Submission to Senate Employment, Workplace Relations and Education Committee

Inquiry into the Social Security Amendment (2007 Measures No. 2) Bill 2007

September 2007

The provisions of the Bill on which we wish to comment are as follows:

1. Replacement of administrative guidelines on Work Capacity Assessments with a legislative instrument that is binding upon the Secretary and appeals bodies.
2. Substitution of work capacity assessors for medical practitioners in the assessment of impairment ratings.

1. Replacement of administrative guidelines on Work Capacity Assessments with a legislative instrument that is binding upon the Secretary and appeals bodies

This measure is designed to implement the Government's Budget decision to 'reinforce the role of job capacity assessments'. The practical effect of this change is likely to substantially restrict the discretion of the Social Security Appeals Tribunal and Administrative Appeals Tribunal in undertaking the merits review of these assessments.

This is of concern since the issues that have to be addressed in a capacity assessments are highly complex, including accurate diagnosis, assessment of the degree of impairment of function, the prognosis over the next two years, assessment of the likely impact of medical treatment or rehabilitation, and assessment of the impact of an impairment on an individual's capacity to work a certain number of hours each week. Accurate assessments of these factors require the exercise of a higher degree of discretion than is the case with most other social security decisions. This is especially so under the present eligibility requirements for Disability Support Pension (DSP), which seek to make fine distinctions between those able to work for less than 8 hours per week, 15 hours per week, or 30 hours per week.

It would therefore be inappropriate to introduce a legislative instrument that prescribes in detail how these assessments should be conducted, beyond the existing legislative framework set out in the Social Security Act. One likely impact of such a change would be to reduce the flexibility of Job Capacity Assessors (JCA) to take individual circumstances into account. A second implication is that Centrelink and the appeals bodies would have less discretion to overturn inaccurate JCA assessments on appeal. This would arise because their discretion to do so would be circumscribed by the provisions of the legislative instrument. As a result of these two factors, it is likely that claims for Disability Support Pension would be unfairly or inappropriately rejected.

Job capacity assessments have a substantial impact on the kind of income support people receive. Those denied the Disability Support Pension pursuant to the 2005 Welfare to Work legislation will, in most cases, receive a much lower Allowance payment such as Newstart Allowance. The difference in levels of payment may exceed $100 per week. The assessments also have an important bearing on the activity requirements that may be imposed, and whether people with disabilities on Allowance payments are entitled to pensioner concessions.

Although as a matter of general principle, ACOSS prefers social security legislation to limit administrative discretion so that decisions are more transparent, fair and consistent, for the reasons outlined above, job capacity assessments inevitably involve a large element of discretion. It would be inappropriate for detailed guidelines in such a complex and sensitive area to be legislated which could lead to an excessively rigid and prescriptive approach to decision making. Legislation should instead set out the broad framework within which assessments will be made. If it is considered necessary to alter the overall framework, then amendments to the Social Security Act would be a more appropriate course of action than a legislated instrument. This would also give the Parliament the opportunity to make amendments to the provisions, which is important in an area of law as complex as capacity assessments.

Given the complexity and gravity of the issues at stake in these assessments, the merits review role of independent appeals bodies is very important. This is illustrated by the significant number of appeals received in regard to disability assessments. If the proposed change in the law is a response to a higher than anticipated number of successful appeals, the appropriate response is for the Government to carefully review the quality of the primary assessments. Concerns have been raised to ACOSS by service providers and advocates about a lack of expertise of assessors to evaluate applicants' specific conditions and the perfunctory nature of some assessments.

Better decisions will be made in this area if the Secretary retains a degree of discretion (within a legislated framework of eligibility conditions and impairment tables), and this is balanced by the fact that decisions may be overturned on appeal.

We ask the Committee to recommend that these amendments should not proceed.

2. Substitution of work capacity assessors for medical practitioners in the assessment of impairment ratings

The Bill seeks to replace references to 'medical practitioners' with 'assessors' (job capacity assessors) as the relevant expert authorities to assess the impairment ratings of applicants for Disability Support Pension. The argument for this change in the Explanatory Memorandum is that while medical expertise is needed to assess an impairment, non-medical expertise may be required to assess its affect on a person's work functionality.

There are essentially two steps in the assessment of a person's work capacity:

1. To determine the applicant's impairment rating using the Impairment Tables in the Social Security Act, and
2. To assess the effect of the impairment on the capacity of the applicant to work at least a certain number of hours each week.

In most cases, the first step (assessment of ratings under the Impairment Tables) is likely to require medical expertise. The introduction to Schedule 1B of the Social, Security Act, which contains the tables, states that:

> *The Tables represent an empirically agreed set of criteria for assessing the severity of functional limitations for work related tables and do not take into account the broader impact of a functional impairment in a societal sense.' Each table deals with specific medical conditions such as 'loss of respiratory function', 'spinal function', 'hearing function', and 'psychiatric impairment'.*

The effect of the proposed changes would be to remove any presumption in the Social Security Act that a qualified medical practitioner should conduct certain assessments, particularly the assessment of impairment ratings using the Impairment Tables in Schedule 1B of the Act (the first step in the overall assessment of work capacity described above). The amendments would replace references in this Schedule of 'medical officers' with 'assessors'.

For example, Item 6 of Schedule 1B refers to the assessment of the likely effects of medical treatment:

> *"In exceptional circumstances, where a condition was considered not stabilised and a permanent impairment rating not assigned because reasonable treatment for a specific condition has not been undertaken, the medical officer should:*
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> - *evaluate and document the probable outcome of treatment and the main risks and or side effects of the treatment; and*
> - *indicate why this treatment is reasonable; and*
> - *note the reasons why the person has chosen not to have treatment."*

Similarly, Item 8 refers to assessment of the effects of pain or fatigue:

> *"In general, pain or fatigue should be assessed in terms of the underlying medical condition which causes it. For example, Table 5 should be used for spinal pathology. However, where the medical officer is of the opinion that the Tables underestimate the level of disability because of the presence of chronic entrenched pain, Table 20 can be used to assign a rating instead of the Table(s) that otherwise would be used to assess the loss of function to which the pain relates. Medical officers must use their clinical judgement and be convinced that pain or fatigue is a significant factor contributing towards the person's overall functional impairment. Medical reports and the person's history should consistently indicate the presence of chronic entrenched pain or fatigue."*

In both of these instances, it is unlikely that non-medically qualified professionals (for example, speech pathologists) could be relied upon to make expert assessments. In both cases the Bill would remove references to 'medical officers'.

The Administrative Appeals Tribunal has raised concerns about the assessment of medical conditions by job capacity assessors lacking medical qualifications in its decision No Q 200600799 on 10 July 2007, which confirmed a decision of the SSAT to set aside a Centrelink decision not to grant a Disability Support Pension (paragraphs 23-25 refer):

> *"The Secretary relies, as well, upon a job capacity assessment report prepared in March 2007 by Mr Andrews, a psychologist employed by Centrelink. Mr Andrews did not see the respondent but he reviewed the variety of medical reports and opinions contained within the Centrelink file. Mr Andrews expressed the opinion that the respondent's hepatitis C condition was temporary and had an expected duration of 12 months from January 2005 to January 2006.*
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> *We have some considerable difficulties with the opinions expressed by Mr Andrews. We accept that Mr Andrews may be in a position to comment, from the perspective of his professional discipline, on issues regarding capacity and limitations to work. But the report by Mr Andrews purports to express opinions on matters of medical expertise, for example the likely duration of medical conditions. As the medical member of the Tribunal observed in the course of the hearing that task is fraught with difficulties for those with medical training and clinical experience. It is perplexing to us how Mr Andrews, who has neither medical training nor clinical experience, could be put forward by the Secretary as someone with the qualifications or capacity to express the opinions in this area that he did. It is notable that the policy Guide issued to assist decision-makers in interpreting the contents of the Tables says in relation to the question of determining permanent impairment that 'medical judgement is usually required to evaluate the available medical evidence and determine if the permanence criteria have been satisfied'.*
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> *Our view of the worth of his evidence was not improved with his concession, on questioning by the Tribunal, that he had no basis in either professional training or experience, on which to express an opinion of the 'expected duration' of the respondent's medical conditions."*

Service providers and advocates have brought to our attention concerns that in many cases, job capacity assessments have been conducted by assessors who lack relevant expertise in regard to the specific impairments of applicants. It appears that cases were being referred to assessors on a first come first serve basis regardless of the nature of the applicant's disability, though we understand that this practice may have recently changed.

The quality and consistency of expert assessment of impairments should not be left to chance. The Social Security Act should strike an appropriate balance between the use of medical and non-medical expertise in the assessment of capacity to work. It is desirable to set out a clear delineation of roles for medical practitioners (especially in the assessment of impairment ratings), and non-medical experts such as occupational therapists (especially in the assessment of the effect of impairments on people's job capacity). If an appropriate balance has not been achieved in the present legislation, then this issue should be carefully and thoroughly reviewed with input from relevant stakeholders and experts before any amending legislation is brought before the Parliament.

We ask the Committee to recommend that these amendments should not proceed.