

# Chapter 2

## Key issues

2.1 Participants in the inquiry expressed concern with elements of the BSWAT Payment Scheme and specific provisions of the Bill, including:

- calculation of the 'payment amount';
- legal consequences of accepting a payment;
- timeframes involved in obtaining a payment;
- requirements for an 'effective acceptance'; and
- appointment, powers and duties of nominees.

### Calculation of the 'payment amount'

2.2 The Bill provides for the Secretary to make an offer to pay the 'payment amount' to eligible applicants for the BSWAT Payment Scheme (clauses 17 and 19 of the Bill).<sup>1</sup> The 'payment amount' will be the amount calculated for an applicant in accordance with a method prescribed by the rules (sub-clause 8(1) of the Bill).<sup>2</sup> In making the rules, the Minister must consider three principles:

- (a) the amount a person should receive, if the person accepts an offer, should broadly reflect the amount that is 50% of the excess (if any) of a productivity scored wage over an actual wage;
- (b) to ensure that the person retains that amount after tax, the amount should be increased to take account of expected tax;
- (c) the amount should be nil if a person's productivity scored wage is the same or less than the person's actual wage [sub-clause 8(3) of the Bill].

2.3 Some submitters and witnesses contended that the 'payment amount' is only half the amount a supported employee should have been paid had the productivity component of the BSWAT been used to calculate their wage.<sup>3</sup>

2.4 Dr Beth Gaze of Melbourne Law School, University of Melbourne, commented that no explanation or justification has been provided in support of

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1 The terms 'productivity-scored wage' and 'actual wage' are defined in sub-clause 8(5) of the Bill.

2 Some submitters questioned the individual assessment of applications, arguing that supported employees with intellectual disability previously assessed using the BSWAT should be automatically eligible for the BSWAT Payment Scheme: AED Legal Centre, *Submission 9*, p. 9; JobWatch Inc., *Submission 15*, p. 9.

3 AED Legal Centre noted that the 'payment amount' will cover a specific period only (1 January 2004 – 28 May 2014), notwithstanding the use of completed BSWAT assessments pending replacement of the BSWAT: *Submission 9*, p. 2. Also see: Australian Centre for Disability Law, *Submission 22*, p. 2; Mr Herman Borenstein QC, Counsel, Maurice Blackburn, Lawyers, *Committee Hansard*, 24 July 2014, p. 34; sub-clause 6(2) of the Bill.

paragraph 8(3)(a) of the Bill,<sup>4</sup> although the Australian Lawyers Alliance suggested that cost considerations might be a relevant factor.<sup>5</sup>

2.5 Dr Ken Baker, Chief Executive of National Disability Services, considered that the BSWAT Payment Scheme resolves 'the issue of retrospective liability for underpaid wages', explaining that calculation of the 'payment amount' will not result in applicants receiving half the amount due to them:

[T]he payment scheme formula says, 'Let's take the rate-of-productivity component [of the BSWAT], but let's discount that result somewhat to reflect the limited range of competencies'. That is why it is 50 per cent of the difference between the actual wage and the productivity output.<sup>6</sup>

2.6 At the public hearing, an officer from the Department confirmed that the proportion is not related to the issue of productivity but to 'what the person actually received and what 100 per cent of the productivity would have been if you completely discounted the competency component [of the BSWAT]'.<sup>7</sup>

2.7 A few submitters also questioned the certainty in clause 8 of the Bill, due to the rules not yet having been published<sup>8</sup> and inclusion of the phrase 'broadly reflect' in paragraph 8(3)(a) of the Bill.<sup>9</sup> JobWatch Inc. highlighted the practical need for legislative clarity:

As the Payment Scheme is essentially an offer of settlement, it must be clear and unambiguous otherwise how can advisors, nominees and/or applicants make informed and rational decisions or obtain accurate advice?<sup>10</sup>

### **Legal consequences of accepting a payment**

2.8 The legal rights of a 'participant'<sup>11</sup> in the BSWAT Payment Scheme will be affected if the Secretary's offer of a 'payment amount' is accepted:

- the applicant will automatically cease to be a group member in a 'relevant representative proceeding' (sub-clause 9(1) of the Bill),<sup>12</sup> including 'the proceeding commenced by originating application in the Federal Court on

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4 *Submission 18*, p. 1.

5 *Submission 14*, p. 8.

6 *Committee Hansard*, 24 July 2014 p. 11. Also see: Mr David Barbagallo, Chief Executive Officer, Endeavour Foundation, *Committee Hansard*, 24 July 2014, p. 12.

7 Ms Laura Angus, Branch Manager, BSWAT Employment Response Unit, *Committee Hansard*, 24 July 2014, p. 42.

8 For example: AED Legal Centre, *Submission 9*, p. 9.

9 For example: JobWatch Inc., *Submission 15*, p. 8.

10 *Submission 15*, p. 8.

11 'Participant' is defined in clause 43 of the Bill.

12 'Relevant representative proceedings' is defined in sub-clause 9(4) of the Bill.

23 December 2013 as proceeding number VID 1367 of 2013' (class action) (paragraph 9(4)(a) of the Bill); and

- the applicant will release and indemnify the Commonwealth from all liability and claims, to the extent to which they relate to the use of a BSWAT assessment to work out a minimum wage, in matters relating to:
  - (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 a territory;
  - (c) any other conduct or failure on the part of the Commonwealth, an ADE or any other person, that might give rise to a liability to the person [sub-clause 10(2) of the Bill].<sup>13</sup>

2.9 Some submitters did not support these proposed provisions, commenting that the provisions seek to: circumvent the Federal Court and High Court of Australia decisions (particularly in respect of the class action),<sup>14</sup> in contravention of international law;<sup>15</sup> and undermine due process of law in exchange for the 'payment amount'.<sup>16</sup>

2.10 Inclusion Australia submitted that 'people with intellectual disability are highly vulnerable to manipulation by people in positions of authority', expressing the concern that applicants might make a choice which is not in their best interests.<sup>17</sup>

2.11 Sub-clause 9(2) of the Bill provides that the automatic opt-out provision (sub-clause 9(1)) has effect notwithstanding Part IVA of the *Federal Court of Australia Act 1976*. That Part includes a provision allowing group members discretion to opt out of a 'representative proceeding' (as defined in that Act).<sup>18</sup>

### **'Alternative amount'**

2.12 The Bill provides that a person cannot make an application for the BSWAT Payment Scheme, be registered by the Secretary (a precondition to making an application after 1 May 2015) or have an application determined, if the person:

- has accepted an amount of money in settlement of a claim; or
- is owed an amount of money pursuant to a court order (collectively, an 'alternative amount');

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13 The release and indemnity from liability extends also to ADEs.

14 For example: AED Legal Centre, *Submission 9*, p. 4; Inclusion Australia, *Submission 10*, p. 6; Disability Advocacy NSW, *Submission 16*, p. 2; Australian Centre for Disability Law, *Submission 22*, p. 1.

15 For example: Grampians disAbility Advocacy, *Submission 8*, p. 2; AED Legal Centre, *Submission 9*, p. 12.

16 For example: Australian Lawyers Alliance, *Submission 14*, p. 5.

17 *Submission 10*, pp 12 and 14.

18 Section 33J of the *Federal Court of Australia Act 1976*.

in relation to a matter referred to in sub-clause 10(2) of the Bill.<sup>19</sup>

2.13 Referring to this proposed provision, as well as sub-clauses 9(4) and 10(2) of the Bill, the AED Legal Centre submitted:

From a cost/benefit point of view the imbalance in the Bill is striking. For only 50% of what they are legally owed employees will sign away their legal rights in the most absolute way.<sup>20</sup>

2.14 Ms Elizabeth Nojin, the mother of one of the appellants in the Federal Court decision, emphasised that the Bill should aim to compensate supported employees whose wages were assessed using the competency component of the BSWAT, not limit their avenues for redress:

The purpose of [the Bill] should be to compensate workers who have not received adequate payments. By not giving an applicant the opportunity to explore all possible avenues to seek their entitlements, the purpose is not being achieved. In the worst case scenario, an applicant may receive very little or no compensation through litigation...and they are then precluded from making an application through the Scheme. By excluding access to the Scheme to anyone who has participated in litigation, the Scheme aims to reduce the amount of payment to be made to employees who are in fact entitled to compensation.<sup>21</sup>

2.15 It is important to note that Ms Nojin's son is not precluded from the BSWAT Payment Scheme as no 'alternative amount' was awarded in the Federal Court decision.<sup>22</sup>

2.16 In evidence, a representative from the Department advised she was aware of 'fewer than half a dozen' people who would, by virtue of the 'alternative amount', be prevented from accessing the BSWAT Payment Scheme.<sup>23</sup> The Department also noted that it is the acceptance of money, not participation in a court process itself, which makes an applicant ineligible for BSWAT payments.<sup>24</sup>

### **Timeframes involved in obtaining a payment**

2.17 Part 3 of the Bill sets out how a person may obtain a payment under the BSWAT Payment Scheme, including a number of timeframes for certain actions. For example: applicants must apply for a payment in the period 1 July 2014 to 30 November 2015;<sup>25</sup> applicants must register with the Secretary before 1 May 2015

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19 Clause 4, sub-clauses 14(1), 16(1) and 18(1) of the Bill.

20 *Submission 9*, p. 1.

21 *Submission 3*, pp 1-2.

22 Department of Social Services, *Submission 11*, p. 3.

23 Ms Laura Angus, *Committee Hansard*, 24 July 2014, p. 42.

24 Answer to question on notice No. 9, 24 July 2014 (received 20 August 2014).

25 Sub-clause 15(1) of the Bill.

in order to make an application after that date;<sup>26</sup> and an applicant must accept an offer of payment within a specified period of at least 14 days (paragraph 19(2)(e) of the Bill).<sup>27</sup> Some submitters expressed concerns with some of these procedural aspects, arguing that the two-stage process of registration and application is unnecessarily complex,<sup>28</sup> and the time allowed for acceptance of an offer of payment is not adequate (particularly in view of the requirements for an 'effective acceptance').<sup>29</sup>

2.18 Both JobWatch Inc. and the AED Legal Centre had reservations regarding people's ability to assess their options and act accordingly within the permitted timeframes. In particular, the AED Legal Centre noted that the application deadline will prevent applicants from being able to 'compare if they are financially better off under [the BSWAT Payment Scheme] or any compensation that may arise from the representative action in the Federal Court'.<sup>30</sup>

2.19 Similarly, the Australian Council of Trade Unions expressed its concern about applicants' access to information and the impact this might have on their ability to make an informed decision:

All workers, including those with disability, have certain legal rights and should be suitably informed of those rights in order to make a reasoned decision about whether to accept an offer of compensation or not.<sup>31</sup>

2.20 The Minister has acknowledged that there are strict timeframes for the BSWAT Payment Scheme:

While these timeframes are generous, they do require that people wishing to access the payment scheme take certain actions before set dates. Timeframes will be made very clear in all scheme materials.<sup>32</sup>

### **Requirements for an 'effective acceptance'**

2.21 The Bill sets out a number of requirements for an applicant to effectively accept the offer of a 'payment amount' ('effective acceptance').<sup>33</sup> For example, the applicant must accept the offer in accordance with clause 35 of the Bill:

- (2) The acceptance must be:
  - (a) in an approved form; and
  - (b) lodged in a manner prescribed by the rules; and
  - (c) lodged before the end of the acceptance period for the offer.

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26 Clause 13 and sub-clause 16(2) of the Bill.

27 Paragraph 19(2)(e) of the Bill.

28 For example: AED Legal Centre, *Submission 9*, p. 11.

29 For example: JobWatch Inc., *Submission 15*, p. 5.

30 *Submission 9*, p. 6. Also see: JobWatch Inc., *Submission 15*, pp 4 and 9.

31 *Submission 23*, p. 3.

32 *House Hansard*, 5 June 2014, p. 2.

33 Clause 38 of the Bill.

- (3) The acceptance must be accompanied by:
- (a) a legal advice certificate that complies with section 36; and
  - (b) a financial counselling certificate that complies with section 37; and
  - (c) an acknowledgement that the person understands the effect of accepting the offer; and
  - (d) any other information or documents prescribed by the rules.

2.22 Submitters expressed concerns with paragraph 35(3)(a)–(b), stating that the Bill should detail the funding arrangements for the provision of the certificates,<sup>34</sup> consistent with the Minister's announcement that these costs are covered by the BSWAT Payment Scheme.<sup>35</sup> Submitters and witnesses indicated also that there will be practical difficulties for applicants in accessing independent advice and counselling (in addition to those concerns raised in relation to timeframes).<sup>36</sup>

2.23 The Department indicated it will develop an online catalogue of legal firms which have expressed a willingness to provide advice in relation to offers under the BSWAT Payment Scheme. This catalogue will include capacity for a firm to provide a brief outline of its experience, including its experience working with people with intellectual disability.<sup>37</sup>

### **Appointment, powers and duties of nominees**

2.24 Part 4 of the Bill sets out the process by which a person can be appointed to make decisions on behalf of another person who is participating in the BSWAT Payment Scheme (nominee). In particular, the Secretary may appoint a nominee on the initiative of the Secretary (paragraph 50(2)(b) of the Bill).

2.25 Submitters questioned whether: the power of appointment should be regulated in the Bill; the Bill should include safeguards to ensure that the applicant's autonomy, will and preferences are respected; and the Bill should include more safeguards once a nominee has been appointed. The issue of a conflict of interest on the part of the Secretary was also raised.

2.26 The Department provided a detailed response regarding the nominee provisions in the Bill, stating:

The BSWAT Payment Scheme Bill is beneficial legislation and attempts, as far as possible, to achieve supported decision making rather than substituted decision making...

The nominee provisions in the Bill and proposed rules have been largely based on the wording and structure of the NDIS legislation. For example, the provisions in the Bill and proposed rules relating to appointments and duties of nominees under the BSWAT Payment Scheme closely reflect the

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34 For example: JobWatch Inc., *Submission 15*, p. 7.

35 *House Hansard*, 5 June 2014, p. 2.

36 For example: Australian Council of Trade Unions, *Submission 23*, p. 3.

37 Answer to question on notice No. 3, 24 July 2014 (received 20 August 2014).

provisions about appointment and duties of nominees under the NDIS legislation...

The rules for the legislation, which cover 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.<sup>38</sup>

### ***Regulating the power of appointment***

2.27 The Office of the Public Advocate (Victoria) submitted that the appointment process will be unregulated, with the Bill not specifying a capacity test or relevant medical threshold. In contrast:

[A]n 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 [similarly] in the [Bill].<sup>39</sup>

2.28 The AED Legal Centre expressed their belief that there was a lack of restriction on who can be appointed to act as a nominee (for example, people with potential conflicts of interest).<sup>40</sup> People with Disability Australia drew attention to a broad range of potential conflicts of interests, which it submitted could occur wherever there is interest in an employee with intellectual disability retaining their job at an ADE:

ADEs themselves have a conflict of interest to act as nominees as they may be liable for paying compensation in the future if people chose to seek a legal remedy—it is to their advantage for workers to accept a payment from the scheme.

For [the Department] it is of advantage for workers to accept a payment from the scheme as this will reduce the number of people seeking to claim compensation from the Commonwealth and the cost of any compensation itself. Therefore it is a conflict of interest for the Secretary to appoint nominees, especially as doing so removes the right of a person to make their own decisions.

Family members and carers who act as nominees may also have a conflict of interest if they fear that a person with intellectual disability may lose their job if they do not accept a payment. The unemployment of a person with disability may be disruptive to family life, and the other disability support arrangements that a person and/or the family is used to, as well as for the person with disability themselves.<sup>41</sup>

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38 Answer to question on notice No. 1, 24 July 2014 (received 20 August 2014).

39 *Submission 20*, p. 1.

40 *Submission 9*, p. 7.

41 *Submission 21*, p. 5. Also see: Mr David Barbagallo, Endeavour Foundation, *Committee Hansard*, 24 July 2014, p. 14, who stated that 'it certainly should not be anyone from our organisations [appointed as nominee]'.

2.29 The Office of the Public Advocate (Victoria) agreed that the Secretary's power to appoint a nominee should be more curtailed. Further, the Bill should give 'greater reference to the rights, will and preferences of participants when nominees are being appointed'.<sup>42</sup>

2.30 However, the Department noted that the rules for appointments will include provisions that identify persons who must not be appointed as nominees. These exclusions include departmental employees and ADEs. Further rules are being drafted to ensure the preferences of the participant are given appropriate weight.<sup>43</sup>

***Respecting the applicant's autonomy, will and preferences***

2.31 Clause 46 of the Bill sets out the duties of a nominee to a participant and the circumstances in which a nominee will be deemed not to have breached those duties:

(1) It is the duty of a nominee of a participant 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.

(2) A nominee does not breach the duty imposed by subsection (1) by doing an act if, when the act is done, the nominee reasonably believes that:

(a) the nominee has ascertained the preferences of the participant in relation to the act; and

(b) the doing of the act gives effect to those preferences.

(3) A nominee does not breach the duty imposed by subsection (1) by refraining from doing an act if, at the relevant time, the nominee reasonably believes that:

(a) the nominee has ascertained the preferences of the participant in relation to the act; and

(b) not doing the act gives effect to those preferences.

(4) The rules may modify the duty of a nominee under subsection (1) in relation to participants who cannot formulate preferences.

(5) The rules may prescribe other duties of a nominee, including duties requiring the nominee:

(a) to support decision-making by the participant personally; or

(b) to have regard to, and give appropriate weight to, the views of the participant; or

(c) to inform the Secretary and the participant if the nominee has, acquires, or is likely to acquire, any interest, pecuniary or otherwise, that conflicts or could conflict with the performance of the nominee's duties.

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42 *Submission 20*, p. 1.

43 Answer to question on notice No. 1, 24 July 2014 (received 20 August 2014).



2.32 Submitters expressed concerns with clause 46, arguing that the proposed provision (and the Bill generally) do not contain sufficient safeguards, to ensure that the autonomy, will and preferences of a participant are respected by a nominee.

2.33 People with Disability Australia, for example, referred to Article 12 of the Convention on the Rights of Persons with Disabilities,<sup>44</sup> noting that clause 46 of the Bill does not specify that 'persons must be supported to make their own decisions, or that the will and preference of the person must be the basis of all decisions'.<sup>45</sup> In evidence, Ms Therese Sands from People with Disability Australia indicated that the proposed provisions relating to nominees are in opposition to Article 12:

Due to these nominee provisions it is reasonable to foresee that many hundreds if not thousands of affected workers will not be involved in decision making about whether they apply for or accept an offer of payment or seek legal remedy.<sup>46</sup>

2.34 The AED Legal Centre considered it 'highly likely that nominees will substitute rather than facilitate the choice and preferences of participants in the scheme'.<sup>47</sup> In this regard:

[The Bill] fails employees with an intellectual disability because it puts them in a position where either the offer is accepted on their part by the nominee or they are expected to blindly accept what they are told by nominees or other parties who may have a conflict of interest.<sup>48</sup>

2.35 In its Ninth Report of the 44<sup>th</sup> Parliament, the Parliamentary Joint Committee on Human Rights noted that the rules may modify and prescribe the duties of a nominee (sub-clauses 46(4)-(5) of the Bill). However, the rules are as yet unpublished:

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.<sup>49</sup>

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44 United Nations, Convention on the Rights of Persons with Disabilities, available at: <http://www.un.org/disabilities/convention/conventionfull.shtml> (accessed 31 July 2014). Article 12 requires States Parties to recognise the legal capacity of persons with disabilities and to take appropriate measures to provide these persons with access to the supports they require in order to exercise their legal capacity.

45 *Submission 21*, p. 5. Also see: Australian Centre for Disability Law, *Submission 22*, p. 2.

46 *Committee Hansard*, 24 July 2014, p. 2. Also see Letter from Maurice Blackburn, Lawyers (received 8 August 2014), p. 1, which noted that the proposed nominee provisions also contrast with the National Disability Insurance Scheme.

47 *Submission 9*, p. 5.

48 *Submission 9*, p. 7.

49 Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Bills introduced 23–26 June 2014, Legislative Instruments received 7–20 June 2014*, July 2014, p. 10.

### ***Safeguards following the appointment of a nominee***

2.36 Clause 45 of the Bill provides that a nominee may do any act that could be done by a participant (except as limited by the instrument of appointment),<sup>50</sup> which will bind the participant. The provision states also:

(4) If the participant's nominee was appointed on the initiative of the Secretary, the nominee may only do an act if the nominee considers that the participant is not capable of doing, or being supported to do, the act.

2.37 The Office of the Public Advocate (Victoria) submitted that, in this context, the judgement of a nominee is a powerful function and, accordingly, 'the [Bill] does not contain sufficient safeguards or oversight of the actions of a nominee once appointed'.<sup>51</sup>

### ***Conflict of interest for the Secretary***

2.38 Submitters commented on the proposal to allow the Secretary, on his or her initiative, to appoint nominees to act on behalf of participants in the BSWAT Payment Scheme (paragraph 50(2)(b) of the Bill).

2.39 In relation to nominee appointments, Dr Baker advised:

The [Bill's intention] seems clear. It is twofold. One is that appointing a nominee would not be usual practice: it would be the exception. The second is that a nominee would typically be a family member of the supported employee...

[T]here will be a group for whom it is appropriate to appoint a nominee. There are other protections in the [Bill] which I think are there in terms of seeking independent financial advice, independent legal advice, capacity for an internal and external review. All of those add up to what seems to me to be a reasonable range of protections.<sup>52</sup>

2.40 Due to the Australian Government's ownership of the BSWAT and the Department's role in administering the BSWAT and the BSWAT Payment Scheme, the AED Legal Centre argued that the Secretary has a conflict of interest, which could directly affect the class action:

[A]cceptance of a scheme entitlement automatically affects the opt-out of the accepting worker from the representative action. Since the Commonwealth is the respondent to the representative action, this provision causes a clear conflict of interest in the Commonwealth in the person of the departmental secretary....They could in effect make decisions that would eliminate people from the class action.<sup>53</sup>

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50 Sub-clauses 50(3)(4) of the Bill.

51 *Submission 20*, p. 2.

52 *Committee Hansard*, 24 July 2014, p.14.

53 *Submission 9*, p. 2.

2.41 In view of such concerns, the Disability Discrimination Legal Service considered the protections proposed in the Bill to be 'inadequate' without 'a guarantee of impartial legal and financial advisors who have expertise in dealing with people with disabilities'.<sup>54</sup>

2.42 Departmental officers gave evidence that clause 50 of the Bill is 'a standard provision under beneficial legislation',<sup>55</sup> which has been 'modelled quite closely on the NDIS' legislation.<sup>56</sup> Unlike the NDIS legislation, the Bill does not articulate principles (including supported decision-making) however a departmental representative cited sub-clause 46(1) of the Bill, which sets out 'an overriding duty on the nominee to act in a supportive manner'.<sup>57</sup>

2.43 The Department also noted that paragraph 51(1)(b) requires the Secretary to take into consideration the preferences of the participant when appointing a nominee, and appointments can be limited in scope and duration.<sup>58</sup>

### **Committee view**

2.44 The Bill seeks to implement a payment scheme for supported employees with intellectual disability whose wages were assessed within a defined period using the BSWAT. The committee accepts that the Bill will achieve this purpose.

2.45 In respect of the 'payment amount', submitters and witnesses questioned the formula set out in paragraph 8(3)(a). Evidence from the Department indicated that the formula reflects the amount supported employees would have received had the competency component of the BSWAT not been used to assess their wages.

2.46 Many participants in the inquiry did not support the proposed legal consequences of an applicant accepting an offer to pay the 'payment amount'. The committee notes the background to the Bill, including current and potential legal actions. The committee also notes, fundamentally, that the Bill provides choice to eligible applicants in the BSWAT Payment Scheme (whether to register, apply for payment, accept an offer, or appeal a determination). Should an applicant accept an offer to pay the 'payment amount', the Bill is quite clear about the impact this will have upon the applicant's legal rights, which is to be acknowledged by the applicant with the provision of a legal advice certificate.

2.47 The committee recognises that there are reasons for the timeframes stipulated in the Bill and is reassured that all scheme materials will be clear in this regard.<sup>59</sup>

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54 *Submission 17*, p. 1. The Disability Discrimination Legal Service stated also that, without such advisors, the review processes in the Bill are 'insufficient to safeguard the rights of employees'.

55 Ms Laura Angus, *Committee Hansard*, 24 July 2014, p. 36.

56 Mr Steven Francis, Principal Legal Officer, *Committee Hansard*, 24 July 2014, p. 36.

57 Mr Steven Francis, *Committee Hansard*, 24 July 2014, p. 36.

58 Answer to question on notice No. 1, 24 July 2014 (received 20 August 2014).

59 Minister, *House Hansard*, 5 June 2014, p. 2.

2.48 Submitters and witnesses expressed particular concerns with the nominee provisions proposed in the Bill. The Department provided that these concerns would be addressed in the drafting of the rules regarding the Bill.<sup>60</sup> The committee is satisfied that the detail provided in these rules will satisfy the concerns raised.

2.49 People with Disability Australia, among others, highlighted that the Bill might not contain sufficient safeguards to ensure that the autonomy, will and preferences of a participant are respected. The committee notes that such matters will be prescribed in the rules (sub-clause 46(5)).

2.50 The committee observes that rules are commonly used to specify the detail of measures proposed in draft legislation. In examining bills referred by the Senate, it is equally common for committees to receive evidence questioning the availability and content of the relevant rules. In the committee's view, it would be preferable for departments to make the rules available, or at least clearly explain their status and, if possible, specific content, before or during an inquiry.

2.51 With its findings in mind, the committee makes the following recommendation:

#### **Recommendation 1**

**2.52 The committee recommends that the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and the Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014 be passed.**

**Senator Zed Seselja**

**Chair**

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60 Answer to question on notice No. 1, 24 July 2014 (received 20 August 2014).