is not accepted that:
  - wage assessment tools that assess competency are inherently discriminatory;
  - assessing productivity is the only "non-discriminatory method" to assess wages;
  - wages assessed under the BSWAT did not provide adequate remuneration for the work being undertaken.
- The Bill does not attempt to limit any rights of the individuals in question (including the right to receive fair and just compensation for their work).
- Assessments of wages under the BSWAT generally resulted in a reasonably accurate measure or assessment of the actual capacity of the individuals to perform the requirements of their employment and produced adequate and fair remuneration.
- After the Court's judgment in *Nojin*, many ADEs feared that legal action would be commenced against them by their present and former employees for compensation in relation to the use of the BSWAT to assess their wages. Many ADEs feared that their business would have to close because of a perceived liability for these claims. If these ADEs had to close, thousands of supported employees would be out of work. The Bill establishes the payment scheme to provide reassurance to supported employees, and their

families and carers, by removing a perceived liability of ADEs that could impact the ability of ADEs to deliver ongoing employment support.

- Acceptance of a payment under the Scheme is entirely voluntary. Individuals can freely choose to pursue a legal remedy in the Courts rather than accepting a payment under the Scheme.
- Part 2, clause 8 of the Bill, provides details as to the determination of the payment amount. While the BSWAT Payment Scheme provides a payment, and not compensation, the process for determining the payment amount:
  - Broadly reflects the amount that is 50 per cent of the excess (if any) of a productivity-scored wage over an actual wage (section 8(3)(a));
  - Includes an increase to the payment amount to take into account expected tax (section 8(3)(b));
  - Will provide payment of \$100 after tax if the amount worked out for the person is more than \$1 but less than \$100.
- Applicants will receive, in writing, the payment offer which outlines how the calculation was determined. Prior to accepting, the applicant will need to receive both financial counselling and legal advice as to the relative merits or otherwise of accepting the offer based on their personal circumstances and wishes. The applicant themselves will then have the choice/opportunity to accept or reject the offer.
- No new assessments have been undertaken using the BSWAT since December 2012. However, it is still included as a valid wage tool permitted in the Supported Employment Services (SES) Modern Award 2010 and is therefore within the scope of Australia's industrial relations system.<sup>6</sup>

## **Committee response**

**2.24 The committee thanks the Assistant Minister for Social Services for his response.**

**2.25 However, in light of the committee's analysis of the response in relation to the compatibility of the bill with a right to an effective remedy, the committee also**

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6 See Appendix 1, Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, dated 14 August 2014, pp 12-13.

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concludes that the bill is incompatible with the right to just and favourable conditions of work.<sup>7</sup>

### **Committee view on compatibility**

#### *Provision for use of nominees*

2.26 The committee sought the advice of the Minister for Social Services as to whether the decision making models in place are compatible with the right to equality and non-discrimination, and particularly:

- whether the bill in this respect is aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

### **Assistant Minister's response**

It is noted that the committee raises concerns in relation to the role of nominees and whether nominees 'support, rather than substitute, the decision making of represented persons'. The committee states that 'the criteria the Secretary is to apply in considering the appointment of nominees are to be contained in as yet unpublished rules...With these matters remaining undefined and discretionary, there is considerable uncertainty as to precisely how the appointment of nominees and their associated duties and obligations will ensure that the effective choice and control of represented individuals is achieved'.

- The BSWAT Payment Scheme Bill attempts, as far as possible, to achieve supported decision making rather than substituted decision making.
- There is no attempt to limit rights in this circumstance.

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7 In particular, the committee notes the finding of Buchanan J in *Nojin v Commonwealth* at para 142: In my view, the criticism of BSWAT is compelling. I can see no answer to the proposition that an assessment which commences with an entry level wage, set at the absolute minimum, and then discounts that wage further by reference to the competency aspects built into BSWAT, is theoretical and artificial. In practice, on the evidence, those elements of BSWAT have the effect of discounting even more severely, than would otherwise be the case, the remuneration of intellectually disabled workers to whom the tool is applied. The result is that such persons generally suffer not only the difficulty that they cannot match the output expected of a Grade 1 worker in the routine tasks assigned to them, but their contribution is discounted further because they are unable, because of their intellectual disability, to articulate concepts in response to a theoretical construct borrowed from training standards which have no application to them. It seems impossible, furthermore, to resist the inference that the tool was adjusted so that it would not produce a better result than a simple productivity measure. The only alternative was a worse result. The disparity between the two results has, on the evidence, simply grown over the years.

- Clause 50 of the Bill allows the appointment of a nominee that may be made at the request of the participant or on the initiative of the Secretary. Paragraph 51(1)(b) requires the Secretary to take into consideration the preferences (if any) of the participant regarding the making of the appointment.
- Nominee appointments can be limited in relation to matters and have a specified term.
- The Bill requires the nominee (as a prescribed duty) to ‘ascertain the preferences of the participant in relation to the BSWAT Payment Scheme and to act in a manner that gives effect to those preferences’ (subclause 46 (1)).
- The rules for nominees are in the process of being drafted. All rules will require a Statement of Human Rights Compatibility to be included at the time of lodgement. The statement will address the concerns raised by the Committee in more detail.
- However, it can be confirmed that the proposed rules will be drafted to include overarching principles for decision making reflecting those set out in the Australian Law Reform Commission’s discussion paper, *Equality, Capacity and Disability in Commonwealth Laws*. These are that:
  - Every adult has the right to make decisions that affect their life and to have those decisions respected.
  - Persons who may require support in decision-making must be provided with the support necessary for them to make, communicate and participate in decisions that affect their lives.
  - The will, preferences and rights of persons who may require decisionmaking support must direct decisions that affect their lives.
  - Decisions, arrangements and interventions for persons who may require decision-making support must respect their human rights.
- It is proposed that the rules will specify, among other things, that the nominee must:
  - Support decision-making by the participant personally;
  - Have regard and give appropriate weight to the views of the participant;
  - Avoid or manage any conflict of interest in relation to the nominee and participant;

- Provide support to the participant to express their preferences in making decisions in respect of accepting or declining an offer from the scheme;
  - Communicate to the participant, the process, decision and implications of decisions relating to the BSWAT Payment Scheme;
  - Promote and safeguard the participant's human rights and act in the way least restrictive of those rights; and
  - Recognise and respect the cultural and linguistic circumstances of the participant and ensure appropriate form of communication is used.
- In appointing a nominee under clause 50, it is proposed the Secretary must have regard to (among other things) the following considerations about the proposed nominee:
    - the relationship between the participant and the proposed nominee;
    - understanding and commitment to performing the duties of a nominee;
    - sensitivity to the cultural and linguistic circumstances of the participant;
    - familiarity with assistive technology used by the participant;
    - ability to act with other supporters and representatives for the participant's wellbeing;
    - the understanding of the proposed nominee of the duties of a nominee;
    - familiarity with, and ability to work with, any assistive technology used by the participant;
    - ability to act in conjunction with other supporters and representatives to maximise the participant's wellbeing;
    - ability of the proposed nominee to undertake the duties of a nominee under the Bill; ability to involve the participant in decision making processes;
    - ability to assist the participant to make their own decisions;
    - ability to determine what judgments/decisions the participant may have made for themselves;
    - desirability of preserving family relationships and informal support networks of the participant;
    - relevant views of other people within the participant's circle of support;
    - any conflict of interest;

- whether a court appointed decision maker is already in place; and
- whether the applicant already has identified a nominee.<sup>8</sup>

### **Committee response**

**2.27 The committee thanks the Assistant Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

**2.28 The committee welcomes the intention to adopt rules that include the overarching principles for decision making set out in the Australian Law Reform Commission's discussion paper: *Equality, Capacity and Disability in Commonwealth Laws*.**

### **Committee view on compatibility**

#### *Timeframes applying to scheme*

2.29 The committee sought the advice of the Minister for Social Services as to whether the strict scheme timeframes are compatible with the right to equality and non-discrimination, and particularly:

- whether the bill in this respect is aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

### **Assistant Minister's response**

*It is noted that the Committee identifies that 'there are no positive obligations on the Secretary to ascertain whether or not a person understands the offer, with the effect that a person is taken to have declined an offer of payment simply by not taking any action by the end of the acceptance period'. It is also noted that the Committee states that, 'the application of these provisions in practice may amount to indirect discrimination, to the extent that they may have a disproportionately negative effect on people with intellectual impairment....the strict timeframes, and lack of opportunity for extensions to seek a review, may therefore limit the right of such persons to enjoy legal capacity on an equal basis with others and to be provided with access to the support necessary to exercise that legal capacity and to avail themselves of those rights'.*

- The BSWAT Payment Scheme will be in place until 31 December 2016.

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8 See Appendix 1, Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, dated 14 August 2014, pp 12-13.



- As the Bill is currently drafted, individuals have until 30 April 2015 to register for the BSWAT Payment Scheme. Clause 13 of the Bill outlines the process for registration. Registration can be achieved by several methods, including making a telephone call.
- Clause 15 of the Bill sets out that an application can be made any time by a person who has registered from the time of scheme commencement until 30 November 2015.
- A number of steps undertaken to inform people whose wages have been assessed using the BSWAT of the Scheme include the establishment of an information telephone line and letters sent in Plain and Easy English providing regular updates of developments.
- Subclause 15(2) requires the application to be in an approved form and lodged to the scheme.
- Clause 17 sets out that the Secretary must make a determination in relation to an application. If a person is eligible for the scheme, the Secretary must then determine a payment amount for that individual. Determinations can be made by the Secretary from the time of BSWAT Payment Scheme commencement right through until 30 November 2015.
- Offers cannot be made to individuals after 30 November 2016. However, offers can be made to individuals as soon as applications are lodged to the scheme, which could be potentially be very close to Scheme opening.
- This means that offers can be made to eligible applicants from BSWAT Payment Scheme commencement (once applications are received) until 30 November 2016.
- Depending on the promptness of their registration and application following the BSWAT Payment Scheme commencement, individuals may have as much as 18 months after receiving their offer to seek financial counselling and legal advice and to consider their offer before lodging an effective acceptance with the BSWAT Payment Scheme before 1 January 2017 (Clause 38). The BSWAT Payment Scheme will work to provide applicants with as much time as practicably possible to consider their offer and to seek the advice required to lodge an effective acceptance with the BSWAT Payment Scheme (the usual period proposed is three months, however longer may be given if applications are received early in the scheme). Applicants can also apply for an extension to the acceptance period to the Secretary under Clause 22.
- The BSWAT Payment Scheme timeframes are in place because of the time limited nature of the BSWAT Payment Scheme and the objective of promoting the delivery of payments to eligible workers as quickly as possible. Timeframes for consideration of offers will

only be shortened when the hard timeframe for lodging an effective acceptance (1 January 2017) approaches.

- There are a series of protections within the legislation to support the decision making of the individual in whether or not to accept a payment through the BSWAT Payment Scheme. An effective acceptance (Clause38) must at least be accompanied by a legal advice certificate that complies with Clause36 (paragraph 35(3)(a)) and a financial counselling certificate that complies with clause37 (paragraph35(3)(b)) and an acknowledgment that the person understands the effect of accepting the offer (paragraph35(3)(c)).
- Clause 41 provides that if a person does not lodge an effective acceptance before the end of the acceptance period, they are taken to have declined the offer. This is consistent with applicants to the BSWAT payment Scheme exercising choice and control.<sup>9</sup>

### **Committee response**

**2.30 The committee thanks the Assistant Minister for Social Services for his response. The committee considers that the measure is compatible with human rights and has concluded its examination of this measure.**

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9 See Appendix 1, Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, dated 14 August 2014, pp 16-18.

## **Family Assistance Legislation Amendment (Child Care Measures) Bill 2014**

## **Family Assistance Legislation Amendment (Child Care Measures) Bill No. 2 2014**

*Portfolio: Education*

*Introduced: House of Representatives, 25 June 2014*

### **Purpose**

2.31 The Family Assistance Legislation Amendment (Child Care Measures) Bill 2014 (the bill) seeks to amend the *A New Tax System (Family Assistance) Act 1999* to maintain the child care benefit income thresholds at the amounts applicable as at 30 June 2014 for a further three years from 1 July 2014, and to maintain the indexation pause on the child care rebate limit at \$7500 for three years from 1 July 2014. The bill also seeks to make consequential amendments to the *Family Assistance Legislation Amendment (Child Care Budget Measures) Act 2011*.

### **Background**

2.32 The committee considered a substantially similar measure in the Social Services and Other Legislation Amendment Bill 2013 in its *First Report of the 44th Parliament*.

2.33 The committee reported on the Family Assistance Legislation Amendment (Child Care Measures) Bill 2014 in its *Eighth Report of the 44th Parliament*. The bill was subsequently amended to remove the changes to the Child Care Benefit. The bill was passed by both Houses and received royal assent on 30 June 2014.

2.34 The child care benefit measure was subsequently included in the Family Assistance Legislation Amendment (Child Care Measures) Bill No. 2 2014, which was considered by the committee in its *Ninth Report of the 44<sup>th</sup> Parliament*.

### **Committee view on compatibility**

#### ***Right to social security and an adequate standard of living***

##### ***Pausing of indexation of child care rebate***

2.35 The committee sought the Minister for Education's advice as to whether continuing the pause of the indexation of the child care rebate is compatible with the right to social security, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

## **Assistant Minister's response**

### ***Whether the proposed changes are aimed at achieving a legitimate objective;***

9. This was a previous government budget measure with expected savings of \$105.8 million. While the savings had already been taken from the Budget, the change to the annual Child Care Rebate limit was not legislated for by the previous government.

10. The Government's objective in continuing to maintain the Child Care Rebate annual limit at \$7500 for three years is to keep the payment within current fiscal constraints and also ensure that expenditure on the Child Care Rebate is sustainable at a time of Budget constraint and repair.

11. The Child Care Rebate is a payment made in addition to Child Care Benefit to families to assist with child care fees - more specifically, it is a payment to families of up to \$7500 per year, per child, to reduce their out of pocket costs after child care fees are paid. Unlike the Child Care Benefit, the Child care Rebate is not means-tested.

12. The Government has increased its investment in child care fee assistance to more than \$28.5 billion over the next four years, including \$14.9 billion for the Child Care Rebate and \$13.6 billion for the Child Care Benefit.

13. Maintaining the annual limit at \$7500 per child does not deny any family a right to their receipt of social security in the form of Child Care Rebate. Rather, it achieves a legitimate objective to continue to make the ongoing payment of the Child Care Rebate to families sustainable in the longer term.

### ***Whether there is a rational connection between the limitation and that objective;***

14. Child care fee assistance, including the Child Care Rebate, is one of the fastest growing areas of Australian Government expenditure. This situation is unsustainable in the current fiscal and economic environment.

15. It is important to note that the Government is not cutting the payment of Child Care Rebate to families. Rather, the Government is continuing to maintain the annual limit of \$7500 per child.

16. Maintaining the Child Care Rebate limit allows families to continue to receive this part of their social security up to the current annual limit to which they are eligible.

### ***Whether the limitation is a reasonable and proportionate measure for the achievement of that objective;***

17. As stated above, the total amount of Government funding for the Child Care Rebate is increasing and child care fee assistance is one of the fastest growing areas of Government outlay. This is unsustainable in the current fiscal and economic environment.

18. Maintaining the Child Care Rebate annual limit at \$7500 will not remove a family's right to their social security in the form of the Child Care Rebate. The Child Care Rebate is not means-tested and families eligible for the Child Care Benefit, even at the zero rate, are eligible to receive the Child Care Rebate, provided they meet the work/training/study requirements.

19. Following the implementation of this measure, it is estimated that around 74,000 of the 972,000 families receiving the Child Care Rebate will reach the \$7500 Child Care Rebate limit in 2014-15. The families that may be affected by maintaining this annual limit are those which have high out-of-pocket child care costs, families with high hours of use of approved child care and families paying above average fees.

20. Low income families will be less affected by maintaining the Child Care Rebate annual limit at \$7500, as these families are eligible for higher levels of Child Care Benefit. This includes families who are on Newstart Allowance, Parenting Payments or other income support payments.<sup>1</sup>

### **Committee response**

**2.36 The committee thanks the Assistant Minister for Education for her response. In light of the information received, the committee considers the measure to be compatible with human rights and has concluded its examination of the measure.**

#### *Pausing of indexation of income thresholds for the child care benefit*

2.37 The committee sought the Minister for Education's advice as to whether pausing the indexation of the income thresholds for entitlement to the child care benefit is compatible with the right to social security and the right to an adequate standard of living, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

### **Assistant Minister's response**

#### ***Whether the proposed changes are aimed at achieving a legitimate objective;***

9. The Government's objective in maintaining the Child Care Benefit income thresholds for three years is to ensure the payment is sustainable so as to be available to families into the future.

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1 See Appendix 1, Letter from the Hon Sussan Ley MP, Assistant Minister for Education, to Senator Dean Smith, dated 28/07/2014, pp 2-3.

10. The Child Care Benefit is a means-tested payment that provides financial assistance to help families with child care costs. The amount of Child Care Benefit a family receives tapers to zero as income increases.

11. The Government provides child care fee assistance to both working/training/studying and non-working/training/studying Australian families. The amount of Child Care Benefit paid is principally determined by family income, the number of children in child care, the type of child care and the hours of child care used.

12. The Child Care Benefit income thresholds are indexed each year on 1 July in line with Consumer Price Index (CPI) increases. This measure would have maintained the Child Care Benefit income thresholds at the levels applicable as at 30 June 2014 for a further three years from 1 July 2014, while continuing to index (increase) the Child Care Benefit standard hourly rate, the weekly rate and the multiple child loadings by the CPI from July each year.

13. Even if the Child Care Benefit measure in the Child Care Measures Bill (No.2) had been passed before 1 July 2014, the indexing of the hourly and weekly rates and multiple child loadings would have meant that some families would have received an increase in their Child Care Benefit, depending on their income, the number of children in care, the hours and type of care used and families' work/training/study commitments.

14. The summary of rate changes from July 2014 at [Attachment A](#) outlines the current Child Care Benefit rates, the income thresholds and the income limits.

15. Families with incomes below the lower income threshold of \$42,997 will continue to be eligible for the maximum rate of Child Care Benefit.

16. The upper income threshold is not a 'cut-off' for eligibility to the Child Care Benefit; it is a mechanism for determining the complex way in which Child Care Benefit is calculated. The Child Care Benefit tapers to zero at the relevant income limits set out in [Attachment A](#).

17. Maintaining the Child Care Benefit income threshold amounts at the 2013-14 levels does not deny families their right to social security, nor is it about making child care unaffordable for low income families. If family circumstances do not change in the course of the financial year, families will not be financially disadvantaged by this measure.

18. Maintaining the Child Care Benefit income threshold amounts achieves a legitimate objective by protecting budget sustainability to continue to make the payments of Child Care Benefit fair and sustainable for the longer term.

***Whether there is a rational connection between the limitation and that objective;***

19. Child care fee assistance is one of the fastest growing areas of Australian Government outlay. This situation is unsustainable in the current fiscal and economic environment.

20. It is important to note that the Government is not cutting the payment of Child Care Benefit to families. Instead, the Government is maintaining the Child Care Benefit income threshold amounts.

***Whether the limitation is a reasonable and proportionate measure for the achievement of that objective***

21. Maintaining the Child Care Benefit income threshold levels would have allowed families to continue to receive their social security up to the full annual amount to which they are eligible, while helping to ensure that expenditure on child care fee assistance continues to be more sustainable in the longer term.

22. Families with incomes below \$42,997 are eligible for the maximum rate of Child Care Benefit.

23. If the Child Care Benefit income thresholds had been maintained, it is estimated around 500,000 families would have received less Child Care Benefit in 2014-15. However, almost the same number of families would have had an increase in the amount of the Child Care Rebate that they receive.<sup>2</sup>

## **Committee response**

**2.38 The committee thanks the Assistant Minister for Education for her response. In light of the information received, the committee considers the measure to be compatible with human rights and has concluded its examination of the measure.**

### ***Right to work***

#### *Impact of measure on right to work for those with family responsibilities*

2.39 The committee sought the Minister for Education's advice as to whether the bill is compatible with the right to work, and particularly:

- whether the proposed changes are aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is reasonable and proportionate measure for the achievement of that objective.

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2 See Appendix 1, Letter from the Hon Sussan Ley MP, Assistant Minister for Education, to Senator Dean Smith, dated 08/08/2014, pp 2-3.

## **Assistant Minister's response**

### ***Whether the proposed changes are aimed at achieving a legitimate objective;***

36. The Government's investment in child care fee assistance is predominantly to support workforce participation. Families who are undertaking work/training/or studying activities may be eligible to access more hours of child care that attract child care payments than families who are not undertaking those activities.

37. The Child Care Rebate and Child Care Benefit measures are compatible with families' right to work. They do not deny families their right to social security in the form of Child Care Benefit and Child Care Rebate.

38. These two measures achieve a legitimate objective by continuing to encourage families' workforce participation and protecting budget sustainability for the longer term.

### ***Whether there is a rational connection between the limitation and that objective;***

39. The Government is maintaining its commitment to support workforce participation and assist working families, in particular, with the cost of child care.

40. Families will continue to be required to meet the relevant work/training/study requirements to enable them to access more hours of care for which they receive child care fee subsidies.

41. Under the Child Care Benefit work/study/training test, if both parents (or one if a single parent family) are engaged in work, training or study activity for less than 15 hours per week/30 hours per fortnight, they are eligible to receive Child Care Benefit for up to 24 hours of child care per week. If both parents (or one if a single parent family) is working, training or studying for 15 hours per week/30 hours per fortnight or more, or have an exemption, they are eligible to receive Child Care Benefit for up to a maximum of 50 hours per week.

42. The Child Care Rebate work/study/training test is met if parents participate in work related commitments at some time during a week, or have an exemption, no minimum number of hours is required. Families that meet the Child Care Rebate work/study/training test are eligible to receive Child Care Rebate for up to 50 hours of child care per week.

### ***Whether the limitation is a reasonable and proportionate measure for the achievement of that objective;***

30. Over the next four years, the Government is maintaining its commitment and increasing its investment in child care fee assistance to more than \$28.5 billion, including \$13.6 billion for Child Care Benefit for the Child Care Benefit and \$14.9 billion for the Child Care Rebate.



31. Any limitations imposed by the Child Care Rebate and Child Care Benefit measures are reasonable and proportionate considering that the measures will not remove a family's right to work or to social security in the form of child care fee assistance. Without limitations, the growth in outlays in child care fee assistance is unsustainable in the current fiscal and economic environment.<sup>3</sup>

### **Committee response**

**2.40 The committee thanks the Assistant Minister for Education for her response. In light of the information received, the committee considers the measure to be compatible with human rights and has concluded its examination of the measure.**

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3 See Appendix 1, Letter from the Hon Sussan Ley MP, Assistant Minister for Education, to Senator Dean Smith, dated 28/07/2014, pp 5-6.

## **Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Bill 2014**

*Portfolio: Veterans' Affairs*

*Introduced: House of Representatives, 27 March 2014*

### **Purpose**

2.41 The Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Bill 2014 (the bill) seeks to enable the expansion of mental health services for veterans and members of the Defence Force and their families, and make changes to the operation of the Veterans' Review Board.

### **Background**

2.42 The committee reported on the bill in its *Sixth Report of the 44<sup>th</sup> Parliament* and *Ninth Report of the 44<sup>th</sup> Parliament*.

2.43 The bill was passed by both Houses and received Royal Assent on 30 June 2014.

### **Committee view on compatibility**

#### ***Right to freedom of expression and opinion and to freedom of assembly***

##### *Contempt of Board offences*

2.44 The committee raised concerns about the human rights compatibility of proposed new subsections 170 (3) and (4), and sought the Minister's advice as to the proportionality of the contempt provisions (including, for example, what safeguards are in place to ensure the provisions are, in practice, applied cautiously).

### **Assistant Minister's response**

You advised that the Committee continues to have concerns about the human rights compatibility) of new subsections 170(3) and (4) of the *Veterans' Entitlements Act 1986*. And sought my advice as to the proportionality of the contempt provisions (including, for example, what safeguards are in place to ensure the provisions are in practice applied cautiously). The contempt provisions relate to the Veterans' Review Board (the Board).

Although a subjective issue, I have been advised that the proportionality of the contempt provisions is appropriate as it provides the Board with the same protection as the Administrative Appeals Tribunal and Courts and the Board considers that these protections are equally valid and necessary in relation to business conducted by the Board. The Board considers that any concerns about the scope of the contempt provisions of Tribunals and Courts should be undertaken at a whole of government level.

I understand that the committee is concerned that subsections 170(3) and (4) may be applied by the Board in such a way as to:

- criminalise protected freedom of assembly rights, such as a peaceful protest;
- limit assemblies not directed at and unrelated to the board and its activities (but taking place near and having the effect of disturbing a Board hearing).

In addressing the hypothetical situations raised by the committee regarding the possible application of the new powers, evidence indicates that the Board has not to date used its contempt powers disproportionately and there is no expectation that this extremely measured approach would change in the future. The new provisions do not prohibit any right to freedom of assembly. However, if necessary they could be used to uphold the interests of public safety, public order and the rights and freedoms of others espoused in article 21 of the International Covenant on Civil and Political Rights.

The Board considers that the provisions provide a proportionate balance between the right to freedom of assembly and the interests of public safety, public order and the rights and freedoms of others necessary for the conduct of Board hearings.<sup>1</sup>

### **Committee response**

**2.45 The committee thanks the Minister for Veterans' Affairs for his response. The committee considers that the measures are compatible with human rights and has concluded its examination of the bill.**

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1 See Appendix 1, Letter from Senator the Hon. Michael Ronaldson, Minister for Veterans' Affairs, to Senator Dean Smith, dated 13 August 2014, pp 1-2.

