



Office of the Public Advocate

Submission in response to the Senate Standing Committee on Community Affairs Legislation Committee:

Business Services Wage Assessment Tool Payment Scheme Bill 2014 Bill

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About the Office of the Public Advocate

- 1.1. The Office of the Public Advocate (OPA) is a statutory office, independent of government and government services, that works to protect and promote the rights, interests and dignity of people with disabilities. OPA provides a number of services to work towards these goals, including the provision of advocacy, investigation and guardianship services to people with cognitive impairments or mental illnesses. In the last financial year, OPA was involved in 1,590 guardianship matters, 386 investigations and 394 cases requiring advocacy.
- 1.2. The OPA mission is to uphold the rights and interests of people with a disability and work to eliminate abuse, neglect and exploitation.
- 1.3. We wish to focus on a particular part of the Business Services Wage Assessment Tool Payment Scheme Bill 2014 (BSWAT Bill): Part 4–Nominees.
- 1.4. The BSWAT Bill contains provisions relating to the appointment of nominees to act on behalf of persons similar to those contained in the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) pt 5. The BSWAT Bill and the NDIS Act retain a substitute decision-making framework through the appointment of nominees. Of particular concern is the power of the Secretary under the BSWAT Bill (like the CEO of the NDIA under the NDIS Act) to appoint a nominee on their own initiative.
- 1.5. OPA wishes to raise a number of concerns on this point:
 - the own motion provision effectively provides for the Secretary to appoint a substitute decision maker through an unregulated process. There is no capacity test or medical threshold determining whether a nominee should be appointed;
 - the Secretary has powers of delegation, effectively meaning a departmental employee can appoint a substitute decision maker;
 - an equivalent process undertaken at a state or territory level is undertaken by a Tribunal, for example the appointment of a guardian by the Victorian Civil and Administrative Tribunal. Criteria for appointment of a guardian, as contained in the *Guardianship and Administration Act 1986* (Vic) for example, is not reflected in the BSWAT Bill.
 - as relevant to the appointment of nominees under the NDIS Act, OPA in a joint submission with the South Australian Office of the Public Advocate to the Australian Law Reform Commission Discussion Paper *Equality, Capacity and Disability in Commonwealth Laws* submitted the following:

“We would like to see the power to appoint representatives curtailed more than it is currently in the case of NDIS nominees (who are appointed by the CEO).” OPA see this as equally applying to the BSWAT Bill and note here that we would like to see greater reference to the rights, will and preferences of participants when nominees are being appointed.



- a nominee appointed on the initiative of the Secretary can ultimately use their own judgment to determine whether the participant is not capable of doing, or being supported to do, the act. This also includes refraining from doing an act in order to give effect to a decision. This is a powerful function and OPA is of the view that the BSWAT Bill does not contain sufficient safeguards or oversight of the actions of a nominee once appointed.
- 1.6. OPA wishes to submit that where it is decided that a nominee is required, the participant's preference of nominee should be respected unless there are very good reasons for not doing so (such a reason would be that the appointment of the person would jeopardise the personal and social wellbeing of the participant).