



Australian Government  
Department of Employment  
and Workplace Relations

# **Inquiry into the Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2023**

Submission from the Department of  
Employment and Workplace Relations to the  
Senate Standing Committees on Education  
and Employment

## Contents

Introduction.....	3
Background.....	3
Overview of the Bill .....	4
Constraining and clarifying the application of section 1062A.....	5
Ensuring that legislative support provided under Chapter 2D operates in a similar way to legislative support provide by section 32B of the FFSP Act and is otherwise effective.....	6
Clarifying how Chapter 2D interacts with the rest of the Social Security Act.....	8
Clarifying the reporting requirement.....	8
Other amendments .....	9

# Inquiry into the Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2023

## Introduction

Thank you for the opportunity to provide a submission to the Education and Employment Committee (the Committee) on the Social Security and Other Legislation (Miscellaneous Measures) Bill (the Bill).

In this submission the Department of Employment and Workplace Relations explains what the measures in the Bill do, providing additional information to that contained in the Explanatory Memorandum (EM). The Bill is a legally technical one that addresses some drafting issues that arise in relation to Chapter 2D of the *Social Security Act 1991* (the SS Act). It does not seek to make policy changes, as is explained below.

## Background

Because the Bill makes amendments in relation to Chapter 2D of the SS Act, it is first appropriate to explain the context and reasons for the inclusion of Chapter 2D in the SS Act. The High Court in the two Williams<sup>1</sup> cases determined that most Commonwealth expenditure requires legislative authority, beyond an appropriation, supported by the Commonwealth's constitutional powers.

Since the Williams decisions legislative authority for many Commonwealth programs has been provided by section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (FFSP Act). Section 32B gives the Commonwealth a broad power to make, vary or administer:

- arrangements under which Commonwealth funds are payable, and
- grants of financial assistance,

provided the arrangements or grants are specified in the regulations or are for the purposes of a program specified in the regulations. The *Financial Framework (Supplementary Powers) Regulations 1997* (the FFSP Regulations) list many Commonwealth programs along with a brief description of each program. The power of the Commonwealth in section 32B is exercisable by a Minister, accountable authority or their delegates.

Adding a new item to the FFSP Regulations involves reasonably substantial administrative effort and time, which has caused implementation delays on occasions for new Commonwealth programs. Chapter 2D was inserted in the SS Act by the *Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Act*

---

<sup>1</sup> See *Williams v Commonwealth of Australia* (2012) 248 CLR 156 and *Williams v Commonwealth of Australia* (2014) 252 CLR 416.

2022 (SPROM Act) to provide an alternative, more streamlined source of legislative authority for programs with an employment focus (in the main programs that help people find and maintain employment), avoiding implementation delays. Chapter 2D consists of five sections with the key provision that provides legislative authority for employment related programs being section 1062A.

The wording of section 1062A closely reflects the wording of section 32B of the FFSP Act as both provisions are intended to provide legislative support for Commonwealth expenditure in a similar way. Both provisions confer a broad power on the Commonwealth to enter into arrangements and make grants, which is appropriate for a provision that (in both cases) provides legislative authority for a wide range of Commonwealth programs. Details regarding individual programs would be specified in documentation relevant to those programs, for example in program guidelines, funding agreements or services contracts, tender documentation etc.

For section 1062A to apply, an arrangement or grant must relate to one or more of the matters specified in section 1062A and come within the specified constitutional limits set out in section 1062B. Section 1062A:

- provides legislative authority to relevant programs irrespective of whether or not the program existed before the provision commenced on 2 April 2022;
- can apply to other departments' programs so long as they fall within its terms, even though the power is vested in the Employment Secretary (or their delegate) on behalf of the Commonwealth; and
- provides "automatic" legislative authority for programs that come within its terms. That is, for such programs the Employment Secretary (or their delegate) may proceed to make, vary, or administer arrangements or grants on the basis there is power to do so, without having to declare or otherwise provide that the arrangement or grant of financial assistance is authorised by the section.

## Overview of the Bill

The explanatory memorandum for the SPROM Bill stated in relation to Chapter 2D that:

*"all Chapter 2D does is provide statutory authority for expenditure ... All of the usual processes and requirements for the establishment and oversight of such programs will remain unchanged."*

The Bill makes technical amendments in relation to Chapter 2D, as described below, to ensure that original intent is achieved and also that Chapter 2D operates effectively.

## Constraining and clarifying the application of section 1062A

As noted above, currently section 1062A provides automatic legislative authority for employment related programs, without the need for the Employment Secretary (or anyone else) to do anything. As further noted, it can provide legislative support for other departments' programs. Because section 32B of the FFSP Act is expressed to only apply where the Commonwealth does not otherwise have the power to do the relevant thing (i.e. enter into arrangements/make grants of financial assistance), where section 1062A provides legislative support for a program, it arguably displaces existing legislative support that is provided by section 32B of the FFSP Act.

The broad scope and automatic application of section 1062A has created some issues, specifically:

- it is difficult to ascertain at any time which programs s1062A provides legislative authority for; that can only be done through a legal analysis of a program against the matters specified in section 1062A and the sources of constitutional support in section 1062B. That difficulty makes it hard to ensure that appropriate delegations are in place for programs and that as relevant they are reported on under section 1062D; and
- in some cases departments may be relying on legislative authority provided by section 32B of the FFSP Act, when arguably that authority has now been displaced by section 1062A, without realising that has occurred.

The Bill will therefore constrain and clarify the application of section 1062A in two key ways:

- First, it will amend section 1062A so that it can only provide legislative support for grants and arrangements if they are for a program specified in a new notifiable instrument made by the Employment Secretary (see item 4). That new notifiable instrument, which will be publicly available, will list programs supported by section 1062A and provide a short description of such programs in a similar way that the FFSP Regulations do. It would be the intent that in the main only programs of the Employment Department would be listed as being supported. In short, this change will mean section 1062A will provide legislative support for less programs than is currently the case, and the programs that are supported will be known with certainty and publicly listed. The amendment therefore promotes greater transparency than the current provisions; and
- The Bill will clarify that section 1062A does not displace legislative authority provided by section 32B of the FFSP Act (see the second part of item 5), allowing other departments

(in particular) to be able to continue to rely on legislative authority provided by section 32B.

Ensuring that legislative support provided under Chapter 2D operates in a similar way to legislative support provide by section 32B of the FFSP Act and is otherwise effective

#### ADJR Review

The Bill (see Item 1) will clarify that decisions under Chapter 2D<sup>2</sup> are not, as was the case for such decisions when previously supported by section 32B of the FFSP Act, subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, for the reasons set out in the EM. Decisions under section 32B of the FFSP Act, and decisions to enter into arrangements and commit money under section 23 of the *Public Governance, Performance and Accountability Act 2013*, are also excluded from ADJR Act review for the same reasons.

It was never the intent that Chapter 2D decisions would be subject to judicial review and even in the absence of the amendments it is not clear that they would be anyway. Section 1062A, which is the most relevant provision in this regard, provides a broad discretionary power for the Commonwealth to do certain things, without requiring the Commonwealth to do anything, or creating any legal entitlement for a third party. As stated in the EM it is really a legislated form of the Commonwealth's executive power; accordingly, decisions under that provision are arguably not of an administrative character as is required for the ADJR Act to apply. Further, there is a body of case law<sup>3</sup> that suggests where a decision is only authorised by statute in very general terms, it is difficult to conclude that the statute made provision for the decision and that the decision was accordingly made "under" the statute which is a further prerequisite to the ADJR Act applying. Finally for a person to have rights under the ADJR Act they would generally need to be aggrieved by a decision; given that Chapter 2D does not invest anyone with rights (cf for example other provisions of the Social Security Act that create rights to benefits if certain conditions are met), it is not clear who would be able to meet that criteria. The amendment is therefore clarificatory only.

It is also worth explicitly noting that the amendments would not affect any income support recipients' rights to review of decisions related to their payments, as those payments do not derive legislative support from Chapter 2D, but rather from other more specific provisions of the social security law.

---

<sup>2</sup> A decision to spend funds or enter into an arrangement under Chapter 2D (specifically under section 1062A) will only be made at the point of payment or entry into an arrangement. Decisions such as those regarding the selection of a successful tenderer in a procurement process, or the selection of successful funding recipients in a grants process, are preliminary decisions that are not captured by Chapter 2D.

<sup>3</sup> See for example *Schlaepfer v Australian Securities and Investments Commission* [2017] FCA 1122, *Hutchins v Commissioner of Taxation* (1996) 65 FCR 269, *Salerno v National Crime Authority* FCR 143 and *Griffith University v Tang* (2005) 221 CLR 99.

### Excluding most of the *Social Security (Administration) Act 1999* (the Admin Act)

As explained in the EM, the Bill excludes the Admin Act (see new section 1062DA at item 8), with three limited exceptions, from applying to Chapter 2D, because other than for those exceptions the Admin Act is simply not relevant to Chapter 2D. This is because Chapter 2D is very different from the rest of the social security law, and was intended to operate as a “standalone” chapter providing legislative authority for employment focussed programs.

Amongst the provisions excluded from applying to Chapter 2D are merits review provisions. Once again it was never the intent that Chapter 2D decisions would be subject to merits review, and for similar reasons as discussed above for ADJR Review, even in the absence of the amendment it is not clear that rights of merits review would apply to Chapter 2D decisions; the amendment merely clarifies that this is the case. In doing so the Bill once again ensures that Chapter 2D decisions are treated in the same way as decisions under section 32B of the FFSP Act (and also other provisions that provide legislative authority for the Commonwealth’s spending or commitment of funds).<sup>4</sup> Again, this aligns arrangements with how they were prior to commencement of Chapter 2D.

Commonwealth decisions to spend or commit funds, for employment type programs or otherwise, will often be inherently unsuited to judicial or merits review. For example, if an unsuccessful tenderer for employment services could seek review of a decision to enter into a contract and pay funds to a successful tender, that could lead to implementation delays and servicing gaps while the decision is reviewed, and also potentially result in compensation being payable to the initially successful tenderer if the decision is reversed.

However, all of the usual rights for persons/organisations under programs continue to apply, irrespective of the legislative source of support for that program (whether it be Chapter 2D, section 32B of the FFSP Act or otherwise). Depending on the nature of the program rights could for example include:

- Rights under the *Government Procurement (Judicial Review) Act 2018*;
- Rights under Program Grant Guidelines; paragraph 8.6 of the Commonwealth Grant Rules and Guidelines (CGRGs) specifies that review and/or and complaint mechanisms should form part of all grant opportunity guidelines, as relevant. As an example the Australian Apprenticeships Incentive System (AAIS program) derives legislative support from Chapter 2D. [The AAIS program guidelines](#) set out a process for internal review of an eligibility or payment decision. They also inform grant recipients about the role the Commonwealth Ombudsman plays in investigating complaints about the actions and

---

<sup>4</sup> Eg section 23 of the PGPA Act and section 85GA of the *A New Tax System (Family Assistance) Act 1999*.

decisions of Australian Government agencies and provides details on how to contact the Ombudsman;

- Rights to raise issues with the Commonwealth Ombudsman (and for the Ombudsman to investigate the matters raised); and
- Rights at common law to seek review of decisions.

### Clarifying how Chapter 2D interacts with the rest of the Social Security Act

It is possible that Chapter 2D could interact with the rest of the SS Act in some unintended ways and the Bill will ensure that is not the case. Specifically, the Bill clarifies:

- for the reasons set out in the EM, that the inclusion of Chapter 2D does not unintentionally give rise to a new category of protected information (see Item 3 of the Bill);
- that the source of legislative authority for a payment is irrelevant to whether it counts as income or not for the purposes of assessing someone's social security benefits (see Item 2, with an equivalent change being made to the *Veterans' Entitlements Act 1986* at Item 12);
- that a payment supported by section 1062A is not a social security payment (see new subsection 1062A(5A) at Item 5).

(As mentioned above other payments (for example jobseeker payment, parenting payment etc) provided for by the Social Security Act do not derive their authority from Chapter 2D, and as such they will not be impacted by any of the above amendments.)

### Clarifying the reporting requirement

Currently section 1062D requires the department to include in its annual report:

- amounts paid under grants and arrangements referred to under section 1062A; and
- the total number of grants and arrangements referred to in section 1062A that were made in that period.

The Bill repeals and replaces section 1062D (see item 11). It does so in order to:

- require the financial information noted in the first dot point above to be reported on a program by program basis; and
- remove the requirement to report the total number of arrangements and grants (see second dot point above). How that number should be totalled is not clear, and whatever



way things are tallied, the number arrived at wouldn't provide Parliament or the public with any meaningful information.

### Other amendments

The Bill makes some technical changes to allow section 1062A to better engage with the Commonwealth's Constitutional powers, specifically in relation to climate change and Indigenous persons (see Items 6 to 10).