Parliamentary Joint Committee on Human Rights

Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*

Bills introduced 26 – 28 August 2014

Legislative Instruments received
26 July – 1 August 2014

Eleventh Report of the 44th Parliament

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PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3823
Fax: 02 6277 5767

E-mail: human.rights@aph.gov.au
Internet: http://www.aph.gov.au/joint_humanrights/

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Membership of the committee

Members

Senator Dean Smith, Chair	Western Australia, LP
Mr Laurie Ferguson MP, Deputy Chair	Werriwa, New South Wales, ALP
Senator Carol Brown	Tasmania, ALP
Senator Matthew Canavan	Queensland, NAT
Dr David Gillespie MP	Lyne, New South Wales, NAT
Mr Andrew Laming MP	Bowman, Queensland, LP
Senator Claire Moore	Queensland, ALP
Ms Michelle Rowland MP	Greenway, New South Wales, ALP
Senator Penny Wright	South Australia, AG
Mr Ken Wyatt AM MP	Hasluck, Western Australia, LP

Functions of the committee

The Committee has the following functions:

a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

Secretariat

Mr Ivan Powell, Acting Committee Secretary
Mr Matthew Corrigan, Principal Research Officer
Ms Zoe Hutchinson, Principal Research Officer
Dr Patrick Hodder, Senior Research Officer
Ms Alice Petrie, Legislative Research Officer

External Legal Adviser

Professor Andrew Byrnes

Abbreviations

Abbreviation	Definition
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of Discrimination against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
EM	Explanatory Memorandum
FRLI	Federal Register of Legislative Instruments
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
PJCHR	Parliamentary Joint Committee on Human Rights

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Executive Summary

This report provides the Parliamentary Joint Committee on Human Rights' view on the compatibility with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* of bills introduced into the Parliament during the period 26 to 28 August 2014 and legislative instruments received during the period 26 July to 1 August 2014. The committee has also considered responses to the committee's comments made in previous reports.

Bills introduced 26 to 28 August 2014

The committee considered four bills, all of which were introduced with a statement of compatibility. Of these four bills, one does not require further scrutiny as it does not appear to give rise to human rights concerns. The committee has decided to defer its consideration of three bills.

The committee has not identified any bills that it considers require further examination and for which it will seek further information.

The committee also examined, and made a number of recommendations in relation to, one Act previously identified as potentially giving rise to human rights concerns.

Of the bills considered, those which are scheduled for debate during the sitting week commencing 1 September 2014 include:

- Business Services Wage Assessment Tool Payment Scheme Bill 2014
- Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014
- Mining Subsidies Legislation Amendment (Raising Revenue) Bill 2014

Legislative instruments received between 26 July 2014 and 1 August 2014

The committee considered 39 legislative instruments received between 26 July and 1 August.

Of these 39 instruments, 37 do not appear to raise any human rights concerns and are accompanied by statements of compatibility that are adequate. The committee has decided to defer its consideration of two instruments.

Responses

The committee has considered four responses relating to matters raised in relation to bills and legislative instruments in previous reports. The committee has concluded its examination relating to three bills.

Senator Dean Smith
Chair

Chapter 1 – New and continuing matters

This chapter lists new matters identified by the committee at its meeting on 1 September 2014, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to the relevant proponent of the bill or instrument maker in relation to substantive matters seeking further information.

Matters which the committee draws to the attention of the proponent of the bill or instrument maker are raised on an advice-only basis and do not require a response.

This chapter includes the committee's consideration of one bill introduced between 26 and 28 August 2014, one Act previously identified as potentially giving rise to human rights concerns, and legislative instruments received between 26 July and 1 August 2014.

Mining Subsidies Legislation Amendment (Raising Revenue) Bill 2014

Sponsor: Senator Christine Milne
Introduced: Senate, 27 August 2014

1.1 The Mining Subsidies Legislation Amendment (Raising Revenue) Bill 2014 (the bill) seeks to abolish the following fossil fuel subsidies for the mining industry from 1 January 2015:

- the diesel fuel rebate;
- accelerated asset depreciation for aircraft, the oil and gas industry and vehicles; and
- immediate deduction for exploration and prospecting expenses for the mining industry.

1.2 **The committee considers that the bill is compatible with human rights and has concluded its examination of the bill.**

Commonwealth Places (Application of Laws) Act 1970

Portfolio: Justice

Purpose

1.3 The application of state laws to Commonwealth places is generally governed by the *Commonwealth Places (Application of Laws) Act 1970* (the CP Act), which was enacted in response to a decision of the High Court in 1970.[1] That case found section 52(i) of the Constitution excludes the direct application of state laws to Commonwealth places.[2]

1.4 The effect of the CP Act is that the provisions of an applied state law generally take effect as a Commonwealth law in relation to the Commonwealth place.[3]

Background

1.5 The committee looked at the CP Act in the context of its examination of the *G20 (Safety and Security) Complementary Act 2014* in the *Sixth Report of the 44th Parliament*, *Ninth Report of the 44th Parliament* and *Tenth Report of the 44th Parliament.*

1.6 The committee determined that, as the CP Act effectively provides for the enactment of Commonwealth laws without the requirement for a human rights assessment under the *Human Rights (Parliamentary Scrutiny) Act 2011*,[4] it would undertake an assessment of the CP Act for compatibility with human rights (as provided for by section 7(b) of the *Human Rights (Parliamentary Scrutiny) Act 2011*). The committee therefore requested that the Minister provide a statement of compatibility for the CP Act to assist in the committee's assessment of the human rights compatibility of the CP Act. The committee also indicated that 'identification of particular state laws that impact on the assessment, as well as the number and area of Commonwealth places would be particularly relevant to the human rights

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1 *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89. See also *Attorney-General (NSW) v Stocks and Holdings (Constructors) Pty Ltd* [1970] HCA 58; (1970) 124 CLR 262; and *R v Phillips* [1970] HCA 50; (1970) 125 CLR 93).

2 Section 52(i) of the Constitution provides: The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to: (i) the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes.

3 See *Pinkstone v R* [2004] HCA 23; 219 CLR 444 at [34], where McHugh and Gummow JJ described the applied state law as operating as 'a surrogate federal law'. See also McHugh J in *Cameron v R* [2002] HCA 6; 209 CLR 339, at [46].

4 See *R v Porter* [2001] NSWCCA 441; 165 FLR 301; 53 NSWLR 354; [41] (Spigelman CJ, with whom Studdert J and Ireland AJ agreed).

assessment.'[5] As no statement of compatibility was provided, the committee's assessment of the compatibility of the CP Act with human rights has been conducted on the basis of information publicly available.

Committee view on compatibility

Multiple rights

1.7 The CP Act effectively provides for the enactment of Commonwealth laws without the requirement for a human rights assessment under the *Human Rights (Parliamentary Scrutiny) Act 2011*. Therefore, to the extent that applied state laws engage and limit human rights, the CP Act has the potential to engage and limit multiple human rights.

State laws applied by Commonwealth Places (Application of Laws) Act 1970

1.8 As noted above, the CP Act allows provisions of a state law to take effect as a Commonwealth law in relation to the Commonwealth place.[6] Such Commonwealth laws are 'facilitative' of state laws regardless of whether or not applied state laws comply with Australia's international human rights obligations. As acknowledged by the Minister:

> The Commonwealth Places Act does not modify or augment State laws in any substantive way, but merely applies those laws to very small areas within each State. Consequently, the Commonwealth Places Act has no greater impact on human rights than the State laws being applied.[7]

1.9 This statement confirms that the CP Act permits the application of state laws to Commonwealth places irrespective of whether they engage or limit human rights, and the committee is concerned that there may be numerous state laws applying to Commonwealth places that engage and significantly limit human rights.[8] The Minister has stated that the CP Act applies state laws to 'very small areas within each State.' The committee notes the Minister did not provide the committee with a list of Commonwealth places within the meaning of the CP Act, and there appears to be no

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5 Parliamentary Joint Committee on Human Rights, *Ninth Report of the 44th Parliament*, para 1.524.

6 State laws which are applied are subject to express or implied limitations on the legislative power of the Commonwealth Parliament. Those state laws that are inoperative by virtue of inconsistency with a Commonwealth law and thus invalid to the extent of the inconsistency pursuant to section 109 of the Constitution, are not applied by the CP Act.

7 See Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament*, Appendix 1, Letter from the Hon Michael Keenan MP, Minister for Justice, to Senator Dean Smith, dated 13/08/2014, p. 1.

8 See, for example, *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW), part 6A; *Summary Offences and Sentencing Amendment* (Vic); *Vicious Lawless Association Disestablishment Act* 2013 *(VLAD)* (Qld) *Criminal Law (Criminal Organisations Disruption) Amendment Act* 2013 *(Qld).*

publicly available list of such places. The committee further notes that the category of Commonwealth places appears to include Australia's major airports, certain military installations located in the states, and other places.[9] The committee considers that the human rights implications of the application of state laws to these areas is of significance, and is concerned that it has not yet been provided with details as to number and nature of Commonwealth places to which the CP Act applies.

1.10 The committee notes that the CP Act was enacted in 1970, prior to the development of parliamentary human rights scrutiny mechanisms. The committee acknowledges that the human rights implications of the CP Act may have been less apparent to Parliament or the executive in that context. However, with the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011*, which is intended to ensure human rights assessment of (generally) all new and proposed Commonwealth legislation, the operation of the CP Act effectively reduces the intended scope of human rights assessment of Commonwealth legislation.

1.11 The committee notes that the federal government possesses relevant powers to ensure compliance with Australia's international obligations.[10] The committee further notes that the division of federal-state responsibilities does not negate Australia's obligations under international human rights law.[11]

1.12 In light of the scheme of the CP Act and the Commonwealth's obligations and powers in respect of human rights, the committee is of the view that the application of state laws via the CP act should be subject to requirements for any such state laws to be assessed for compatibility with human rights. While the committee acknowledges the Minister's advice regarding the practical difficulty of assessing all state laws of general application, the committee considers that a reasonable starting point would be to subject newly applied state laws to an assessment of human rights compatibility.

1.13 **The committee requests the Minister for Justice to provide it with categories of Commonwealth places to which the *Commonwealth Places (Application of Laws) Act 1970* applies.**

1.14 **The committee recommends that newly applied state laws be subject to an assessment of human rights compatibility.**

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9 For example, the Googong Dam Area outside Canberra: *Canberra Water Supply (Googong Dam) Act 1974*, s 27.

10 See Australian Constitution, sections 51(xxix), 52(i), 109.

11 See, for example, Vienna Convention on the Law of Treaties, 1969, article 27; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, articles 1 – 3, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed 27 August 2014).

1.15 **The committee considers that the *Commonwealth Places (Application of Laws) Act 1970* is likely to be incompatible with human rights.**

1.16 **The committee recommends that the *Commonwealth Places (Application of Laws) Act 1970* be amended to provide that state laws apply only insofar as they are compatible with Australia's obligations under international human rights law.**

Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014

Portfolio: Employment
Introduced: House of Representatives, 4 June 2014

Purpose

1.17 The Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014 (the bill) seeks to amend the *Social Security (Administration) Act 1999* to provide that:

- jobseekers who incur an eight-week non-payment penalty for refusing suitable work will no longer be able to have the penalty waived; and
- jobseekers who persistently fail to comply with participation obligations will only be able to have the penalty waived once while in receipt of an activity tested income support payment.

Background

1.18 The committee reported on the bill in its *Ninth Report of the 44th Parliament.*

Committee view on compatibility

Right to social security and an adequate standard of living

Removal or limitation of the ability to waive the non-payment penalty for refusal of suitable work, or for persistent non-compliance

1.19 The committee sought the advice of the Assistant Minister for Employment as to whether the removal or limitation of the ability to have the non-payment penalty waived 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

> *Are the proposed changes aimed at achieving a legitimate objective?*
>
> The Bill addresses a number of legitimate objectives. The proposed changes will help to ensure the integrity of the income support system and ensure more job seekers are employed and experiencing the financial and social benefits of work. The amendments are intended to encourage job seekers to take active steps to meet their participation requirements, such as accepting a suitable job, and thereby increase their chances of moving from welfare to work.

The Bill does not take away a job seeker's entitlement to social security income support payments and does not impact on job seekers who cannot get work despite their best efforts. It is important to note that penalties will not be applied where a person who refuses a job has a reasonable excuse and that the existing safeguards and protections for vulnerable job seekers will remain in place.

There is a pressing and substantial need for the measures in the Bill. Since the introduction of the provisions allowing waivers of eight week non-payment penalties for refusing suitable work, the number of such penalties being imposed has almost trebled-from 644 penalties in 2008-09 to 1,718 in 2012-13, of which 68 per cent were waived. This difference cannot be attributed to any comparable change in the size of the activity-tested job seeker caseload or increase in the number of jobs being offered (as evidenced by the fact that the total job seeker population and vacancy rate changed very little between these years). In other words, many more job seekers are refusing suitable work and this has coincided with the introduction of the waiver provisions.

Australia's income support system is designed to act as a safety net for people who are unemployed and job seekers are required to do all they can to find and keep a job. Job seekers who incur penalties for refusing suitable work without a reasonable excuse are clearly employable and are expected to accept work rather than remain in receipt of income support at the taxpayer's expense. Job seekers who have a reasonable excuse for refusing the job, or are offered a job that is not suitable, are not affected by the changes.

Similarly, the number of instances of persistent non-compliance has almost trebled since the waiver provisions were introduced. In 2008-09 there were 8,850 eight week penalty periods imposed compared to 25,286 in 2012-2013 of which 73 per cent were waived. Of the percentage waived, 31 per cent were a second or subsequent waiver, indicating that the waiver provisions have undermined the deterrent effect of eight week non-payment periods.

The changes proposed will provide a stronger deterrent and, as evidence by the figures from 2008-09 outlined above, promote higher levels of job seeker compliance with their participation requirements.

Is there a rational connection between the limitation and the objective?

There is a rational connection between the measures in the Bill and the objective of the Bill, because the significant increase in the job seeker behaviour that can result in an eight week non-payment penalty being applied coincided with the introduction of the provisions permitting waiver of such penalties.

Data from the Australian Bureau of Statistics indicates that the number of jobs on offer has remained steady during this time. In 2008-09, there was an average of just under four unemployed people per vacancy, which

increased to just over four job seekers per vacancy in 2012-13. During this same period, the number of activity-tested job seekers dropped by approximately 5.8 per cent. The trebling of the number of serious failures applied for refusing work and persistent non-compliance has, therefore, occurred for no other apparent reason than job seekers are able to have the eight week non-payment penalty waived.

Is the limitation a reasonable and proportionate measure for the achievement of that objective?

The limitations on the availability of waivers are reasonable and proportionate to the above objectives. The majority of job seekers will not be impacted by this Bill as they meet mutual obligation requirements. During 2012-13, only 22 per cent of all activity-tested job seekers had a participation failure applied by the Department of Human Services. Less than two per cent of job seekers incurred penalties for refusing work or persistent non-compliance.

I would draw the Committee's attention to the protections for job seekers who refuse a suitable job. Before a penalty can be applied, an additional test (mandated by legislation) is required to establish that the job was suitable for the job seeker. This includes ensuring that it meets the applicable statutory conditions; that the job seeker is capable of doing the work (or appropriate training will be provided); that it will not aggravate a pre-existing illness, disability or injury; and that it would not involve more hours of work than the person's assessed capacity. Additionally, a penalty is not applied if the job seeker had a reasonable excuse for refusing the job.

Before a penalty can be applied for persistent non-compliance, the job seeker must first undergo a Comprehensive Compliance Assessment by a senior or specialist officer of the Department of Human Services (such as a social worker). The purpose of this assessment is to ensure a job seeker has no undisclosed barriers to participation. Before a penalty can be applied, it must additionally be established that the job seeker's prior failures constitute wilful and persistent non-compliance.

Job seekers who incur penalties for persistent non-compliance will still have one opportunity for a penalty to be waived. Therefore the Bill would only impact a job seeker if he or she had been deliberately non-compliant on numerous occasions without a good reason. This is a reasonable and proportionate response to the problem of increased non-compliance since the introduction of the waiver provisions. It is reasonable to expect the job seeker to take responsibility for avoiding penalties for persistent non-compliance after an initial warning.

Job seekers would be informed in person of the Bill's impact at routine contacts with employment service providers and with the Department of Human Services. A job seeker also has a right to internal and external review of decisions in relation to all eight week non-payment penalties.

> This helps ensure that such penalties are not imposed or served where that would not be appropriate.[1]

Committee response

1.20 **The committee thanks the Assistant Minister for Employment for his response.**

1.21 The committee considers that the response has provided a range of useful information to assist the committee in its assessment of the measure. The committee notes that this included useful information on whether the proposed measure was reasonable, necessary and proportionate in pursuit of a legitimate objective.

1.22 The committee notes that the response provides data regarding the increase in the number of penalties applied since the introduction of the waiver as well as the high percentage of cases in which a waiver has been granted. However, the response does not directly explain whether these increases were as a result of waivers being misused by the department or whether the use of waivers as a re-engagement tool was ineffective. Without such information the committee is unable to conclude that the measure is necessary in pursuit of a legitimate objective.

1.23 **The committee therefore requests the advice of the Assistant Minister for Employment as to whether the waiver was being misused or was ineffective.**

Committee view on compatibility

Right to equality and non-discrimination

Removal or limitation of the ability to waive the non-payment penalty for refusal of suitable work, or for persistent non-compliance

1.24 The committee sought the advice of the Assistant Minister for Employment as to whether the removal or limitation of the ability to have the non-payment penalty waived is compatible with the rights to equality and non-discrimination.

Assistant Minister's response

> The Bill does not directly target the behaviour of any category of job seeker other than the small group of job seekers who deliberately refuse suitable work or persistently avoid complying with mutual obligation requirements. Regarding the committee's concern that the Bill could discriminate indirectly, for example by having a disproportionately negative effect on women; data shows that, while women made up 49.7 per cent of the activity-tested caseload in 2012-13, they incurred only 23 per cent of the penalties that were applied for refusing work in that year

1 See Appendix 1, Letter from the Hon. Luke Hartsuyker MP, Assistant Minister for Employment, to Senator Dean Smith, dated 14 August 2014, pp 1-3.

and only 26 per cent of the penalties that were applied for persistent non-compliance.

Job seekers who do their best to find suitable work will be unaffected by this Bill regardless of age, gender or other attributes. The checks and balances outlined above will ensure that non-payment penalties are not imposed or served inappropriately.[2]

Committee response

1.25 **The committee thanks the Assistant Minister for Employment for his response and has concluded its examination of this aspect of the matter.**

2 See Appendix 1, Letter from the Hon. Luke Hartsuyker MP, Assistant Minister for Employment, to Senator Dean Smith, dated 14 August 2014, pp 3-4.

The committee has deferred its consideration of the following bills and instruments

Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014

Higher Education and Research Reform Amendment Bill 2014

National Security Legislation Amendment Bill (No. 1) 2014

Autonomous Sanctions (Designated and Declared Persons - Former Federal Republic of Yugoslavia) Amendment List 2014 (No. 2) [F2014L00970]

Criminal Code (Terrorist Organisation—Islamic State) Regulation 2014 [F2014L00979]

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 44th 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.

- 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.[1]

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.

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.[2]

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

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.

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).[3]

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

> to achieve a remedy that suits them best) rests with the eligible person with disability.[4]

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'.*

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.[5]

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.**

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.[6]

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**

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.

concludes that the bill is incompatible with the right to just and favourable conditions of work.[7]

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' (subclause46 (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 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.[8]

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.

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 Clause22.
- 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 (paragragh35(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.[9]

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.**

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 44th 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.[1]

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.

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 1July2014, 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.[2]

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.

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 arid 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.[3]

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.**

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 44th Parliament* and *Ninth Report of the 44th 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.[1]

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.**

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.

Appendix 1

Correspondence

SENATOR THE HON MITCH FIFIELD

ASSISTANT MINISTER FOR SOCIAL SERVICES

MC14-009096

Senator Dean Smith
Senator for Western Australia
PO Box 930
WEST PERTH WA 6872

Dear Senator Smith

Thank you for your letter of 15 July 2014 to the Hon Kevin Andrews, Minister for Social Services, in relation to the Parliamentary Joint Committee's consideration of the BSWAT Payment Scheme Bill 2014, and the BSWAT Payment Scheme (Consequential Amendments) Bill 2014. Your letter was referred to me as this matter falls within my portfolio responsibilities.

I am pleased to provide you with the responses to the questions raised by the Committee in the *Ninth Report of the 44th Parliament* in relation to these two pieces of legislation.

Yours sincerely

MITCH FIFIELD

Encl. *Responses to the Parliamentary Joint Committee on Human Rights: Business Services Wage Assessment Tool Payment Scheme Bill 2014, Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014*

14/8/14.

PARLIAMENT HOUSE, CANBERRA ACT 2600 TELEPHONE: 02 6277 7280 EMAIL: MINISTER.FIFIELD@DSS.GOV.AU

Responses to the Parliamentary Joint Committee on Human Rights:

Business Services Wage Assessment Tool Payment Scheme Bill 2014

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

Summary of the purpose of the Business Services Wage Assessment Tool (BSWAT) Payment Scheme Bill 2014

The Business Services Wage Assessment Tool (BSWAT) Payment Scheme Bill 2014 (the Bill) establishes a payment scheme for supported employees with intellectual impairment in ADEs (ADEs) who previously had their wages assessed under the Business Services Wage Assessment Tool (BSWAT).

Supported employees in ADEs are paid a pro-rata wage, worked out in about half of all cases under the BSWAT.

However, two supported employees were found through a recent court decision to have experienced indirect discrimination because their wages were assessed under the BSWAT.

Following this decision, 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 the perceived liability for these claims. If these ADEs closed, thousands of supported employees would be out of work. This Bill establishes a payment scheme to provide reassurance to supported employees, and their families and carers, by removing the perceived liability that could impact the ability of ADEs to deliver ongoing employment support.

The scheme will not pay compensation, but will provide a payment to eligible people.

The payment scheme will allow registration from 1 July 2014 for payments to former and current eligible employees in relation to work they have performed in the past.

To be eligible for the payment scheme, a person must, for at least one day between 1 January 2004 and 28 May 2014 have:

- had an intellectual impairment
- been employed by an ADE; and

- been paid a pro-rata wage determined under the BSWAT, or a training wage paid while waiting for an assessment under the BSWAT to be undertaken.

Further, the person must have required daily support in the workplace from the ADE to maintain his or her employment and the person cannot have received any amount in settlement of, or that has been ordered by the court in relation to, a claim concerning the BSWAT.

The BSWAT Payment Scheme will deliver payments to eligible workers as quickly as possible. People with disability planning to submit an application for the scheme have until 1 May 2015 to register. Providing the person has registered for the scheme, applications to the scheme can be submitted up until 30 November 2015.

There are strict timeframes for the scheme. While these timeframes are generous, they do require that people wishing to access the scheme take certain actions before set dates. These timeframes will be made very clear in all scheme materials.

Once an application has been received, the applicant's eligibility for the scheme will be determined. Once eligibility is established, a payment amount will be calculated, based on half the excess (if any) of a "productivity-scored wage" (being the amount the worker would have been paid had the productivity element only of the BSWAT been applied) over the actual wage they were paid.

If the payment amount is greater than zero, the eligible applicant will receive a letter of offer, including a payment amount. During the acceptance period, the applicant must seek independent financial counselling and legal advice, funded through the scheme. Amongst other things, certificates must be provided, from both the financial counsellor and the legal adviser, along with acceptance of a payment offer. Once an offer has been formally accepted by an eligible applicant in accordance with the relevant requirements, payment will be made.

To ensure people with disability have the opportunity to provide further information or to raise any concerns, the scheme will have both internal and external review processes.

Summary of the Purpose of the Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014

The Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014 provides the consequential amendments that need to be made to Commonwealth legislation in light of the new scheme. For example, amendments to the taxation law will ensure payments under the scheme are eligible income for the lump sum in arrears tax offset.

Amendments to the social security law and the *Veterans' Entitlements Act 1986* will ensure the payments are not income tested, and so will not reduce the income support payments of supported employees who receive payments under the scheme.

Lastly, the confidentiality provisions in the social security law will be adjusted to make sure personal information can be obtained and disclosed for the purpose of administering the new scheme.

Background

The judgment of the Full Court of the Federal Court in *Nojin v Commonwealth of Australia* (2012) FCAFC 192 (21 December 2012) (*Nojin*) found that two workers with intellectual disability (Messrs Nojin and Prior) were indirectly discriminated against because of a requirement that they undergo a wage assessment using the BSWAT to achieve a higher wage outcome. The findings of unlawful discrimination made by the Court were made in relation to Messrs Nojin and Prior only and were made by reference to, and were based on, the particular evidence before the Court and the particular findings of fact made by the Court in those 2 proceedings. The findings of the Court do not apply to all workers with intellectual disability who have had their wages assessed under the BSWAT. Whether it was lawful to use the BSWAT to assess their wages, or whether these persons have been unlawfully discriminated against, will turn on the particular circumstances of each case.

The Minister does not agree that that use of the BSWAT to assess the wages of all intellectually disabled employees constitutes (or constituted) unlawful discrimination (which is not the effect of the Court's decision in *Nojin*).

Furthermore, no compensation was ordered by the Federal Court for Messrs Nojin and Prior as the claim for compensation was abandoned during the running of the legal proceedings. Accordingly, the Court did not consider the difficult question of how any compensation should have been calculated for Messrs Nojin and Prior.

No new wage assessments have been conducted using the BSWAT since December 2012.

On 29 April 2014, a 12 month conditional exemption from certain sections from the Disability Discrimination Act 1992 was given by the Australian Human Rights Commission:

http://www.humanrights.gov.au/department-social-services-dss

It is the Australian Government's position that, in order to ensure persons with disabilities assessed under the scheme do not need to bring litigation to assert their rights and to ensure the stability of the supported employment sector, proactive action in the form of the establishment of the BSWAT Payment Scheme was the most favourable outcome for employees, their families and carers and providers. The BSWAT Payment Scheme will provide a payment to eligible workers who have had their wages assessed using the BSWAT. The BSWAT Payment Scheme seeks to provide reassurance to people with disability, their parents and carers, and to supported employers by removing any perceived liability on the part of supported employers (ADEs) that have used the BSWAT to assess the wages of their employees.

Responses to Committee Questions

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.
  - 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.

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'.

- 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.

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 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).

1.30. The committee therefore seeks the advice of the Minister for Social Services 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 reasonable and proportionate measure for the achievement of that objective.***

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 to achieve a remedy that suits them best) rests with the eligible person with disability.

1.34. The committee therefore seeks the advice of the Minister for Social Services 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 reasonable and proportionate measure for the achievement of that objective.***

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'.

- 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.

1.42 The committee therefore seeks the advice of the Minister for Social Services to whether the basis of 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 reasonable and proportionate measure for the achievement of that objective.***

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.

1.56 The Committee therefore seeks 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 reasonable and proportionate measure for the achievement of that objective.***

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.
- 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' (subclause46 (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 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 decision-making 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.

1.62 The Committee therefore seeks the advice of the Minister for Social Services as to whether the strict scheme timeframes 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 reasonable and proportionate measure for the achievement of that objective.***

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.
- 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 Clause22.
- 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 (paragragh35(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.

THE HON SUSSAN LEY MP
ASSISTANT MINISTER FOR EDUCATION

Our Ref MC14-006874

28 JUL 2014

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear ~~Senator~~ Dean

Thank you for your letter of 24 June 2014 to the Hon Christopher Pyne MP, Minister for Education, seeking advice in relation to issues raised in the report of the Parliamentary Joint Committee on Human Rights in relation to the Family Assistance Legislation Amendment (Child Care Measures) Bill 2014 (the Bill). As the matter you have raised falls within my portfolio responsibilities as Assistant Minister for Education, your letter was referred to me for response.

Please find attached a response to the questions raised by the Committee in their report on the Bill. In broader terms I confirm that the Australian Government considers the Bill is consistent with Australia's human rights obligations.

I note that the Bill was passed by the Parliament, with the Child Care Benefit measure removed from the Bill, and Royal Assent was granted on 30 June 2014.

The Child Care Benefit measure was subsequently included in the Family Assistance Legislation Amendment (Child Care Measures) Bill (No.2) 2014 that I introduced into the House of Representatives on 25 June 2014.

Yours sincerely

The Hon Sussan Ley MP

Encl.

Response to the Parliamentary Joint Committee on Human Rights on the Family Assistance Legislation Amendment (Child Care Measures) Bill 2014

Background to the Bill

1. On 5 June 2014 the Hon Sussan Ley MP, Assistant Minister for Education, introduced the Family Assistance Legislation Amendment (Child Care Measures) Bill 2014 (the Child Care Measures Bill) into the House of Representatives.

2. The Child Care Rebate measure in the Child Care Measures Bill was previously included as Schedule 9 of the Social Services and Other Legislation Amendment Bill 2013 (the SSOLA Bill) introduced to the 43rd Parliament. On 5 December 2013, the Senate referred Schedule 9 (and Schedule 6) of the SSOLA Bill to the Senate Education and Employment Legislation Committee for inquiry and report by 12 December 2013. The Committee's December 2013 report recommended 'that the Senate pass the measures contained in schedules 6 and 9 of the Bill'. The SSOLA Bill was passed by Parliament on 25 March 2014. However, an amendment was made in the Senate that removed the Child Care Rebate measure prior to the passage of the SSOLA Bill.

3. The Child Care Measures Bill introduced on 5 June 2014 proposed amendments to the *A New Tax System (Family Assistance) Act 1999* (the Family Assistance Act) to:

   a. continue to maintain the Child Care Rebate limit at $7500 per child, per financial year, for a further three income years to 30 June 2017; and

   b. to maintain the Child Care Benefit income thresholds at the levels applicable as at 30 June 2014 for a further three years from 1 July 2014.

4. The Child Care Measures Bill was passed by the Parliament 23 June 2014 and received Royal Assent on 30 June 2014. Before being passed by the Parliament, the Child Care Measures Bill was amended in the Senate, and agreed by the House of Representatives, to remove the Child Care Benefit measure.

5. On 25 June 2014 the Assistant Minister for Education introduced the Family Assistance Legislation Amendment (Child Care Measures) Bill (No.2) 2014 (the Child Care Measures Bill No.2) to implement the Child Care Benefit measure.

6. As the Child Care Measures Bill No.2 was not passed by the Parliament before 1 July 2014, the Child Care Benefit income thresholds were indexed with effect from 7 July 2014 (refer Attachment A).

7. On 24 June 2014 Senator Dean Smith, Chair of the Parliamentary Joint Committee on Human Rights wrote to the Hon Christopher Pyne MP, Minister for Education, to draw the Minister's attention to comments in the Parliamentary Joint Committee on Human Rights' report of the *Eighth Report of the 44th Parliament*. In the report the Committee seeks the Minister's advice in relation to its consideration of the Child Care Measures Bill.

8. In addition to the Explanatory Memorandum statement addressing human rights implications of the Child Care Measures Bill, this submission sets out answers to the following questions raised in the Committee's report.

'1.83 The Committee therefore seeks the Minister for Social Services' (sic) 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 reasonable and proportionate measure for the achievement of that objective.'**

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.

'1.91 The Committee therefore seeks the Minister for Social Services' (sic) advice as to whether the 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.'**

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

21. 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.

22. The Child Care Benefit is an 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.

23. 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.

24. 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.

25. 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.

26. 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.

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

28. 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.

29. 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.

30. 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;

31. 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.

32. 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

33. 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.

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

35. 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.

'1.100 The Committee therefore seeks the Minister for Social Services' (sic) 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 a reasonable and proportionate measure for the achievement of that objective.'**

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;

43. 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.

44. 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.

Attachment A

Australian Government
Department of Education

Child Care Benefit—summary of rate changes from July 2014

Child Care Benefit (effective from the first Monday in July 2014)	Old Amount	July 2014	Increase	Unit
Hourly Maximum Rates				
1 Child	$ 3.99	$4.10	$ 0.11	ph
2 Children	$ 4.16	$4.28	$ 0.12	ph
3 Children	$ 4.33	$4.45	$ 0.12	ph
4 Children	$ 4.33	$4.45	$ 0.12	ph
add for each additional child in care	$ 4.33	$4.45	$ 0.12	ph
Weekly Maximum Rates				
1 Child	$ 199.50	$ 205.00	$ 5.50	pw
2 Children	$ 416.92	$ 428.40	$ 11.48	pw
3 Children	$ 650.57	$ 668.48	$ 17.91	pw
4 Children	$ 867.42	$ 891.30	$ 23.88	pw
add for each additional child in care	$ 216.85	$ 222.82	$ 5.97	pw
Registered Care Rate				
Hourly	$ 0.666	$ 0.684	$ 0.018	ph
Weekly (based on 50 hours pw)	$ 33.30	$ 34.20	$ 0.900	pw
Income Thresholds				
Lower Income Threshold	$ 41,902	$ 42,997	$ 1,095	pa
Upper Income Threshold	$ 97,632	$ 100,268	$ 2,636	pa
Multiple Child Loadings				
Multiple for 2 children	$ 17.92	$ 18.40	$ 0.48	pw
Multiple for 3 children	$ 52.07	$ 53.48	$ 1.41	pw
Income Limits				
1 Child	$ 145,642	$ 149,597	$ 3,955	pa
2 Children	$ 150,914	$ 155,013	$ 4,099	pa
3 Children	$ 170,404	$ 175,041	$ 4,637	pa
4 Children	$ 202,623	$ 208,146	$ 5,523	pa
add for each additional child in care	$ 32,219	$ 33,106	$ 887	pa

Note: This table provides the Child Care Benefit rates with effect from 1 July 2014 and also outlines the respective indexed increases from the 2014-15 financial year. The Child Care Benefit Budget measure will maintain **only** the lower and upper Income Thresholds at the 2014-15 rates for three years. As the respective income limits are derived from both the income thresholds and the hourly rates these will also increase albeit by a lower amount because the Income Thresholds will be maintained.

THE HON SUSSAN LEY MP
ASSISTANT MINISTER FOR EDUCATION

8 AUG 2014

Our Ref MC14-008357

Senator Dean Smith
Chair
Joint Parliamentary Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your letter of 15 July 2014 to the Hon Christopher Pyne MP, Minister for Education, seeking advice in relation to issues raised in the report of the Parliamentary Joint Committee on Human Rights in relation to the Family Assistance Legislation Amendment (Child Care Measures) Bill 2014 Bill (No.2) (the Bill). As the matter you have raised falls within my portfolio responsibilities as Assistant Minister for Education, your letter was referred to me for response.

Please find attached a response to the questions raised by the Committee in their report on the Bill. In broader terms I confirm that the Australian Government considers the Bill is consistent with Australia's human rights obligations.

Yours sincerely

The Hon Sussan Ley MP

Encl.

Response to the Parliamentary Joint Committee on Human Rights on the Family Assistance Legislation Amendment (Child Care Measures) Bill No. 2 2014

Background to the Bill

1. On 5 June 2014 the Hon Sussan Ley MP, Assistant Minister for Education, introduced the Family Assistance Legislation Amendment (Child Care Measures) Bill 2014 (the Child Care Measures Bill) into the House of Representatives.

2. The Child Care Measures Bill proposed amendments to the *A New Tax System (Family Assistance) Act 1999* (the Family Assistance Act) to:

   a. continue to maintain the Child Care Rebate limit at $7500 per child, per financial year, for a further three income years to 30 June 2017; and

   b. to maintain the Child Care Benefit income thresholds at the levels applicable as at 30 June 2014 for a further three years from 1 July 2014.

3. The Child Care Measures Bill was passed by the Parliament 23 June 2014 and received Royal Assent on 30 June 2014. Before being passed by the Parliament, the Child Care Measures Bill was amended in the Senate, and agreed by the House of Representatives, to remove the Child Care Benefit measure.

4. On 25 June 2014 the Assistant Minister for Education introduced the Family Assistance Legislation Amendment (Child Care Measures) Bill (No.2) 2014 (the Child Care Measures Bill No.2) to implement the Child Care Benefit measure.

5. As the Child Care Measures Bill No.2 was not passed by the Parliament before 1 July 2014, the Child Care Benefit income thresholds were indexed with effect from 7 July 2014 (refer Attachment A).

6. On 24 June 2014 Senator Dean Smith, Chair of the Parliamentary Joint Committee on Human Rights wrote to the Hon Christopher Pyne MP, Minister for Education, to draw the Minister's attention to comments in the Parliamentary Joint Committee on Human Rights' *Eighth Report of the 44th Parliament*. In the report the Committee sought the Minister's advice in relation to its consideration of the Child Care Measures Bill. A response was provided to the Committee by the Hon Sussan Ley MP, Assistant Minister for Education, on 28 July 2014.

7. On 15 July 2014 Senator Dean Smith, Chair of the Parliamentary Joint Committee on Human Rights wrote to the Hon Christopher Pyne MP, Minister for Education, to draw the Minister's attention to comments in the Parliamentary Joint Committee on Human Rights' *Ninth Report of the 44th Parliament*. In the report the Committee seeks the Minister's advice in relation to its consideration of the Child Care Measures Bill No.2.

8. In addition to the Explanatory Memorandum statement addressing human rights implications of the Child Care Measures Bill No.2 and the submission to the Committee on the earlier Bill, this submission sets out answers to the following questions raised in the Committee's *Ninth Report of the 44th Parliament*.

'1.153 The committee therefore seeks the Minister for Social Services' (sic) advice as the whether the 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 reasonable and proportionate measure for the achievement of that objective.'**

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.

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.

'1.162 The committee therefore seeks the Minister for Social Services' (sic) advice as the 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.'**

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

24. 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.

25. The Child Care Benefit measure is compatible with families' right to work and it does not deny families their right to social security in the form of Child Care Benefit.

26. This measure achieves 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;

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

28. 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.

29. 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.

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 Benefit measure is reasonable and proportionate considering that the measure 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.

Attachment A

Australian Government
Department of Education

Child Care Benefit—summary of rate changes from July 2014

Child Care Benefit (effective from the first Monday in July 2014)	Old Amount	July 2014	Increase	Unit
Hourly Maximum Rates				
1 Child	$ 3.99	$4.10	$ 0.11	ph
2 Children	$ 4.16	$4.28	$ 0.12	ph
3 Children	$ 4.33	$4.45	$ 0.12	ph
4 Children	$ 4.33	$4.45	$ 0.12	ph
add for each additional child in care	$ 4.33	$4.45	$ 0.12	ph
Weekly Maximum Rates				
1 Child	$ 199.50	$ 205.00	$ 5.50	pw
2 Children	$ 416.92	$ 428.40	$ 11.48	pw
3 Children	$ 650.57	$ 668.48	$ 17.91	pw
4 Children	$ 867.42	$ 891.30	$ 23.88	pw
add for each additional child in care	$ 216.85	$ 222.82	$ 5.97	pw
Registered Care Rate				
Hourly	$ 0.666	$ 0.684	$ 0.018	ph
Weekly (based on 50 hours pw)	$ 33.30	$ 34.20	$ 0.900	pw
Income Thresholds				
Lower Income Threshold	$ 41,902	$ 42,997	$ 1,095	pa
Upper Income Threshold	$ 97,632	$ 100,268	$ 2,636	pa
Multiple Child Loadings				
Multiple for 2 children	$ 17.92	$ 18.40	$ 0.48	pw
Multiple for 3 children	$ 52.07	$ 53.48	$ 1.41	pw
Income Limits				
1 Child	$ 145,642	$ 149,597	$ 3,955	pa
2 Children	$ 150,914	$ 155,013	$ 4,099	pa
3 Children	$ 170,404	$ 175,041	$ 4,637	pa
4 Children	$ 202,623	$ 208,146	$ 5,523	pa
add for each additional child in care	$ 32,219	$ 33,106	$ 887	pa

Note: This table provides the Child Care Benefit rates with effect from 1 July 2014 and also outlines the respective indexed increases from the 2014-15 financial year.

THE HON. LUKE HARTSUYKER MP
DEPUTY LEADER OF THE HOUSE
ASSISTANT MINISTER FOR EMPLOYMENT

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your letter of 15 July 2014 to Senator the Hon. Eric Abetz, Minister for Employment seeking further information on the Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014. As the issues raised fall within my portfolio responsibilities as Assistant Minister for Employment, your letter was referred to me for reply.

The Parliamentary Joint Committee on Human Rights has sought advice 'as to whether the removal or limitation of the ability to have the non-payment penalty waived 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 reasonable and a proportionate measure for the achievement of that objective'.

The Committee also sought my advice 'as to whether the removal or limitation of the ability to have the non-payment penalty waived is compatible with the rights to equality and non-discrimination'. Each of these matters is addressed below.

Are the proposed changes aimed at achieving a legitimate objective?

The Bill addresses a number of legitimate objectives. The proposed changes will help to ensure the integrity of the income support system and ensure more job seekers are employed and experiencing the financial and social benefits of work. The amendments are intended to encourage job seekers to take active steps to meet their participation requirements, such as accepting a suitable job, and thereby increase their chances of moving from welfare to work.

CANBERRA: M1 48, Parliament House, Canberra ACT 2600. Phone: 02 6277 7540 Fax: 02 6273 0207
COFFS HARBOUR: 39 Little Street, Coffs Harbour NSW 2450 Phone: 02 6652 6233 Fax: 02 6651 4346
Luke.Hartsuyker.MP@aph.gov.au http://lukehartsuyker.com.au

The Bill does not take away a job seeker's entitlement to social security income support payments and does not impact on job seekers who cannot get work despite their best efforts. It is important to note that penalties will not be applied where a person who refuses a job has a reasonable excuse and that the existing safeguards and protections for vulnerable job seekers will remain in place.

There is a pressing and substantial need for the measures in the Bill. Since the introduction of the provisions allowing waivers of eight week non-payment penalties for refusing suitable work, the number of such penalties being imposed has almost trebled—from 644 penalties in 2008–09 to 1,718 in 2012–13, of which 68 per cent were waived. This difference cannot be attributed to any comparable change in the size of the activity-tested job seeker caseload or increase in the number of jobs being offered (as evidenced by the fact that the total job seeker population and vacancy rate changed very little between these years). In other words, many more job seekers are refusing suitable work and this has coincided with the introduction of the waiver provisions.

Australia's income support system is designed to act as a safety net for people who are unemployed and job seekers are required to do all they can to find and keep a job. Job seekers who incur penalties for refusing suitable work without a reasonable excuse are clearly employable and are expected to accept work rather than remain in receipt of income support at the taxpayer's expense. Job seekers who have a reasonable excuse for refusing the job, or are offered a job that is not suitable, are not affected by the changes.

Similarly, the number of instances of persistent non-compliance has almost trebled since the waiver provisions were introduced. In 2008–09 there were 8,850 eight week penalty periods imposed compared to 25,286 in 2012–2013 of which 73 per cent were waived. Of the percentage waived, 31 per cent were a second or subsequent waiver, indicating that the waiver provisions have undermined the deterrent effect of eight week non-payment periods.

The changes proposed will provide a stronger deterrent and, as evidence by the figures from 2008-09 outlined above, promote higher levels of job seeker compliance with their participation requirements.

Is there a rational connection between the limitation and the objective?

There is a rational connection between the measures in the Bill and the objective of the Bill, because the significant increase in the job seeker behaviour that can result in an eight week non-payment penalty being applied coincided with the introduction of the provisions permitting waiver of such penalties.

Data from the Australian Bureau of Statistics indicates that the number of jobs on offer has remained steady during this time. In 2008–09, there was an average of just under four unemployed people per vacancy, which increased to just over four job seekers per vacancy in 2012–13. During this same period, the number of activity-tested job seekers dropped by approximately 5.8 per cent. The trebling of the number of serious failures applied for refusing work and persistent non-compliance has, therefore, occurred for no other apparent reason than job seekers are able to have the eight week non-payment penalty waived.

Is the limitation a reasonable and proportionate measure for the achievement of that objective?

The limitations on the availability of waivers are reasonable and proportionate to the above objectives. The majority of job seekers will not be impacted by this Bill as they meet mutual obligation requirements. During 2012–13, only 22 per cent of all activity-tested job seekers had a participation failure applied by the Department of Human Services. Less than two per cent of job seekers incurred penalties for refusing work or persistent non-compliance.

I would draw the Committee's attention to the protections for job seekers who refuse a suitable job. Before a penalty can be applied, an additional test (mandated by legislation) is required to establish that the job was suitable for the job seeker. This includes ensuring that it meets the applicable statutory conditions; that the job seeker is capable of doing the work (or appropriate training will be provided); that it will not aggravate a pre-existing illness, disability or injury; and that it would not involve more hours of work than the person's assessed capacity. Additionally, a penalty is not applied if the job seeker had a reasonable excuse for refusing the job.

Before a penalty can be applied for persistent non-compliance, the job seeker must first undergo a Comprehensive Compliance Assessment by a senior or specialist officer of the Department of Human Services (such as a social worker). The purpose of this assessment is to ensure a job seeker has no undisclosed barriers to participation. Before a penalty can be applied, it must additionally be established that the job seeker's prior failures constitute wilful and persistent non-compliance.

Job seekers who incur penalties for persistent non-compliance will still have one opportunity for a penalty to be waived. Therefore the Bill would only impact a job seeker if he or she had been deliberately non-compliant on numerous occasions without a good reason. This is a reasonable and proportionate response to the problem of increased non-compliance since the introduction of the waiver provisions. It is reasonable to expect the job seeker to take responsibility for avoiding penalties for persistent non-compliance after an initial warning.

Job seekers would be informed in person of the Bill's impact at routine contacts with employment service providers and with the Department of Human Services. A job seeker also has a right to internal and external review of decisions in relation to all eight week non-payment penalties. This helps ensure that such penalties are not imposed or served where that would not be appropriate.

Is the limitation of the ability to have the non-payment penalty waived compatible with the rights to equality and non-discrimination?

The Bill does not directly target the behaviour of any category of job seeker other than the small group of job seekers who deliberately refuse suitable work or persistently avoid complying with mutual obligation requirements.

Regarding the committee's concern that the Bill could discriminate indirectly, for example by having a disproportionately negative effect on women; data shows that, while women made up 49.7 per cent of the activity-tested caseload in 2012–13, they incurred only 23 per cent of the penalties that were applied for refusing work in that year and only 26 per cent of the penalties that were applied for persistent non-compliance.

Job seekers who do their best to find suitable work will be unaffected by this Bill regardless of age, gender or other attributes. The checks and balances outlined above will ensure that non-payment penalties are not imposed or served inappropriately.

I trust that the above information is of assistance to the Committee.

Yours sincerely

LUKE HARTSUYKER

27 AUG 2014

Senator the Hon. Michael Ronaldson
Minister for Veterans' Affairs
Minister Assisting the Prime Minister for the Centenary of ANZAC
Special Minister of State

M14/2438

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Smith,

Thank you for your letter of 15 July 2014 drawing my attention to the Committee's comments in the Ninth Report of the 44th Parliament (the Report), concerning the *Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Act 2014*.

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.

I hope the information I have provided is of assistance to the Committee.

Yours sincerely

SENATOR THE HON. MICHAEL RONALDSON

13 AUG 2014

Appendix 2

Practice Note 1 and
Practice Note 2 (interim)

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

PRACTICE NOTE 1

Introduction

This practice note:

(i) sets out the underlying principles that the committee applies to the task of scrutinising bills and legislative instruments for human rights compatibility in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*; and

(ii) gives guidance on the committee's expectations with regard to information that should be provided in statements of compatibility.

The committee's approach to human rights scrutiny

- The committee views its human rights scrutiny tasks as primarily preventive in nature and directed at minimising risks of new legislation giving rise to breaches of human rights in practice. The committee also considers it has an educative role, which includes raising awareness of legislation that promotes human rights.
- Consistent with the approaches adopted by other human rights committees in other jurisdictions, the committee will test legislation for its potential to be incompatible with human rights, rather than considering whether particular legislative provisions could be open to a human rights compatible interpretation. In other words, the starting point for the committee is whether the legislation could be applied in ways which would breach human rights and not whether a consistent meaning may be found through the application of statutory interpretation principles.
- The committee considers that the inclusion of adequate human rights safeguards in the legislation will often be essential to the development of human rights compatible legislation and practice. The inclusion of safeguards is to ensure a proper guarantee of human rights in practice. The committee observes that human rights case-law has also established that the existence of adequate safeguards will often go directly to the issue of whether the legislation in question is compatible. Safeguards are therefore neither ancillary to compatibility and nor are they merely 'best practice' add-ons.
- The committee considers that, where relevant and appropriate, the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources for understanding the nature and scope of the human rights defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*.
- The committee notes that previously settled drafting conventions and guides are not determinative of human rights compatibility and may now need to be re-assessed for the purposes of developing human rights compatible legislation and practice.

The committee's expectations for statements of compatibility

- The committee views statements of compatibility as essential to the consideration

of human rights in the legislative process. It is also the starting point of the committee's consideration of a bill or legislative instrument.

- The committee expects statements to read as stand-alone documents. The committee relies on the statement to provide sufficient information about the purpose and effect of the proposed legislation, the operation of its individual provisions and how these may impact on human rights. While there is no prescribed form for statements under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the committee has found the templates[1] provided by the Attorney-General's Department to be useful models to follow.
- The committee expects statements to contain an assessment of whether the proposed legislation is compatible with human rights. The committee expects statements to set out the necessary information in a way that allows it to undertake its scrutiny tasks efficiently. Without this information, it is often difficult to identify provisions which may raise human rights concerns in the time available.
- In line with the steps set out in the assessment tool flowchart[2] (and related guidance) developed by the Attorney-General's Department, the committee would prefer for statements to provide information that addresses the following three criteria where a bill or legislative instrument limits human rights:
  1. whether and how the limitation is aimed at achieving a legitimate objective;
  2. whether and how there is a rational connection between the limitation and the objective; and
  3. whether and how the limitation is proportionate to that objective.
- If no rights are engaged, the committee expects that reasons should be given, where possible, to support that conclusion. This is particularly important where such a conclusion may not be self-evident from the description of the objective provided in the statement of compatibility.

SEPTEMBER 2012

1 http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/Statements-of-Compatibility-templates.aspx

2 http://www.ag.gov.au/Humanrightsandantidiscrimination/Pages/Tool-for-assessing-human-rights-compatibility.aspx

For further Information please contact:

Parliamentary Joint Committee on Human Rights

Tel. (02) 6277 3823 • Fax. (02) 6277 5767

Email: human.rights@aph.gov.au

PO Box 6100, Parliament House
CANBERRA ACT 2600

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

Practice Note 2 (interim)

Civil Penalties

Introduction

1.1 This interim practice note:

- sets out the human rights compatibility issues to which the committee considers the use of civil penalty provisions gives rise; and
- provides guidance on the committee's expectations regarding the type of information that should be provided in statements of compatibility.

1.2 The committee acknowledges that civil penalty provisions raise complex human rights issues and that the implications for existing practice are potentially significant. The committee has therefore decided to provide its initial views on these matters in the form of an interim practice note and looks forward to working constructively with Ministers and departments to further refine its guidance on these issues.

Civil penalty provisions

1.3 The committee notes that many bills and existing statutes contain civil penalty provisions. These are generally prohibitions on particular forms of conduct that give rise to liability for a 'civil penalty' enforceable by a court.[1] These penalties are pecuniary, and do not include the possibility of imprisonment. They are stated to be 'civil' in nature and do not constitute criminal offences under Australian law. Therefore, applications for a civil penalty order are dealt with in accordance with the rules and procedures that apply in relation to civil matters.

1.4 These provisions often form part of a regulatory regime which provides for a graduated series of sanctions, including infringement notices, injunctions, enforceable undertakings, civil penalties and criminal offences. The committee appreciates that these schemes are intended to provide regulators with the flexibility to use sanctions that are appropriate to and likely to be most effective in the circumstances of individual cases.

Human rights implications

1.5 Civil penalty provisions may engage the criminal process rights under articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).[2] These articles set out specific guarantees that apply to proceedings involving the determination of 'criminal charges' and to persons who have been convicted of a 'criminal offence', and provide protection against the imposition of retrospective criminal liability.[3]

1.6 The term 'criminal' has an 'autonomous' meaning in human rights law. In other words, a penalty or other sanction may be 'criminal' for the purposes of the ICCPR even if it is considered to be 'civil' under Australian domestic law. Accordingly, when a provision imposes a civil penalty, an assessment is required of whether it amounts to a 'criminal' penalty for the purposes of the ICCPR.[4]

The definition of 'criminal' in human rights law

1.7 There are three criteria for assessing whether a penalty is 'criminal' for the purposes of human rights law:

a) *The classification of the penalty in domestic law*: If a penalty is labelled as 'criminal' in domestic law, this classification is considered

determinative for the purposes of human rights law, irrespective of its nature or severity. However, if a penalty is classified as 'non-criminal' in domestic law, this is never determinative and requires its nature and severity to be also assessed.

b) *The nature of the penalty*: A criminal penalty is deterrent or punitive in nature. Non-criminal sanctions are generally aimed at objectives that are protective, preventive, compensatory, reparatory, disciplinary or regulatory in nature.

c) *The severity of the penalty*: The severity of the penalty involves looking at the maximum penalty provided for by the relevant legislation. The actual penalty imposed may also be relevant but does not detract from the importance of what was initially at stake. Deprivation of liberty is a typical criminal penalty; however, fines and pecuniary penalties may also be deemed 'criminal' if they involve sufficiently significant amounts but the decisive element is likely to be their purpose, ie, criterion (b), rather than the amount per se.

1.8 Where a penalty is designated as 'civil' under domestic law, it may nonetheless be classified as 'criminal' under human rights law if either the nature of the penalty or the severity of the penalty is such as to make it criminal. In cases where neither the nature of the civil penalty nor its severity are separately such as to make the penalty 'criminal', their cumulative effect may be sufficient to allow classification of the penalty as 'criminal'.

When is a civil penalty provision 'criminal'?

1.9 Many civil penalty provisions have common features. However, as each provision or set of provisions is embedded in a different statutory scheme, an individual assessment of each provision in its own legislative context is necessary.

1.10 In light of the criteria described in paragraph 1.9 above, the committee will have regard to the following matters when assessing whether a particular civil penalty provision is 'criminal' for the purposes of human rights law.

a) Classification of the penalty under domestic law

1.11 As noted in paragraph 1.9(a) above, the classification of a civil penalty as 'civil' under Australian domestic law will be of minimal importance in deciding whether it is criminal for the purposes of human rights law. Accordingly, the committee will in general place little weight on the fact that a penalty is described as civil, is made explicitly subject to the rules of evidence and procedure applicable to civil matters, and has none of the consequences such as conviction that are associated with conviction for a criminal offence under Australian law.

b) The nature of the penalty

1.12 The committee considers that a civil penalty provision is more likely to be considered 'criminal' in nature if it contains the following features:

- the penalty is punitive or deterrent in nature, irrespective of its severity;
- the proceedings are instituted by a public authority with statutory powers of enforcement;[5]
- a finding of culpability precedes the imposition of a penalty; and
- the penalty applies to the public in general instead of being directed at regulating members of a specific group (the latter being more likely to be viewed as 'disciplinary' rather than as 'criminal').

c) The severity of the penalty

1.13 In assessing whether a pecuniary penalty is sufficiently severe to amount to a 'criminal' penalty, the committee will have regard to:

- the amount of the pecuniary penalty that may be imposed under the relevant legislation;
- the nature of the industry or sector being regulated and relative size of the pecuniary penalties and the fines that may be imposed;
- whether the maximum amount of the pecuniary penalty that may be imposed under the civil penalty provision is higher than the penalty that may be imposed for a corresponding criminal offence; and
- whether the pecuniary penalty imposed by the civil penalty provision carries a sanction of imprisonment for non-payment.

The consequences of a conclusion that a civil penalty is 'criminal'

1.14 If a civil penalty is assessed to be 'criminal' for the purposes of human rights law, this does not mean that it must be turned into a criminal offence in domestic law. Human rights law does not stand in the way of decriminalization. Instead, it simply means that the civil penalty provision in question must be shown to be consistent with the criminal process guarantees set out the article 14 and article 15 of the ICCPR.

1.15 If a civil penalty is characterised as not being 'criminal', the criminal process guarantees in articles 14 and 15 will not apply. However, such provisions must still comply with the right to a fair hearing before a competent, independent and impartial tribunal contained in article 14(1) of the ICCPR.

The committee's expectations for statements of compatibility

1.16 As set out in its *Practice Note 1*, the committee views sufficiently detailed statements of compatibility as essential for the effective consideration of the human rights compatibility of bills and legislative instruments. The committee expects statements for proposed legislation which includes civil penalty provisions, or which draws on existing legislative civil penalty regimes, to address the issues set out in this interim practice note.

1.17 In particular, the statement of compatibility should:

- explain whether the civil penalty provisions should be considered to be 'criminal' for the purposes of human rights law, taking into account the criteria set out above; and
- if so, explain whether the provisions are consistent with the criminal process rights in article 14 and article 15 of the ICCPR, including providing justifications for any limitations of these rights.[6]

1.18 The key criminal process rights that have arisen in the committee's scrutiny of civil penalty provisions are set out briefly below. The committee, however, notes that the other criminal process guarantees in articles 14 and 15 may also be relevant to civil penalties that are viewed as 'criminal' and should be addressed in the statement of compatibility where appropriate.

Right to be presumed innocent

1.19 Article 14(2) of the ICCPR provides that a person is entitled to be presumed innocent until proved guilty according to law. This requires that the case against the person be demonstrated on the criminal standard of proof, that is, it must be proven beyond reasonable doubt. The standard of proof applicable in civil penalty proceedings is the civil standard of proof, requiring proof on the balance of probabilities. **In cases where a civil penalty is considered 'criminal', the statement of compatibility should explain how the application of the civil standard of proof for such proceedings is compatible with article 14(2) of the ICCPR.**

Right not to incriminate oneself

1.20 Article 14(3)(g) of the ICCPR provides that a person has the right 'not to be compelled to testify against himself or to confess guilt' in criminal proceedings. **Civil penalty provisions that are considered 'criminal' and which compel a person to provide incriminating information that may be used against them in the civil penalty proceedings should be appropriately justified in the statement of compatibility.[7] If use and/or derivative use immunities are not made available, the statement of compatibility should explain why they have not been included.**

Right not to be tried or punished twice for the same offence

1.21 Article 14(7) of the ICCPR provides that no one is to be liable to be tried or punished again for an offence of which she or he has already been finally convicted or acquitted. **If a civil penalty provision is considered to be 'criminal' and the related legislative scheme permits criminal proceedings to be brought against the person for substantially the same conduct, the statement of compatibility should explain how this is consistent with article 14(7) of the ICCPR.**

1 This approach is reflected in the Regulatory Powers (Standard Provisions) Bill 2012, which is intended to provide a standard set of regulatory powers which may be drawn on by other statutes.

2 The text of these articles is reproduced at the end of this interim practice note. See also UN Human Rights Committee, General Comment No 32 (2007) on article 14 of the ICCPR.

3 Article 14(1) of the ICCPR also guarantees the right to a fair hearing in civil proceedings.

4 This practice note is focused on civil penalty provisions that impose a pecuniary penalty only. But the question of whether a sanction or penalty amounts to a 'criminal' penalty is a more general one and other 'civil' sanctions imposed under legislation may raise this issue as well.

5 In most, if not all, cases, proceedings in relation to the civil penalty provisions under discussion will be brought by public authorities.

6 That is, any limitations of rights must be for a legitimate objective and be reasonable, necessary and proportionate to that objective – for further information see *Practice Note 1*.

7 The committee notes that a separate question also arises as to whether testimony obtained under compulsion that has already been used in civil penalty proceedings (whether or not considered 'criminal') is consistent with right not to incriminate oneself in article 14(3)(g) of the ICCPR if it is used in subsequent criminal proceedings.

For further Information please contact:

Parliamentary Joint Committee on Human Rights

Tel. (02) 6277 3823 • Fax. (02) 6277 5767

Email: human.rights@aph.gov.au

PO Box 6100, Parliament House
CANBERRA ACT 2600

Articles 14 and 15 of the International Covenant on Civil and Political Rights

1. Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal

case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

c) To be tried without undue delay;

d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.