

## **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**

1.5 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.<sup>1</sup> 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. The bill establishes a payment scheme for eligible current and former employees of Australian Disability Enterprises for work previously performed whilst earning wages calculated using BSWAT.

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

1.6 The principal rights engaged by this bill are the right to an effective remedy, the right to just and favourable conditions of work and the right to equality and non-discrimination, including the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity.

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

1.7 Article 2 of the International Covenant on Civil and Political Rights (ICCPR) requires States parties to ensure access to an effective remedy for violations of human rights. States parties are required to establish appropriate judicial and administrative mechanisms for addressing claims of human rights violations under domestic law. Where public officials have committed violations of rights, States parties may not relieve perpetrators from personal responsibility through amnesties or legal immunities and indemnities.

1.8 States parties are required to make reparation to individuals whose rights have been violated. Reparation can involve restitution, rehabilitation and measures of satisfaction—such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices—as well as bringing to justice the perpetrators of human rights violations.

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1 *Nojin v Commonwealth of Australia* [2012] FCAFC 192.

1.9 Effective remedies should be appropriately adapted to take account of the special vulnerability of certain categories of person including, and particularly, children.

*Whether payment amounts constitute an effective remedy*

1.10 As noted above, the bill seeks to establish a payment system for supported employees (with an intellectual impairment) of Australian Disability Enterprises who previously had their wages assessed under BSWAT. This follows the Federal Court's decision in *Nojin v Commonwealth of Australia*, which found the application of the BSWAT to be discriminatory.<sup>2</sup>

1.11 The statement of compatibility notes that the bill engages and may limit the right to an effective remedy, particularly with regard to the fact that the scheme will not make payments to individuals who 'seek redress through the courts or other systems'. The statement of compatibility concludes that the bill is compatible with this right because, to the extent that it 'may be perceived to limit human rights, those limitations are reasonable, necessary and proportionate'.<sup>3</sup>

1.12 The committee notes that the scheme provides for the payment of an amount equal to 50 per cent of what a person would have been paid had their wages been assessed only on the productivity component of BSWAT.<sup>4</sup> The precise calculation will be set out in rules determined by the minister.<sup>5</sup> However, the committee notes that, while the statement of compatibility states that the scheme provides an 'effective remedy' for eligible workers,<sup>6</sup> 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.

1.13 The committee notes that information regarding the factors taken into account in determining the amount of scheme payments is particularly relevant to the human rights assessment of whether the scheme provides an effective remedy. The continued use of BSWAT to assess the wages of individuals with an intellectual disability, discussed below, is also relevant to this assessment.

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2 *Nojin v Commonwealth of Australia* [2012] FCAFC 192.

3 Statement of compatibility, p. 2.

4 The Federal Court found that the non-productive element of the BSWAT assessment of wages for workers with an intellectual disability constituted unlawful discrimination in contravention of section 15 of the *Disability Discrimination Act 1992*.

5 Proposed subsection 8(3).

6 Statement of compatibility, p. 1.

**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.**

*Continued use of BSWAT to assess the wages of individuals with an intellectual disability*

1.15 As noted above, the bill establishes a payment scheme for eligible current and former employees of Australian Disability Enterprises for work previously performed whilst earning wages calculated using BSWAT.<sup>7</sup>

1.16 The committee notes that the Australian Human Rights Commission (AHRC) has granted a 12-month exemption from the operation of certain provisions of the *Disability Discrimination Act 1992* to allow for the continued use of BSWAT. The exemption contains several conditions, including a requirement that the Commonwealth take all necessary steps to transition as quickly as possible from the BSWAT to the Supported Wage System, or an alternative tool approved by the Fair Work Commission.

1.17 In the committee's view, the extent to which the quantum of the proposed scheme payments may 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.

1.18 Further, the committee considers it unlikely that the bill could be assessed as providing an effective remedy while affected individuals continue to be paid wages assessed by the use of BSWAT.

**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.**

*Effect of scheme payments on legal remedies*

1.20 The bill provides that, if a person accepts a payment under the scheme, the effect is twofold in respect of access to legal remedies. First, the person will cease to be a member in any of a number of specified proceedings. Second, a statutory release and indemnity provision will immediately operate to relieve the Commonwealth, each Australian Disability Enterprise and all other people from further liability.<sup>8</sup> In relation to these measures, the statement of compatibility notes:

There could be a perception that a human right to an effective remedy is being limited because...acceptance of a payment from the scheme releases the Commonwealth, Australian Disability Enterprises and all other persons

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7 Statement of compatibility, p. 1.

8 Proposed section 10.

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from liability in relation to unlawful discrimination associated with the use of a BSWAT assessment to determine the wages of that individual.<sup>9</sup>

1.21 The statement of compatibility explains that these measures are intended to serve the objective of preventing 'the Commonwealth utilising taxpayer funds to pay more than once for the same, or similar, claims in relation to the payment of wages assessed using the BSWAT'.<sup>10</sup>

1.22 The committee notes that, in addition to these measures, the statement of compatibility states that it is intended that 'the scheme will not pay compensation, but will provide a payment to eligible people',<sup>11</sup> and that any payment made under the scheme will not lead to any admission of liability on the part of the Commonwealth.<sup>12</sup>

1.23 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.<sup>13</sup> Taken together, in light of the Federal Court finding that the application of the BSWAT constituted unlawful discrimination, the release and indemnity provisions; the expressing of offers as payments instead of 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.

1.24 The committee 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.

**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.**

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

1.26 The payment scheme proposed by the bill would not provide payments for affected persons who have received an 'alternative amount'. This is defined as being where a person has accepted or been paid money in relation to or settlement of a claim made in relation to matters related to the discriminatory BSWAT assessments.

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9 Statement of compatibility, p. 2.

10 Statement of compatibility, p. 2.

11 Statement of compatibility, p. 2.

12 Proposed subsection 98.

13 Statement of compatibility, p. 3.

1.27 The committee notes that the statement of compatibility states that the scheme 'provides an effective remedy to...[affected] workers, while also providing effective mechanisms for internal and external appeal for the scheme itself'.<sup>14</sup> However, there appears to be no internal or external review provisions for people deemed to be ineligible for the scheme due to having an 'alternative amount'.<sup>15</sup>

1.28 The committee notes that this represents a limitation on the right to an effective remedy. However, the bill provides no assessment of the compatibility of this apparent limitation on the right.

1.29 The committee's usual expectation where a right may be limited is that the statement of compatibility set out the legitimate objective being pursued, the rational connection between the measure and that objective, and the proportionality of the measure.

**1.30 The committee therefore seeks the advice of the Minister for Social Services as to whether the lack of effective review mechanisms for person 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.**

*Secretary-appointed external reviewer*

1.31 The committee notes that the external review mechanisms provided in the bill do not enable a person to seek merits review through the Administrative Appeals Tribunal. Instead, proposed section 27 requires the Secretary to appoint an external reviewer.

1.32 The committee is concerned that this approach has a number of consequences that may not be compatible with the right to an effective remedy. For instance, the external reviewer may request the Secretary to exercise his or her powers to seek further information but 'only if the Secretary considers it appropriate to do so';<sup>16</sup> and the Secretary may 'refuse to comply with the request and inform the

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14 Statement of compatibility, p. 2.

15 This limits the review mechanisms available for such people who are affected by decisions made under section 6 (ineligibility for the scheme), section 14 (inability to register), section 16 (ineligible to make an application), section 17 (no determination to be made) and section 21 (not to receive an offer).

16 Proposed section 30; Explanatory memorandum, p. 23.

external reviewer',<sup>17</sup> in cases 'where the Secretary has already sought the information and the applicant or person has provided a reasonable explanation as to why the information cannot be provided'.<sup>18</sup>

1.33 However, 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.

**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.**

***Right to just and favourable conditions of work***

1.35 The right to work and rights in work are guaranteed in articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>19</sup>

1.36 The UN Committee on Economic, Social and Cultural Rights has stated that the obligations of States parties to the ICESCR in relation to the right to work include the obligation to ensure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly, allowing them to live in dignity. The right to work is understood as the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work.

1.37 Under article 2(1) of ICESCR, Australia has certain obligations in relation to the right to work. These include:

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right;

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17 Subclause 30(2).

18 Explanatory memorandum, p. 23.

19 Related provisions relating to such rights for specific groups are also contained in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), articles 11 and 14(2)(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 32 of the Convention on the Rights of the Child and article 27 of the Convention on the Rights of Persons with Disabilities (CRPD).

- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

1.38 The right to work may be subject only to such limitations as are determined by law and compatible with the nature of the right, and solely for the purpose of promoting the general welfare in a democratic society.

*Whether payment amounts constitute adequate remuneration*

1.39 As described above, the bill would establish a scheme that provides for the payment of an amount equal to 50 per cent of what an affected person would have been paid had their wages been assessed only on the productivity component of BSWAT.

1.40 The committee notes that, to the extent that the payments provided for by the scheme would be 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. However, the statement of compatibility provides no assessment of this potential limitation on the right to work and rights at work.

1.41 The committee's usual expectation where a right may be limited is that the statement of compatibility set out the legitimate objective being pursued, the rational connection between the measure and that objective, and the proportionality of the measure.

**1.42 The committee therefore seeks 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 reasonable and proportionate measure for the achievement of that objective.**

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**Rights to equality and non-discrimination**

1.43 The rights to equality and non-discrimination are guaranteed by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).<sup>20</sup>

1.44 These are fundamental human rights that essential to the protection and respect of all human rights. They provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.45 For human rights purposes 'discrimination' is impermissible differential treatment among persons or groups that result in a person or a group being treated less favourably than others, based on one of the prohibited grounds for discrimination.<sup>21</sup>

1.46 Discrimination may be either direct or indirect. Indirect discrimination may occur when a requirement or condition is neutral on its face but has a disproportionate or unintended negative impact on particular groups.

1.47 The Convention on the Rights of Persons with Disabilities (CRPD) further describes the content of these rights, describing the specific elements that States parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others.

1.48 Article 5 of the CRPD guarantees equality for all persons under and before the law and the right to equal protection of the law. It expressly prohibits all discrimination on the basis of disability.

1.49 Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) requires States parties to refrain from denying persons with disabilities their legal capacity, and to provide them with access to the support necessary to enable them to make decisions that have legal effect.

***Provision for use of nominees***

1.50 The statement of compatibility notes that the 'scheme's target group is vulnerable because they have an intellectual disability', and lists a number of

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20 See also article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), articles 1, 2, 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), article 2 of the Convention on the Rights of the Child (CRC), articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and articles 3, 4, 5 and 12 of the Convention on the Rights of Persons with Disabilities (CRPD).

21 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.



mechanisms that are intended to increase the choice and control of affected individuals, including:

- allowing the provision of nominees;
- requiring nominees to ascertain the preferences of the applicant and to act in a manner giving effect to those wishes; and
- protecting the rights of the person with disability by requiring the nominee to declare any interest, pecuniary or otherwise, in the outcome.<sup>22</sup>

1.51 While the committee acknowledges that some people with an intellectual impairment may benefit from the appointment of a nominee, it considers that provision for use of nominees must be accompanied by adequate safeguards to ensure that the represented person's autonomy, will and preferences are respected and that the nominee acts to support, rather than substitute, the decision making of the represented person.<sup>23</sup>

1.52 In this respect, the committee is concerned that the bill may not, in a number of respects, ensure that nominees support, rather than substitute, the decision making of represented persons.

1.53 For example, the committee notes that the criteria the Secretary is to apply in considering the appointment of nominees are to be contained in as yet unpublished rules.<sup>24</sup> The rules may also prescribe and modify duties of a nominee, which *may* include duties requiring the nominee to support decision making by the participant personally, or to have regard to and give appropriate weight to the views of the participant or inform the secretary and participant of declaring any interest, pecuniary or otherwise, in the outcome.<sup>25</sup> 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.

1.54 The committee notes that the statement of compatibility provides no assessment of this potential limitation on the rights of person with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity.

1.55 The committee's usual expectation where a right may be limited is that the statement of compatibility set out the legitimate objective being pursued, the rational connection between the measure and that objective, and the proportionality of the measure.

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22 Statement of compatibility, p. 3

23 Committee on the Rights of Persons with Disabilities, General Comment No 1 (2014); Article 12: Equal recognition before the law (CRPD/C/GC/1, adopted 11 April 2014) p. 6.

24 Subclause 51(5)(b).

25 Subclause 46(5).

**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.**

*Timeframes applying to scheme*

1.57 The statement of compatibility for the bill notes that there are 'strict timeframes for the scheme'.<sup>26</sup> These include a requirement for registering by 1 May 2015, and lodging an application by 30 November 2015; timeframes will also apply to acceptance of an offer and applications for a review of a determination. There are no avenues for extension of the proposed deadlines where a review of a determination is being sought.

1.58 The objective of the strict timeframes is identified as being to promote the delivery of payments to eligible workers 'as quickly as possible'.

1.59 The committee notes also 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 for payment simply by not taking any action by the end of the acceptance period.<sup>27</sup>

1.60 The committee notes 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 an intellectual impairment. For example, such people may need more time and flexibility in order to access necessary support and advice to facilitate the exercise of their personal choice and control in responding to an offer. 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 their rights. However, the statement of compatibility provides no assessment of this potential limitation of those rights.

1.61 The committee's usual expectation where a right may be limited is that the statement of compatibility set out the legitimate objective being pursued, the

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26 Statement of compatibility, p. 1.

27 Subclause 19(2). It should also be noted that a period of 14 days may be all that is available for a person to consider an offer if made late during the operation of the scheme.

rational connection between the measure and that objective, and the proportionality of the measure.

**1.62 The committee therefore seeks 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 reasonable and proportionate measure for the achievement of that objective.**