

The Senate

Community Affairs
Legislation Committee

Business Services Wage Assessment Tool
Payment Scheme Bill 2014 [Provisions]

Business Services Wage Assessment Tool
Payment Scheme (Consequential Amendments)
Bill 2014 [Provisions]

August 2014

© Commonwealth of Australia 2014

ISBN 978-1-76010-074-2

Secretariat

Ms Jeanette Radcliffe (Committee Secretary)

Ms Monika Sheppard (Senior Research Officer)

Ms Carol Stewart (Administrative Officer)

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3515

Fax: 02 6277 5829

E-mail: community.affairs.sen@aph.gov.au

Internet: www.aph.gov.au/senate_ca

This document was produced by the Senate Community Affairs Committee Secretariat and printed by the Senate Printing Unit, Parliament House, Canberra.

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia License.



The details of this licence are available on the Creative Commons website: <http://creativecommons.org/licenses/by-nc-nd/3.0/au/>

MEMBERSHIP OF THE COMMITTEE

44th Parliament

Members

Senator Sue Boyce, Chair to 30 June	Queensland, LP
Senator Zed Seselja, Chair from 1 July	Australian Capital Territory, LP
Senator Rachel Siewert, Deputy Chair	Western Australia, AG
Senator Carol Brown	Tasmania, ALP
Senator Nova Peris OAM	Northern Territory, ALP
Senator Linda Reynolds (from 1 July)	Western Australia, LP
Senator Dean Smith	Western Australia, LP

Participating members for this inquiry

Senator Claire Moore	Queensland, ALP
----------------------	-----------------

TABLE OF CONTENTS

Membership of the Committee	iii
Abbreviations	vii
List of Recommendations	ix
Chapter 1	
Introduction	1
Background.....	1
Purpose and key provisions of the bills.....	3
Consideration by other committees	5
Conduct of the inquiry.....	5
Acknowledgement.....	5
Note on references.....	6
Chapter 2	
Key issues.....	7
Calculation of the 'payment amount'	7
Legal consequences of accepting a payment.....	8
Timeframes involved in obtaining a payment.....	10
Requirements for an 'effective acceptance'	11
Appointment, powers and duties of nominees	12
Committee view.....	17
Labor Senators' Dissenting Report.....	19
Governments must do more to support people with disability into employment	19
The Bill.....	19
The right to pursue legal redress	20
Nominee provisions.....	21

A long term solution.....	21
Australian Greens’ Dissenting Report.....	23
Accessing the Payment.....	24
Power to appoint a nominee	24
Viability of ADE	25
Conclusion.....	25
Appendix 1	
Submissions and additional information received by the Committee.....	27
Appendix 2	
Public hearings.....	29

ABBREVIATIONS

ADE	Australian Disability Enterprises
AHRC	Australian Human Rights Commission
Bill	Business Services Wage Assessment Tool Payment Scheme Bill 2014
BSWAT	Business Services Wage Assessment Tool
BSWAT Payment Scheme	The payment scheme to be established by the Bill
Consequential Bill	Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014
Department	Department of Social Services
Disability Discrimination Act	<i>Disability Discrimination Act 1992</i>
EM	Explanatory Memorandum
Federal Award	<i>Supported Employment Services Award 2010 (MA000103)</i>
Federal Court	Federal Court of Australia
Minister	Minister for Social Services
NDS	National Disability Services
OPA	Office of the Public Advocate (Victoria)
PJC-HR	Parliamentary Joint Committee on Human Rights
Secretary	The Secretary of the Department of Social Services

LIST OF RECOMMENDATIONS

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.

Chapter 1

Introduction

1.1 On 19 June 2014, the Senate referred the Business Services Wage Assessment Tool Payment Scheme Bill 2014 (Bill) and the Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014 (Consequential Bill) to the Community Affairs Legislation Committee (committee) for inquiry and report by 26 August 2014.¹ The reporting date was subsequently extended until 27 August 2014.²

Background

1.2 Australian Disability Enterprises (ADEs) are generally not-for-profit organisations, which are funded by the Commonwealth to provide employment opportunities to people with moderate to severe disability (supported employees). Across Australia, there are 193 ADEs providing employment opportunities to approximately 20,000 supported employees.³

1.3 The wages of supported employees are assessed in accordance with the *Supported Employment Services Award 2010* (MA000103) (Federal Award). The Federal Award provides for:

- an employee to be graded by the employer on appointment, having regard to the employee's skills, experience and qualifications;⁴ and
- an employee with disability to be paid a percentage of the relevant grade rate, as assessed under an 'approved wage assessment tool' chosen by a supported employment service.⁵

1.4 The Business Services Wage Assessment Tool (BSWAT) is one of 30 'approved wage assessment tools',⁶ and the most commonly used wage assessment tool for supported employees. It assesses the productivity and competency of a

1 *Journals of the Senate*, No. 33—19 June 2014, pp 914–916.

2 *Journals of the Senate*, No. 46—26 August 2014, p. 1289.

3 Department of Social Services, 'Australian Disability Enterprises', available at: <http://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/for-service-providers/australian-disability-enterprises> (accessed 24 July 2014).

4 The employee is graded with reference to Schedule B—Classifications of the *Supported Employment Services Award 2010* (MA000103) (Federal Award): clause 14.1.

5 Clauses 14.2 and 14.4 of the Federal Award.

6 Clause 14.4(b) of the Federal Award.

supported employee, with the scores for each of these two components combined to determine an overall pro-rata wage rate.⁷

Federal Court of Australia challenge

1.5 In 2012, two supported employees with intellectual disabilities took action in the Federal Court of Australia (Federal Court), claiming that, by using the BSWAT to measure their work contribution and assess their wage, their employers were discriminating against them, compared to supported employees with physical disabilities (who, owing to a lack of intellectual impairment, could achieve higher scores under the BSWAT).⁸

1.6 The Full Court of the Federal Court agreed, holding that the ADEs concerned had contravened section 15 of the *Disability Discrimination Act 1992* (Disability Discrimination Act).⁹ In finding for the supported employees, Justice Buchanan found the criticisms of the BSWAT 'compelling':

I can see no answer to the proposition that an assessment which commences with an entry level wage, set at the absolute minimum, and then discounts that wage further by reference to the competency aspects built into BSWAT, is theoretical and artificial. In practice, on the evidence, those elements of BSWAT have the effect of discounting even more severely, than would otherwise be the case, the remuneration of intellectually disabled workers to whom the tool is applied. The result is that such persons generally suffer not only the difficulty that they cannot match the output expected of a Grade 1 worker in the routine tasks assigned to them, but their contribution is discounted further because they are unable, because of their intellectual disability, to articulate concepts in response to a theoretical construct borrowed from training standards which have no application to them.¹⁰

1.7 The High Court of Australia subsequently refused the Commonwealth's applications for special leave to appeal the Federal Court's decision, stating 'we see no reason to doubt the conclusions of the Full Court'.¹¹

Application to the Australian Human Rights Commission

1.8 In September 2013, the Department of Social Services (Department), which developed the BSWAT, applied to the Australian Human Rights Commission

7 Department of Social Services, 'Wage assessments in Australian Disability Enterprises', available at: <http://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/for-people-with-disability/wage-assessments-in-australian-disability-enterprises> (accessed 24 July 2014).

8 *Nojin v Commonwealth of Australia* [2012] FCAFC 192 at para 1 per Buchanan J.

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

10 *Nojin v Commonwealth of Australia* [2012] FCAFC 192 at para 142 per Buchanan J.

11 *Commonwealth of Australia and Anor v Prior; Commonwealth of Australia v Nojin and Anor* [2013] HCATrans 101 (10 May 2013) per Crennan J.

(AHRC) for a three-year exemption from the application of certain provisions of the Disability Discrimination Act.¹²

1.9 In its application, the Department stated that the exemption was being sought to address the implications of the Federal Court decision, and would apply 'while alternative wage setting arrangements are being considered, devised and/or established and implemented by [the Department]'.¹³

1.10 On 29 April 2014, following public consultations,¹⁴ the AHRC granted the Commonwealth and all ADEs a one-year exemption, to allow the payment of wages to supported employees, based on assessments already conducted using the BSWAT. The grant was subject to conditions, one of which was the requirement for the Commonwealth to:

- (a) Take all necessary steps to transition from the BSWAT to the Supported Wage System..., or an alternative tool approved by the Fair Work Commission..., as quickly as possible.¹⁵

Purpose and key provisions of the bills

1.11 The Australian Government is currently in the process of developing a new 'wage assessment process'.¹⁶ The bills therefore represent an interim measure, designed to reassure supported employees, their families and carers:

...by removing perceived liability that could impact the ability of [ADEs] to deliver ongoing employment opportunities.¹⁷

-
- 12 On behalf of the Commonwealth, the application sought exemption from section 29 (administration of Commonwealth laws and programs) of the *Disability Discrimination Act 1992* (Disability Discrimination Act); on behalf of Australian Disability Enterprises, the application sought exemption from sections 15 (discrimination in employment) and 24 (goods, services and facilities) of the Disability Discrimination Act.
 - 13 Department of Social Security, 'Application for Temporary Exemption under Section 55 of the *Disability Discrimination Act 1992*', 5 September 2013, p. 1, available at: <https://www.humanrights.gov.au/sites/default/files/FaHCSIA%20-%20DDA%20Exemption%20Application.pdf> (accessed 24 July 2014).
 - 14 The consultations included a call for submissions and requests for further information. Over 100 submissions and four responses to requests for further information were received by the Australian Human Rights Commission (AHRC).
 - 15 AHRC, '*Disability Discrimination Act 1992* (CTH), s 55(1), Notice of Grant of a Temporary Exemption', p. 1, available at: https://www.humanrights.gov.au/sites/default/files/20140429_Notify_of_Exemption_BSWAT.pdf (accessed 24 July 2014). The Supported Wage System is the second 'approved wage assessment tool' owned by the Australian Government and used in mainstream employment.
 - 16 The Hon. Kevin Andrews MP, Minister for Social Services (Minister), and Senator the Hon. Mitch Fifield, Assistant Minister for Social Services, 'Payment scheme for workers assessed under the Business Services Wage Assessment Tool', Joint Media Release, 15 January 2014.
 - 17 The Minister, *House Hansard*, 5 June 2014, p. 1.

Business Services Wage Assessment Tool Payment Scheme Bill 2014

1.12 The Bill seeks to establish a payment scheme for supported employees with intellectual disability in ADEs, who previously had their wages assessed under the BSWAT (BSWAT Payment Scheme).¹⁸ This purpose is primarily achieved through:

- Part 2 of the Bill, which outlines the key elements of the BSWAT Payment Scheme; and
- Part 3 of the Bill, which sets out how a supported employee may obtain a payment under the BSWAT Payment Scheme.

1.13 Part 4 of the Bill describes the process by which a person can be appointed as a nominee for a supported employee who is participating in the BSWAT Payment Scheme.¹⁹

Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014

1.14 The Consequential Bill seeks to provide for consequential amendments related to the Bill in four Commonwealth Acts.²⁰ These amendments will:

- ensure that payments under the BSWAT Payment Scheme:
 - are eligible income for the lump sum in arrears tax offset;²¹
 - are not income for the purposes of income support payments;²² and
- allow protected (that is, personal) information to be obtained, recorded and disclosed for the purposes of administering the BSWAT Payment Scheme.²³

1.15 The Explanatory Memorandum states that the financial impact of the bills will depend on the number of supported employees who apply for a payment under the scheme, as well as the payment amounts determined for eligible applicants.²⁴ The Bill contains a standing appropriation in this regard.²⁵

18 Explanatory Memorandum (EM), p. 1. The bills refer to 'intellectual impairment' rather than 'intellectual disability' however this report uses the more common terminology.

19 Part 5 of the Business Services Wage Assessment Tool Payment Scheme Bill 2014 (Bill) outlines various administrative matters associated with the payment scheme; Part 6 of the Bill deals with miscellaneous matters.

20 These Commonwealth Acts are: the *Income Tax Assessment Act 1936*; the *Social Security Act 1991*; the *Social Security (Administration) Act 1999*; the *Veterans' Entitlements Act 1986*.

21 Clauses 1–2 of the Business Services Wage Assessment Tool (Consequential Amendments) Bill 2014 (Consequential Bill).

22 Clauses 3 and 6 of the Consequential Bill.

23 Clauses 4–5 of the Consequential Bill.

24 EM, p. 2.

25 Clause 99 of the Bill.

Consideration by other committees

1.16 The Bill has been considered by the Senate Standing Committee for the Scrutiny of Bills²⁶ and the Parliamentary Joint Committee on Human Rights (PJC-HR).²⁷ In its report, the PJC-HR stated:

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.²⁸

1.17 Further advice has been sought from the Minister by the PJC-HR in relation to these rights, which might be affected by various provisions of the Bill.²⁹

Conduct of the inquiry

1.18 Details of the inquiry, including links to the bills and associated documents, were placed on the committee's website.³⁰ The committee also wrote to 20 organisations, inviting submissions by 23 July 2014. Submissions continued to be accepted after that date.

1.19 The committee received 23 submissions, which are listed at Appendix 1. All submissions were published on the committee's website.

1.20 The committee held a public hearing in Melbourne on 24 July 2014. A list of witnesses who appeared at the hearing is at Appendix 2, and the *Hansard* transcript is available through the committee's website.

Acknowledgement

1.21 The committee thanks those organisations who made submissions and who gave evidence at the public hearing.

26 Alert Digest 6/14, 18 June 2014, pp 9–16. Further information was sought from the Minister on a number of matters: provisions relating to external review; delegation of legislative power in clause 56 of the Bill; reversal of onus of proof in sub-clause 73(2) of the Bill; disclosure of 'protected information' in clause 81 of the Bill; broad delegation of administrative powers in clause 100 of the Bill; appropriateness of the delegation of legislative power in clause 102 of the Bill.

27 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, Ninth Report of the 44th Parliament*, 15 July 2014, pp 2–12.

28 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, Ninth Report of the 44th Parliament*, 15 July 2014, p. 2.

29 For example: calculation of the 'payment amount' in clause 8 of the Bill; release and indemnity provisions in clauses 9–10 of the Bill; nominee provisions in Part 4 of the Bill; timeframes set out in the Bill.

30 See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs.

Note on references

1.22 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

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).¹ 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).² 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.³

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

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,⁴ although the Australian Lawyers Alliance suggested that cost considerations might be a relevant factor.⁵

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.⁶

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]'.⁷

2.7 A few submitters also questioned the certainty in clause 8 of the Bill, due to the rules not yet having been published⁸ and inclusion of the phrase 'broadly reflect' in paragraph 8(3)(a) of the Bill.⁹ 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?¹⁰

Legal consequences of accepting a payment

2.8 The legal rights of a 'participant'¹¹ 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),¹² including 'the proceeding commenced by originating application in the Federal Court on

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].¹³

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),¹⁴ in contravention of international law;¹⁵ and undermine due process of law in exchange for the 'payment amount'.¹⁶

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.¹⁷

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).¹⁸

'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');

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.¹⁹

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.²⁰

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.²¹

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.²²

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.²³ 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.²⁴

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;²⁵ applicants must register with the Secretary before 1 May 2015

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;²⁶ 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).²⁷ Some submitters expressed concerns with some of these procedural aspects, arguing that the two-stage process of registration and application is unnecessarily complex,²⁸ and the time allowed for acceptance of an offer of payment is not adequate (particularly in view of the requirements for an 'effective acceptance').²⁹

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'.³⁰

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.³¹

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.³²

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').³³ 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.

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,³⁴ consistent with the Minister's announcement that these costs are covered by the BSWAT Payment Scheme.³⁵ 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).³⁶

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.³⁷

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

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.³⁸

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].³⁹

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).⁴⁰ 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.⁴¹

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'.⁴²

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.⁴³

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.

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,⁴⁴ 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'.⁴⁵ 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.⁴⁶

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'.⁴⁷ 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.⁴⁸

2.35 In its Ninth Report of the 44th 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.⁴⁹

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),⁵⁰ 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'.⁵¹

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.⁵²

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.⁵³

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'.⁵⁴

2.42 Departmental officers gave evidence that clause 50 of the Bill is 'a standard provision under beneficial legislation',⁵⁵ which has been 'modelled quite closely on the NDIS' legislation.⁵⁶ 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'.⁵⁷

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.⁵⁸

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.⁵⁹

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.⁶⁰ 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

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

Labor Senators' Dissenting Report

Governments must do more to support people with disability into employment

1.1 Labor believes that more needs to be done to support people with disability into employment.

1.2 In the last term of government, Labor introduced the National Disability Insurance Scheme (NDIS), the most significant reform to disability services in this country's history.

1.3 Labor also introduced the National Disability Strategy, introduced 'the Vision' (Inclusive Employment 2012-2022), delivered historic increases to the Disability Support Pension (DSP), and doubled Australian Government funding for disability care and support under the National Disability Agreement.

1.4 By contrast, the Government's 2014-15 Budget includes savage cuts to people with disability, for example by changing the indexation arrangements of the DSP and Carer Payment.

1.5 People with disability, their families and carers have been abandoned by Tony Abbott's Liberal-National Government.

1.6 In 12 years of the previous Coalition Government, the value of Commonwealth funding for disability services was cut dramatically. The previous Coalition Government capped the number of disability employment assistance (DES) places that meant many people missed out. In 2010 Labor invested \$3.2 billion to uncap DES places. As a result, around 160,000 DES participants with disability found work.

1.7 Labor is concerned that the Government does not have a plan to support people with disability into work.

1.8 Advancing the objectives of the *Disability Discrimination Act 1992* (Cth) is of critical importance to Labor. Achieving the objectives of the Act, such as the elimination of discrimination against people with disability, including in the area of employment, is vital.

1.9 Labor wants to ensure that people with disability have the same fundamental rights as the rest of the community. Labor is also committed to ensuring a viable employment sector that does not put jobs in jeopardy.

The Bill

1.10 The positions outlined in this report will not jeopardise jobs. Labor wants to ensure that people with disability retain their jobs. Equally, Labor is determined to see workers with disability receive fair pay.

1.11 Both the Federal and High Courts of Australia have determined that the Business Services Wage Assessment Tool (BSWAT) has discriminated against some people with intellectual disability.

1.12 This means that these Australian workers, some of the most vulnerable in our community, have been paid less than they should have been.

1.13 The Joint Parliamentary Committee on Human Rights expressed a view that:
The scheme does not contain the requisite elements of an effective remedy to the unlawful discrimination found to have taken place.

1.14 Labor Senators on the Committee do support the concept of the Government making a payment as an interim measure whilst the Government puts in place an appropriate non-discriminatory mechanism to ensure people receive fair pay. This additional funding will provide much needed support while this matter is resolved.

The right to pursue legal redress

1.15 The Labor Senators on the Committee have very serious concerns that the Bill effectively extinguishes a person's legal rights.

1.16 The Bill stipulates that a person ceases to be a group member of any relevant representative proceeding at the time the acceptance of a payment under the Scheme is lodged.

1.17 Labor understands that the Government's rationale for this provision is that once a person has accepted the offer of payment under the Scheme, they have accepted that they no longer have a cause of action for which the Court needs to declare a remedy.

1.18 However, in assessing the Bills' compatibility under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Joint Parliamentary Committee on Human Rights Statement of Compatibility states that:

'there could be a perception that a human right to an effective remedy is being limited.'

1.19 In giving evidence to the current Senate Inquiry, People with Disability Australia argued that:

The Bill is a clear attempt on behalf of the Commonwealth to avoid implementation of the Nojin and Prior judgement, and to sabotage the current representative action for compensation by people with intellectual disability who experienced discrimination as a result of having their wages assessed using the BSWAT. In doing so, the Bill will exploit the vulnerable circumstances of people with intellectual disability who work in ADEs, by providing a payment in exchange for their consent to maintain a system of wage determination which has been proven to discriminate against them.

1.20 Labor Senators of the Committee recommend that the provisions of the Bill which seek to extinguish a person's right to pursue compensation through the courts be rejected.

1.21 Instead, Labor Senators of the Committee recommend that the Bill be amended to protect people's legal rights, whilst ensuring that people cannot receive money under the Government's scheme and money awarded by the courts. This is effectively how the compensation rules under the *Social Security Act 1991* operate.

Nominee provisions

1.22 The Labor members of the Committee are concerned by the evidence presented to the Committee regarding the nominee provisions in the Bill.

1.23 The Human Rights Committee expressed concern about the lack of regulation in the Bill to ensure the nominee rules 'support, rather than substitute the decision making of the represented person'.

1.24 The nominee rules under the NDIS Act are underpinned by principles of supported decision making and by the UN Convention of the Rights of Persons with Disabilities.

1.25 We are concerned that the nominee provisions in this Bill are not premised on this principle of supported decision making.

1.26 We would be very concerned by any rules that do not ensure nominee provisions are used as a last resort.

1.27 Labor Senators share the Human Rights Committee's concerns that the rules are not yet published. Labor notes that the Human Rights Committee has sought advice from the Minister as to whether the decision making models in place are 'compatible with the right to equality and non-discrimination'.

1.28 We urge the Government to publish the proposed rules as soon as possible, and undertake extensive consultation on them, to ensure they are consistent with the principle of 'supported decision making,' consistent with the NDIS.

A long term solution

1.29 Labor is concerned about the lack of action by the Government to progress an adequate solution to this issue.

1.30 The Government has had almost 12 months to address this issue. The Australian Human Rights Commission (AHRC) handed down its 12 month exemption in April this year – the Government is already a quarter of the way through this exemption period. The Committee heard that to date, there has been no progress made.

1.31 The AHRC's exemption was granted to the Commonwealth, subject to a number of conditions, including that the Commonwealth:

- a. take all necessary steps to transition to the Supported Wage System, or an alternative tool approved by the Fair Work Commission, as quickly as possible.
- b. immediately commence using the Supported Wage System, or an alternative tool approved by the Fair Work Commission, to conduct new and outstanding wage assessments.
- c. report to the Commission on a quarterly basis during the exemption period as to:

- i. The number of assessments conducted each quarter; and
 - ii. The number of assessments still to be conducted.
- d. give consideration to ensuring that no disadvantage is suffered by ADE employees whose wages may be reduced as a result of the application of the Supported Wage System or alternative tool.

1.32 The Labor members of the Committee are not aware that the Government has provided the AHRC with a substantive report or update to the AHRC, as per part c) above.

1.33 We urge the Government to get on with the work outlined in the AHRC's conditions immediately, and that the Government work closely with all relevant stakeholders every step of the way.

Recommendation 1

1.34 Labor senators on the Committee do support the concept of the Government making a payment as an interim measure whilst the Government puts in place an appropriate non-discriminatory mechanism to ensure people receive fair pay. Labor senators on the Committee recommend that the Government sit down with people with disability, employers and relevant others as soon as practicable to try and resolve this matter. Labor senators on the Committee believe this approach would be in the best interests of workers and employers.

Recommendation 2

1.35 It is recommended that the Bill be opposed in its current form.

Recommendation 3

1.36 It is recommended that the Bill be amended in a way that leaves intact peoples' rights to pursue legal redress, whilst ensuring people cannot receive money from the Government's payment scheme and any money awarded by the courts.

Recommendation 4

1.37 It is recommended that the nominee provisions in the Bill be amended to more closely reflect the nominee provisions in the NDIS Act 2013.

Senator Carol Brown

Senator Nova Peris OAM

Senator Claire Moore

Australian Greens' Dissenting Report

1.1 People with a disability are severely underrepresented in the workforce in Australia, and those with an intellectual disability are especially so. With only 6.9 percent of working age people with an intellectual disability reporting work in an open labour market¹ it is clear that workers with an intellectual disability face “large gaps of support to help them move into open employment, earn a real wage and reduce their reliance on the pension.”²

1.2 Structural change is required. We need much better strategies and legislation to encourage and support a greater participation by people with disabilities. However, increased participation by discrimination against workers is unacceptable. The Australian Greens are committed to equal pay for equal work and are very concerned with the distressingly low payments made to people with an intellectual disability assessed under the Business Services Wage Assessment Tool (BSWAT).

1.3 BSWAT has been found by the High Court to be discriminatory towards workers with an intellectual disability. The Australian Human Rights Commission also finds BSWAT to be an unacceptable tool, and concerns have also been raised by a variety of peak disability and legal bodies including Inclusion, People with Disabilities and AED legal centres.

1.4 The Australian Greens are deeply concerned with the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and the Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014 and the affect that they will have on the rights of workers with a disability assessed under BSWAT.

1.5 We are particularly concerned that the Bill does not adequately address or cease the continued discrimination of workers assessed under BSWAT. We also have key concerns regarding:

1. That a payment rather than compensation is being offered
2. People have to waive their legal rights to access the payment
3. Conflict of interest issues around power to appoint a nominee provisions.

1.6 The Australian Greens are also concerned with the fact that the Bill does not extend to workers with a disability who do not have an intellectual disability.

Only people with intellectual disability will be eligible for the payment scheme. A person with psychosocial disability, for example, may work in the same ADE, do the same job and earn the same wage as a person with an intellectual disability but they are excluded from the payment scheme. The

1 Inclusion Australia, *Submission 10*, p. 2.

2 Inclusion Australia, *Submission 10*, p. 2.

Commonwealth's failure to recognise the violation of rights that people without intellectual disability have experienced will continue.³

Accessing the Payment

1.7 Approximately half of Australian Disability Enterprises (ADEs) use the BSWAT, which means there are currently around 10,000 people who have been assessed using the BSWAT model.⁴ This Bill offers a potential payment of up to 50 percent of what is already owed on completed work in exchange for workers losing their right to seek a fair pay settlement. In other words, for 50 percent of what workers are entitled to they will be asked to sign away their legal rights. Only paying workers 50 percent of what they are entitled to, is unacceptable. There should be full compensation for unpaid wages. In addition, the lost opportunity of what people could have purchased with their rightful wage is not addressed. This is a similar situation that resulted from wages stolen from Aboriginal and Torres Strait Islander peoples.

1.8 The Australian Greens are very concerned that the tight timeframe that people have to decide if they wish to pursue the payment will mean that people can't adequately weigh up all their options to make a decision in their best interest.

1.9 We are also concerned that there are inadequate provisions being made to ensure all those affected are aware of their choices and the consequences of decisions. This legislation could lead to unfair outcomes for underpaid workers.

1.10 There are also inconsistencies between the payments as:

A person who is found eligible and is made an offer of payment this year will receive less than if they apply to the payment scheme next year as they would have been working under the BSWAT for longer. This will create unequal outcomes and is unfair.⁵

Power to appoint a nominee

1.11 The provision in the Bill that allows the Secretary of the Department of Social Services to appoint nominees on behalf of underpaid workers without their consent is very concerning. "There is no restriction on who can be appointed and no exclusion of individuals or parties with a conflict of interest"⁶

The third point—and, in my eyes, the most important—is the right given to the secretary to appoint a nominee to effectively stand in the shoes of the supported employees. This is not only a conflict of interest but removes from these employees their very basic human and constitutional rights.

3 Ngila Bevan, Manager, People with Disability Australia, *Committee Hansard*, 24th July 2014, p. 1.

4 National Disability Services, *Submission 5*, p. 2.

5 Ngila Bevan, Manager, People with Disability Australia, *Committee Hansard*, 24th July 2014, p. 1.

6 AED Legal Centre, *Submission 9*, p. 7.

There is a very real danger here that the nominee appointed would or could have a larger picture goal in sight rather than that of the employee.⁷

1.12 This Bill ignores supported decision making, which is vitally important in respecting the rights of people with a disability.

So really the whole provisions in this act around appointing nominees are completely in opposition to respect for supported decision making and respect for a person's right to legal capacity.⁸

There is a conflict of interest, first, in having the secretary being able to appoint a nominee. As to the nominee themselves, the role of that nominee raises the concern that it could be, potentially, a conflict of interest.⁹

1.13 This Bill does not have adequate safeguards to ensure peoples' legal rights are protected.

Viability of ADE

1.14 ADEs are an important part of work opportunities for people with disabilities and offer support and employment that are very much in demand. During the inquiry the viability of ADEs to survive if they had to pay the non-discriminatory wage was brought up on several occasions. The Greens agree with People with Disabilities Australia that "maintaining the financial viability of ADEs is not a consideration that should trump the right of a worker to receive equal pay for work of equal value."¹⁰

Conclusion

1.15 The BSWAT tool has been found to discriminate against workers with an intellectual disability. This Bill does not adequately address the discrimination or need for compensation.

1.16 The Bill fails because it "does not fairly compensate employees who have been underpaid whilst working for an Australian Disability Enterprise."¹¹

In conclusion, the payment scheme is asking people with intellectual disability to accept a partial payment for the wage injustice, discrimination and significant economic loss that they have experienced. In return, they will continue to experience the same wage injustice, discrimination and economic loss indefinitely.¹²

7 Kairsty Wilson, Legal Manager, Principal Legal Practitioner, AED Legal Centre, *Committee Hansard*, p. 3.

8 Therese Sands, Co-Chief Executive Officer, People with Disability Australia, *Committee Hansard*, p. 4.

9 Kairsty Wilson, Legal Manager, Principal Legal Practitioner, AED Legal Centre, *Committee Hansard*, p. 5.

10 People with Disability Australia, *Submission 21*, p. 4.

11 Elizabeth Nojin, *Submission 3*, p. 1.

12 Ngila Bevan, Manager, People with Disability Australia, *Committee Hansard*, 24th July 2014, p. 2.

1.17 The Greens support compensation for these unpaid wages. However, because of the provisions in the Bill only paying 50 percent of wages owed, the demand for relinquishing legal rights, issues around timeframes and transparency, as well as conflict of interest in power to appoint a nominee, the Australian Greens cannot support the Business Services Wage Assessment Tool Payment Scheme Bill 2014 and the Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014.

Recommendation 1

1.18 That the Business Services Wage Assessment Tool Payment Scheme Bill 2014 (Bill) and the Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014 (Consequential Bill) not be passed in their current form.

Senator Rachel Siewert

APPENDIX 1

Submissions and additional information received by the Committee

Submissions

- 1 Ms Janine Roberts
- 2 Mr Robert Macfarlane
- 3 Ms Elizabeth Nojin
- 4 Mr Matthew Dimmoc
- 5 National Disability Services
- 6 Mr Neville Ramaker
- 7 Ms Hope Winters
- 8 Grampians disAbility Advocacy
- 9 AED Legal Centr
- 10 Inclusion Australia (formerly National Council on Intellectual Disability)
- 11 Department of Social Services
- 12 Ms Claudine Duval
- 13 Ms Felicity Smith
- 14 Australian Lawyers Alliance
- 15 JobWatch Inc.
- 16 Disability Advocacy NSW
- 17 Disability Discrimination Legal Service
- 18 Dr Beth Gaze
- 19 Victorian Equal Opportunity and Human Rights Commission
- 20 Office of the Public Advocate (Victoria)
- 21 People with Disability Australia
- 22 Australian Centre for Disability La
- 23 Australian Council of Trade Unions

Answers to Questions on Notice

- 1 Answers to Questions on Notice received from Department of Social Services,
20 August 2014
- 2 Answers to Questions on Notice received from Department of Social Services,
20 August 2014

Correspondence

- 1 Correspondence clarifying evidence given at Melbourne public hearing on 24
July, from Maurice Blackburn Lawyers, received 8 August 2014

APPENDIX 2

Public hearings

Thursday, 24 July 2014

Parliament House, Melbourne

Witnesses

Department of Social Services

ANGUS, Ms Laura, Branch Manager, BSWAT Employment Response Unit

FRANCIS, Mr Steven, Principal Legal Officer

LEWIS, Mr Evan, Group Manager, Disability and Carers

National Disability Services

BAKER, Dr Ken, Chief Executive

Endeavour Foundation

BARBAGALLO, Mr David Peter, Chief Executive Officer

People with Disability Australia

BEVAN, Ms Ngila, Manager, Advocacy and Communications

SANDS, Ms Therese, Co-Chief Executive Officer

Maurice Blackburn Lawyers

BORENSTEIN, Mr Herman, QC, Counsel for the Applicant in proceeding VID 1367 of 2013

BORNSTEIN, Mr Josh, Principal

Inclusion Australia

CAIN, Mr Paul, Director, Research and Strategy

Australian Centre for Disability Law

FRISCH, Ms Ya'el, Vice-Chairperson, ACDL Management Committee

KAYESS, Ms Rosemary, Chairperson, ACDL Management Committee

Disability Advocacy Network Australia

MALLETT, Ms Mary, Chief Executive Officer

AED Legal Centre

WILSON, Ms Kairsty, Legal Manager, Principal Legal Practitioner