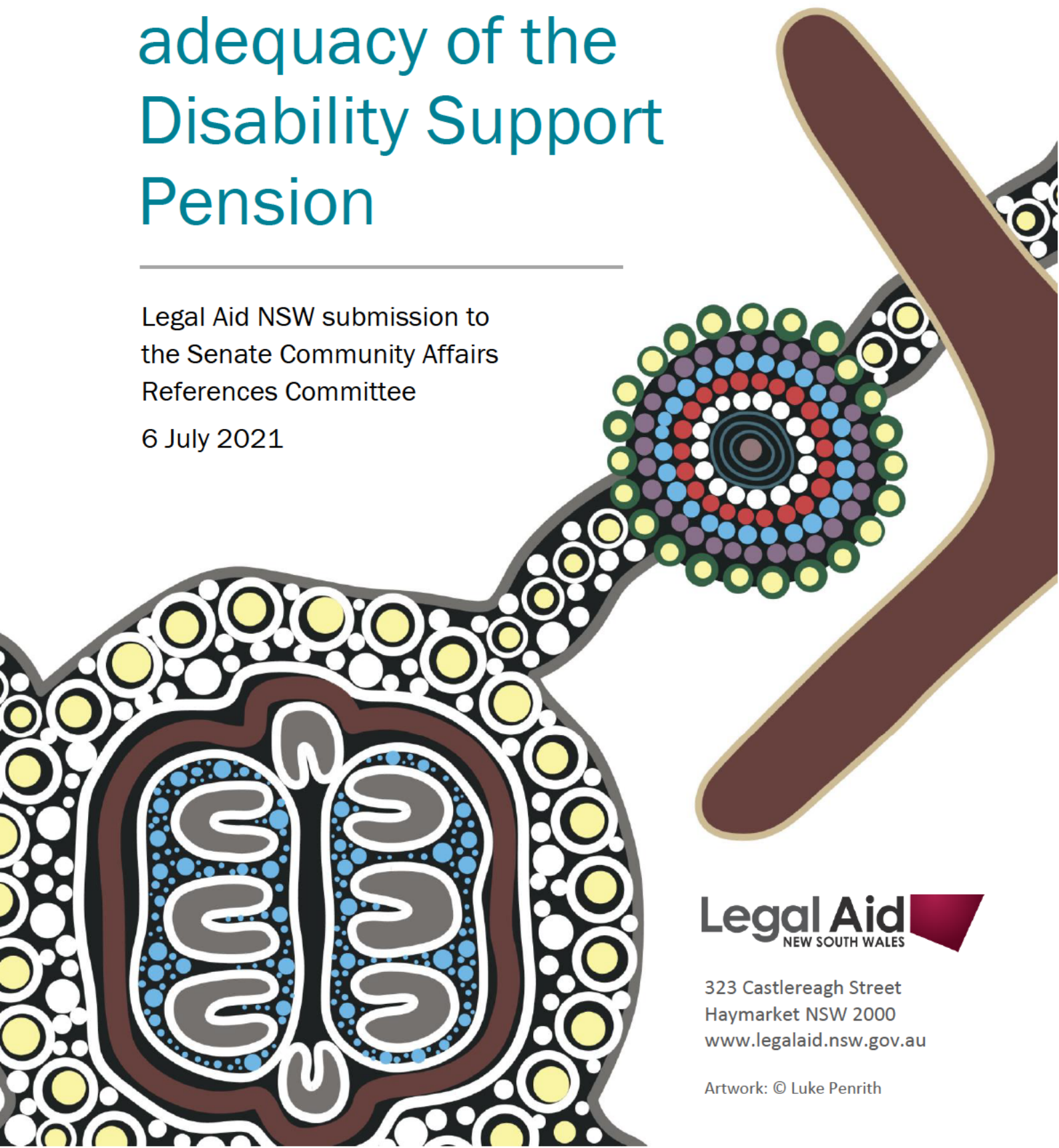


Inquiry into the purpose, intent and adequacy of the Disability Support Pension

Legal Aid NSW submission to
the Senate Community Affairs
References Committee

6 July 2021



Legal Aid
NEW SOUTH WALES

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Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law. Specialist services focus on the provision of Family Dispute Resolution Services, family violence services and the early triaging of clients with legal problems through the Family Law Early Intervention Unit.

Legal Aid NSW provides duty services at a range of courts, including the Parramatta, Sydney, Newcastle and Wollongong Family Law Courts, all six specialist Children's Courts and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Domestic Violence Unit is a service made up of lawyers, social workers and financial counsellors dedicated to assist victims of domestic and family violence. The Domestic Violence Unit provides casework litigation, social work assistance and financial counselling services to victims of domestic and family violence who are at serious threat and/or have complex legal and social needs.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

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2. Executive Summary

Legal Aid NSW welcomes the opportunity to provide a submission to the Senate Community Affairs References Committee's *Inquiry into the purpose, intent and adequacy of the Disability Support Pension*.

Legal Aid NSW lawyers provide advice, minor assistance and representation to people who are adversely affected by the decisions of Centrelink. Legal Aid NSW represents people before the Administrative Appeals Tribunal (**AAT**), including people whose claims for Disability Support Pension (**DSP**) have been refused or whose DSP has been cancelled. The comments provided in this submission draw on the practical experience of Legal Aid NSW's lawyers in advocating on behalf of these clients.

This submission will focus on item b. in the Terms of Reference:

- *the DSP eligibility criteria, assessment and determination, including the need for health assessments and medical evidence and the right to review and appeal.*

It is Legal Aid NSW's experience that there are significant difficulties for people with serious medical conditions and limited or no capacity to work in meeting the eligibility criteria for DSP or in being able to prove they meet the eligibility criteria for DSP. The complexity of the criteria and the assessment and review process create barriers for applicants, particularly for those from culturally and linguistically diverse backgrounds, with mental health conditions and those that experience other compounding disadvantage.

Based on our experience, we recommend that changes are made to the requirements to promote fairer and more transparent decisions, including changes to processes, the evidence that can be considered in decision making and the legal requirements to be eligible for the DSP.

Recommendations

Recommendation 1: Assessors and Job Capacity Assessors

That job capacity assessments and government-contracted doctors are limited to expressing opinions within the expertise of the assessor and are not used as a substitute for decision making on whether a claimant meets the eligibility criteria.

Recommendation 2: Medical evidence

That a form with questions to a claimant's treating doctor relevant to the determination of whether they meet the eligibility criteria be reintroduced.

Recommendation 3: Permanency

That Centrelink officers determining whether a person meets the eligibility criteria thoroughly consider the available evidence about:

- a. Whether any treatment for a condition would lead to a significant functional improvement for the claimant within the next two years.
- b. Whether any treatment which is suggested is 'reasonable'.

Recommendation 4: Impairment Tables – Table 1

That the following change be made to **Table 1**: that the 'without assistance' requirement is removed from Table 1 or re-stated so as to make it clear the assistance that is required does not need to be from another person and can instead take the form of equipment or medical aides.

Recommendation 5: Impairment Tables – Table 2

That the following change be made to **Table 2**: that the functional tasks for upper limb function are separated so that a claimant can be assigned points if they experience impairment in fine motor skills **or** heavy load bearing tasks, not a combination of most of the functional limitations of both.

Recommendation 6: Impairment Tables – Table 3

That the following changes be made to **Table 3**:

- a. that the 'without assistance' requirement is removed from Table 3 or otherwise clarified to include assistive technology and medical equipment.
- b. that changes are made to Table 3 to take into account the functional impacts of associated conditions such as a spinal function.

Recommendation 7: Impairment Tables – Table 4

That the following changes be made to **Table 4**: that changes are made to Table 4 to take into account the associated functional impacts under Table 3.

Recommendation 8: Impairment Tables – Table 5

That the following changes be made to **Table 5**:

- a. that a mental health condition should be accepted as being diagnosed where there is evidence of the person's diagnosis from any practitioner who is qualified to make that diagnosis (including GP notes, clinical notes, GP summary reports and documents provided by social workers, counsellors and support workers), not just a diagnosis from a psychiatrist or clinical psychologist.
- b. that Table 5 be amended so that the description of the 5-point rating is adjusted to 10, and the 10-point to 20.

Recommendation 9: Program of Support Requirements – Severe Impairment

The definition of ‘severe’ impairment for the purposes of satisfying the program of support requirement be amended so that it includes obtaining 20 impairment points under a single impairment table or a total of 30 impairment points or more across multiple tables.

Recommendation 10: Program of Support Requirements – participation

The *Social Security (Active Participation for Disability Support Pension) Determination 2014* be amended so that the following be counted as participation for the purposes of the program of support requirement:

- a. periods of time where Centrelink have medically exempted a person from participating in a program of support, and
- b. periods of time where a person is assessed as having an inability to work more than 15 hours per week and are not required to attend a program of support.

Recommendation 11: Program of Support Requirements – benefit from program

A wide range of evidence to be accepted illustrating a person is unlikely to benefit from a program of support (including medical reports).

Recommendation 12: Program of Support Requirements – evidence from provider

That Program of Support providers are able to report to Centrelink at any time if they do not believe a person will benefit from a program of support because of their disabilities, with the person receiving confirmation they then satisfy the program of support requirement.

Recommendation 13: Program of Support Requirements – decision a person unlikely to benefit

That Centrelink assessors and Job Capacity Assessors can assess, based on medical or other evidence supplied with a DSP claim form, that a person is unlikely to benefit from a program of support.

3. Overview of the current eligibility and assessment regime

3.1 Disability Support Pension eligibility criteria

Subject to residence and age limitations, qualification for DSP is governed by section 94 of the *Social Security Act 1991* (**the Act**). The requirements for DSP qualification are that a person:

1. has a physical, intellectual or psychiatric impairment (s 94(1)(a)); and
2. has a total impairment rating of 20 points or more under the Impairment Tables (s 94(1)(b)); and
3. has a continuing inability to work (s 94(1)(c)(i)) or is participating in a supported wage system (s 94(1)(c)(ii)).

The current Impairment Tables commenced January 2012 and are contained in the *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011* (**Impairment Tables**).

Since 1 July 2006 “work” has meant 15 hours or more per week (s 94(5)).

A “continuing inability to work” is defined in subsection 94(2) as meaning:

- the impairment prevents the person from doing any work independently of a program of support within the next two years; and
- the impairment prevents the person from undertaking a training activity during the next two years or the training activity is unlikely, because of the impairment, to enable them to do any work independently of a program of support in the next two years; and
- the person has actively participated in a program of support, unless they have a severe impairment.

A person will have a “severe impairment” if the impairment meets the description of 20 points or more under a single Impairment Table (s 94(3B)).

3.2 Assessment and determination of Disability Support Pension entitlement

When a person claims DSP, their claim is reviewed to see if there is sufficient medical evidence suggesting their conditions are “permanent”. An assessor conducts a DSP Medical Eligibility Assessment Recommendation. If there is insufficient evidence, the claim will be refused without the person being assessed by a job capacity assessor.

If there is sufficient evidence suggesting a person may be eligible for the DSP, they are referred to a job capacity assessor for an assessment, usually held face to face. The

assessor will complete a Job Capacity Assessment noting whether they consider the person meets the eligibility criteria for DSP.

A specialist assessment may be conducted in addition to a job capacity assessment. These can be arranged where comprehensive evidence has been given to a job capacity assessor but clarification is required and cannot be obtained by any other means, or the job capacity assessor observes or suspects that a person has an intellectual disability, acquired brain injury or psychological/psychiatric disorder and there is no evidence of diagnosis or treatment as the person lacks insight into the condition or is otherwise incapable of independently engaging in medical services to obtain the required information.

If the job capacity assessor does not consider the person meets the criteria, the DSP claim will be refused. If they consider the person qualifies for DSP, the application is then referred for a disability medical assessment by a Government-contracted doctor. Government-contracted doctors must be registered and licensed medical practitioners, or in the case of a person with a mental health condition, a registered clinical psychologist. The Government-contracted doctor will conduct their own assessment and make a recommendation about whether they consider the person meets the eligibility criteria for DSP.

3.3 Overview of concerns with current eligibility criteria, assessment and determination process

In summary, the difficulties with the current eligibility criteria, assessment and determination process are as follows:

- The use of Job Capacity Assessments (JCAs) and Government-contracted doctors to determine new claims for DSP and for reviewing a current DSP recipient's ongoing entitlement to a pension.
- Inadequate processes for obtaining evidence about a person's medical conditions and impairments.
- Failure to properly consider all elements of the definition of "permanent".
- Impairment Tables – issues with the expression of functional limitations in Tables 1, 3, 4 and 5.
- Difficulties for people with mental health conditions obtaining evidence from a clinical psychologist or psychiatrist to evidence mental health diagnoses.
- That the current program of support requirements exclude people with severe disabilities who cannot participate in a program of support.

We provide further detail on these issues below.

4. Assessors and Job Capacity Assessors

Based on our experience, it is submitted that initial assessors and job capacity assessors' roles should be limited to assessing applicants' functioning, and that they are not the appropriate people to assess the legal requirements for eligibility for DSP.

A serious flaw in the assessment process is the lack of relevant experience or qualifications held by assessors and job capacity assessors who are assessing the medical conditions with which the person presents. A person should be allocated to an initial assessor and then a job capacity assessor with specialisation in the person's primary medical condition.

In most cases the health professional who undertakes the initial assessment and thereafter the job capacity assessment does not have qualifications in medicine. More commonly initial assessors and job capacity assessors are allied health professionals such as psychologists, social workers, nurses, occupational therapists, or exercise physiologists.

As a result, initial assessors and job capacity assessors are frequently asked to make findings outside their professional expertise. Legal Aid NSW is concerned that a lack of expertise at the original decision-making level is resulting in adverse outcomes for our most disadvantaged and vulnerable clients.

Recent examples from our casework include:

1. A DSP claimant with atrial fibrillation and angioplasty had his DSP claim initially determined by a psychologist, with a Job Capacity Assessment later being conducted by an Accredited Exercise Physiologist.
2. A DSP claimant with a brain tumour, spinal disorder, upper limb condition and a mental health condition had his claim initially assessed by a psychologist, with a Job Capacity Assessment later being undertaken by a Registered Occupational Therapist.

Legal Aid NSW submits that initial assessors and job capacity assessors should not be the gatekeepers for whether someone is considered eligible for DSP.

This submission also extends to Government-Contracted doctors. Although a Government-contracted doctor is required to be a registered and licensed medical practitioner or a registered clinical psychologist (for mental health conditions only), there is no requirement that the person specialise in the area(s) to which the claimant's medical conditions relate.

Recommendation 1: Assessors and Job Capacity Assessors

Legal Aid NSW recommends that job capacity assessments and government-contracted doctors are limited to expressing opinions within the expertise of the assessor and are not used as a substitute for decision making on whether a claimant meets the eligibility criteria.

5. Medical evidence

Legal Aid NSW considers it is vital that whoever assesses a person's eligibility for DSP has the necessary information available to them from the person's treating doctor, any treating specialists and allied health professionals. It is our experience that there is a lack of knowledge amongst doctors about what information is required to assess DSP claims against the legislative criteria.

Prior to July 2015, Centrelink required a form be completed by the person's treating doctor as part of the claim for DSP. There were significant problems with that form (Medical report – *Disability Support Pension*) principally because it did not ask for sufficient details from the doctor to allow for a thorough assessment of the DSP eligibility requirements. We advocated for improvements to the form including guides to assist doctors to complete the forms.

In July 2015 a new assessment process was introduced that removed the requirement for a form to be completed by the person's treating doctor and instead required the person to provide existing medical reports. As a result, there is no longer a mechanism for a doctor to list all the person's medical conditions and the resulting impairments and provide an overview of the medical conditions of the person claiming DSP. It has put the burden on claimants for DSP to locate and provide Centrelink with copies of primary medical documents such as imaging reports, rehabilitation reports, hospital discharge reports, specialist reports etc. This creates a significant burden on applicants who already possess limited capacity by virtue of their disability to obtain and provide this documentation to Centrelink. Whilst recognising the benefit in Centrelink having those records, our experience is that a form with appropriate questions and guidance to doctors would better assist decision makers determining DSP claims.

Recommendation 2: Medical Evidence

Legal Aid NSW recommends that a form with questions to a claimant's treating doctor relevant to the determination of whether they meet the eligibility criteria be reintroduced.

6. Permanency

In order for a person's medical condition to be given an impairment rating, it must be "permanent" as defined in clauses 6(4) – 6(7) of the Rules for applying the Impairment Tables (commonly referred to as a condition that is "diagnosed, treated and stabilised").

This is a complex process that requires a medical officer to decide, amongst other things, if there is any further reasonable treatment available for a person's impairment and whether such treatment would lead to a significant functional improvement in the next two years.

Assessments of impairments by job capacity assessors do not always properly consider all elements of the definition of 'permanent'. Our experience is that the following parts of the definition are often overlooked or misinterpreted by job capacity assessors:

- Whether any treatment for the condition would lead to a significant functional improvement within the next two years.
- Whether any treatment which is suggested is 'reasonable'.

6.1 Significant functional improvement

In Legal Aid NSW's experience, job capacity assessors often suggest a treatment for a particular condition with little or no consideration given to whether that treatment would achieve *significant* functional improvement within the next two years, as required by clause 6(6) of the Rules for applying the Impairment Tables. For example, our solicitors see inappropriate recommendations from Job Capacity Assessors for claimants with spinal and upper/lower limb conditions to attend 'pain management programs' and clinics, solutions which are unsupported by the medical evidence or physicians specialised in the applicant's impairment.

6.2 Reasonable treatment

Similarly, often little or no consideration is given to whether a suggested treatment for a condition is 'reasonable'. The Rules for applying the Impairment Tables require consideration of a number of factors including whether the treatment is available at a location reasonably accessible to the person and at a reasonable cost (clause 6(7)). Often, we observe that the job capacity assessor has not considered whether a treatment is available through the public health system, or whether it is available in the person's geographical area. This creates a perverse outcome whereby an applicant is denied financial assistance due to a lack of finances or mobility to access recommended treatment.

Another area of difficulty is where a person may have received treatment for a condition, sometimes over a long period of time, however the job capacity assessor will suggest the condition is not permanent because a different type of treatment has not been tried.

In Legal Aid NSW's experience, persons who are applying for DSP have undergone several years of medical tests and specialist appointments, and have exhausted any realistic remaining avenues of available treatment. However, our casework reflects the pitfalls of a system whereby a non-medically qualified 'job capacity assessor' will suggest that a condition is not permanent because a different type of treatment has not been tried, in circumstances where the person's longstanding medical practitioner has never recommended that treatment. In our view, this is an inappropriate outcome and provides an unnecessary barrier to access to the DSP. A person should not be refused DSP on the basis of a non-medically qualified person determining treatment is 'reasonable' when it has never been suggested by the person's treating medical practitioners.

Recommendation 3: Permanency

Legal Aid NSW recommends that Centrelink officers determining whether a person meets the eligibility criteria thoroughly consider the available evidence about:

- Whether any treatment for a condition would lead to a significant functional improvement for the claimant within the next two years.
- Whether any treatment which is suggested is 'reasonable'.

7. Impairment Tables

A person's permanent impairments are assessed against the Impairment Tables to determine how many points each impairment attracts. Each table contains a scale of points (0, 5, 10, 20 or 30) and a descriptor of the level of functional impact the impairments must cause to be assigned each number of points on the scale. A person needs a total of 20 points under the Impairment Tables to qualify for DSP. Significant amendments were made to the Impairment Tables, commencing in January 2011.

While we consider it positive that the Impairment Tables are function based, rather than diagnosis based, there are several tables where the descriptions of functional limitations caused by an impairment are expressed too narrowly. As a result, applicants who have significant functional limitations cannot meet the descriptors to be assigned 10 or 20 points for a condition (see examples below). Additionally, the 5 and 10-point ratings are under-weighted in a number of the Tables (see examples below).

7.1 Table 1 - Functions requiring Physical Exertion and Stamina

Table 1 is used to consider permanent conditions that result in functional impairments when performing activities requiring physical exertion and stamina. This is often as a result of cardiac or respiratory conditions, conditions resulting in chronic pain or extreme fatigue.

To obtain 10 impairment points under Table 1 a person needs to demonstrate that they experience frequent symptoms (e.g. shortness of breath, fatigue, cardiac pain) when performing day to day activities around the home and community and, due to these symptoms, the person:

- i) is unable to walk (or mobilise in a wheelchair) far outside the home and needs to drive or get other transport to local shops or community facilities; or
- ii) has difficulty performing day to day household activities (e.g. changing the sheets on a bed or sweeping paths).

In order to obtain 20 impairment points under Table 1 a person needs to demonstrate that they usually experience symptoms (e.g. shortness of breath, fatigue, cardiac pain) when performing light physical activities and, due to these symptoms, the person is unable to:

- i) walk (or mobilise in a wheelchair) around a shopping centre or supermarket without assistance; or
- ii) walk (or mobilise in a wheelchair) from the carpark into a shopping centre or supermarket without assistance; or
- iii) use public transport without assistance; or

iv) perform light day to day household activities (e.g. folding and putting away laundry or light gardening).

The person also needs to show they have or are likely to have difficulty sustaining work-related tasks of a clerical, sedentary or stationary nature for a continuous shift of at least three hours.

The requirement for 10 impairment points covers the difficulties the person may have accessing the community and maintaining their home. This criterion is based on what the person can and cannot do themselves, taking into account available equipment such as a wheelchair.

The requirement for 20 impairment points is significantly harder to demonstrate and includes an assessment about what the person can and cannot do ‘without assistance’ in three of the four criteria. It is understood that ‘without assistance’ means assistance from another person, rather than assistance from equipment or medical aides.

In our experience, the requirement that the person demonstrate they need the assistance of another person to undertake the designated activities effectively precludes a number of people with otherwise severe impairments in this domain from being able to obtain 20 impairment points. The criterion does not take into account advancements in assistive technology and medical equipment that would enable a person to independently access the community and utilise public transport, yet nevertheless have severe difficulties doing so. As it is currently written, a person who doesn’t require the assistance of another person but of assistive technology/equipment can only obtain 20 impairment points if they can show they cannot perform light day to day household activities.

As a result of the ‘without assistance’ requirement in Table 1 for 20 impairment points, a number of claimants are necessarily assigned 10 impairment points for their impairment related to physical examination and stamina, despite that criterion dramatically understating their difficulties.

We submit the ‘without assistance’ requirement should be removed from Table 1 or re-stated so as to make it clear the assistance that is required does not need to be from another person and can instead take the form of equipment or medical aides.

Recommendation 4: Table 1

Legal Aid NSW recommends that the following change be made to **Table 1**: that the ‘without assistance’ requirement is removed from Table 1 or re-stated so as to make it clear the assistance that is required does not need to be from another person and can instead take the form of equipment or medical aides.

7.2 Table 2 – Upper Limb Function

Table 2 is used to consider permanent conditions that result in functional impairments in performing activities requiring the use of arms and hands. This may be as a result of arthritis, paralysis following a stroke or nerve injury, cerebral palsy or amputation. To be ascribed points under Table 2 a person must have difficulty (mild for 5 points, moderate for 10 points, severe for 20 points, or extreme for 30 points) with a mixture of tasks such as carrying or picking up heavy or bulky items, as well as difficulties with fine motor tasks.

To obtain 5, 10 or 20 impairment points under Table 2 a person must demonstrate they have difficulties with ‘most’ of the examples provided for each points scale. Whilst the use of ‘most’ across the Impairment Tables broadly enables a range of different functional limitations to be taken into account in order for impairment points to be assigned, in our experience the concept of ‘most’ is inappropriate in the context of upper limb conditions.

In our experience claimants with significant upper limb conditions are prevented from getting 10 or even 5 impairment points under Table 2 due to the ‘most’ requirement requiring them to demonstrate difficulties in upper limb function across both heavy load bearing tasks and detailed manual tasks.

Specifically, to obtain 5 points under Table 2 a person must demonstrate they have ‘some difficulty with most of the following’:

- a) picking up heavier objects (e.g. a 2 litre carton of liquid or carrying a full shopping bag)
- b) handling very small objects (e.g. coins)
- c) doing up buttons
- d) reaching up or out to pick up objects.

In our experience, claimants who are unable to carry heavy items, transfer large items, reach out or above to pick up items and yet are able to undertake tasks involving fine motor skills such as doing up buttons or handling coins are precluded from getting even 5 impairment points under Table 2. However, owing to the inability to reach out to grab items and transfer heavier objects, these claimants would have great difficulty undertaking a wide range of employment related tasks. In our experience the requirement for ‘most’ criteria to be met under this Table does not take into account the unique difficulties claimants with particular upper limb conditions, such as those related to muscle degeneration and decreased strength, may experience.

We recommend that the functional tasks for upper limb function are separated so that a claimant can be assigned points if they experience impairment in fine motor skills **or** heavy load bearing tasks, not a combination of most of the functional limitations of both.

Recommendation 5: Table 2

Legal Aid NSW recommends that the following change be made to **Table 2**: that the functional tasks for upper limb function are separated so that a claimant can be assigned points if they experience impairment in fine motor skills **or** heavy load bearing tasks, not a combination of most of the functional limitations of both.

7.3 Table 3 – Lower Limb Function

Table 3 is used to consider permanent conditions that result in functional impairments in performing activities requiring the use of legs or feet. Similar to Table 2, this may be as a result of arthritis, paralysis following a stroke or nerve injury, cerebral palsy or amputation.

The descriptor for 20 impairment points under Table 3 is similar to that contained in Table 1 in that it requires the person demonstrate they are unable to do certain tasks ‘without assistance’. As set out above in the comments for Table 1, in our experience, the requirement that the person demonstrate they cannot do certain tasks without the assistance of another person precludes a number of people with otherwise severe lower limb conditions from being able to obtain 20 impairment points. This is especially the case in Table 3 where the descriptors all need to be proven, rather than only one having to be demonstrated (as is the case in Table 1).

In this Table the requirement at 1(a)(iii) for 20 impairment points - that a person demonstrate they are unable to stand up from a sitting position without assistance - is more in line with an extreme impairment than a severe one. There is a raft of assistive technology that would assist a person to mobilise from a seated to standing position without requiring the intervention of another person. That person may still have a severe functional difficulty of the lower limbs despite their being able to undertake that single movement. Owing to the wording of Table 3, if the person can stand on their own accord without another person, they are unable to obtain 20 impairment points, even if all other criteria are met. We support the ‘without assistance’ criterion being removed from Table 3 or otherwise clarified to include assistive technology and medical equipment.

In our experience, the descriptors in Table 3 do not encompass the lower limb functional impacts people with spinal issues experience. Table 4 exists to take into account functional impairments related to the spine. However, Table 4 does not provide for co-existing lower limb impairments, such as sciatica down the legs and groin. Claimants with lower back pain often report associated pain in their hip, behind their thighs and running down to their ankles. We support changes to Table 3 that take into account the functional impacts of associated conditions such as a spinal function.

Recommendation 6: Table 3

Legal Aid NSW recommends in relation to **Table 3**:

- that the 'without assistance' requirement is removed from Table 3 or otherwise clarified to include assistive technology and medical equipment.
- that changes are made to Table 3 to take into account the functional impacts of associated conditions such as a spinal function

7.4 Table 4 – Spinal Function

Table 4 is used to consider permanent conditions that result in functional impairments in performing activities of the spine.

As outlined above under Table 3, in our experience DSP claimants with spinal issues often experience associated lower limb functional impacts as a result of sciatica and associated nerve pain. The descriptors to obtain points under Table 4 do not take into account these associated impacts. Claimants are rarely assigned impairment points under Table 3 for pain or functional impacts directly resultant from a spinal issue. We support clarity being provided around this issue in Tables 3 and 4 so that people with spinal function issues are appropriately assigned impairment points for the totality of their symptoms.

Recommendation 7: Table 4

Legal Aid NSW recommends that changes are made to Table 4 to take into account the associated functional impacts under Table 3.

7.5 Table 5 – Mental Health Function

Where a person has mental health conditions, any resulting impairments are assessed against the descriptors in Table 5. Since January 2012, in order for a person to be assigned any points under Table 5, there has been a requirement for their condition to be diagnosed by a psychiatrist, or a GP with evidence from a clinical psychologist.

There are no exemptions to this requirement. This requirement does not reflect the most common treatment regime for this condition - a GP diagnosing a mental health condition and prescribing medication and any psychotherapy being delivered through a registered psychologist or a mental health social worker. It excludes other professionals who would otherwise be able to make a considered opinion as to the effects of a person's impairments. It creates significant difficulties for people who live in regional areas of Australia where there is extremely limited access to psychiatrists. It also fails to reflect

the likelihood that a person who has been on unemployment benefits will be unable to afford the cost of seeing a psychiatrist or a clinical psychologist. Legal Aid NSW considers that a mental health condition should be accepted as being diagnosed where there is evidence of the person's diagnosis from any practitioner who is qualified to make that diagnosis.

This requirement creates a particular problem for people who have been on DSP on the basis of mental health conditions prior to January 2012. If their eligibility for DSP is reviewed, it is done against the new requirement. In our experience, many people who have been on DSP for decades do not have recent evidence from a psychiatrist or clinical psychologist. Again, where a person's entitlement to DSP is being reviewed, they should not be required to show diagnosis by a psychiatrist or evidence from a clinical psychologist.

A further concern is that the level of evidence required in DSP claims is onerous, and more so for people who are severely mentally ill at the time of claiming DSP. It is evident that a specialist assessment can be conducted in addition to a job capacity assessment where a person does not have evidence of the diagnosis of their mental health condition and they are unable to independently engage in medical services to obtain that information. In our experience, specialist assessments of this nature occur infrequently. The onus falls on the claimant to obtain evidence of their diagnostic assessment and produce evidence of their treatment history and symptoms in line with Table 5. This is often a costly exercise and outside the ambit of many DSP claimants. We support a broader range of evidence being accepted as evidence of a treated and stabilised mental health condition, including GP notes, clinical notes, GP summary reports and documents provided by social workers, counsellors and support workers.

We consider that the criteria to get 5 and 10 points under Table 5 are under-weighted. The indicators which produce a 5 impairment point rating, indicative of a 'mild' functional impact, constitute behaviours and symptoms that may be mild across day to day life but would make sustained employment, even at 15 hour per week, difficult if not impossible. Considering that all or most of the indicators must apply for 5 points to be awarded, it is difficult to imagine a workplace or employer that could accommodate such behaviours. Similarly, the criteria for 10 impairment points under Table 5 appears to be under-weighted considering they are meant to be reflective of a 'moderate' impairment. We recommend that Table 5 be amended so that the description of the 5 point rating is adjusted to 10, and the 10 point to 20.

Recommendation 8: Table 5

Legal Aid NSW recommends that the following changes be made to **Table 5**:

- that a mental health condition should be accepted as being diagnosed where there is evidence of the person's diagnosis from any practitioner who is qualified to make that diagnosis (including GP notes, clinical notes, GP summary reports and documents provided by social workers, counsellors and support workers), not just a diagnosis from a psychiatrist or clinical psychologist.
- that Table 5 be amended so that the description of the 5-point rating is adjusted to 10 points, and the 10-point to 20 points.

8. Program of support requirements

Since 3 September 2011, unless they have a 'severe impairment', a new claimant for the DSP must have actively participated in a program of support in order to be eligible for payments. The details of what is a "program of support" and how to determine if a person has 'actively participated' are contained in the *Social Security (Active Participation for Disability Support Pension) Determination 2014 (Determination)*.

In practice, people participate in a program of support through participation in employment or disability employment services while in receipt of an activity tested income support payment, such as JobSeeker Payment or Youth Allowance. Normally, 18 months total participation in the program is required (excluding periods of exemption). The program usually includes activities such as job search, job preparation, or education and training.

In accordance with the Determination, a person has actively participated in a program of support if in the three years prior to claiming DSP they have complied with the requirements of the program and:

- the person participated in the program of support for at least 18 months (clause 5(2); **or**
- the duration of the program was less than 18 months and the person completed it (clause 5(3); **or**
- the program was terminated because the person was unable, solely because of their impairment, to improve their capacity to find, gain or obtain employment through continued participation (clause 5(4); **or**
- the person is participating in the program but is prevented, solely because of their impairment, from improving their capacity to find, gain or obtain employment through continued participation (clause 5(5)).

At a minimum, the effect is that a person must have some participation in a program prior to claiming DSP, unless they have a 'severe impairment'.

8.1 Severe impairment

A person has a 'severe impairment' if they have an impairment that meets the descriptor for 20 impairment points under a single impairment table. This means anyone else who is found to meet the descriptors for 5 to 10 points under a number of Impairment Tables, giving them a total of 20, 30, 40 or 50 points under the Impairment Tables, is required to actively participate in a program of support.

In our experience, claimants often have significant disability due to the combined effect of multiple impairments. They frequently report difficulties in undertaking the activities of the program of support due to their disabilities and are often given frequent medical exemptions from attending on their employment or disability service providers. As a result, they are unable to acquire the 18 months attendance (in a three-year period) and end up languishing on Jobseeker Payments, with no prospects of being able to undertake employment in the future.

We recommend changes to the definition of ‘severe’ impairment for the purposes of satisfying the program of support requirement so that it includes obtaining 20 impairment points under a single impairment table or a total of 30 impairment points or more across multiple tables.

Recommendation 9: Severe Impairment

Legal Aid NSW recommends that the definition of ‘severe’ impairment for the purposes of satisfying the program of support requirement be amended so that it includes obtaining 20 impairment points under a single impairment table or a total of 30 impairment points or more across multiple tables.

8.2 Active participation in a program of support requirements

In our experience the 18 months active participation requirement in the *Social Security (Active Participation for Disability Support Pension) Determination 2014 (Determination)* often prevents or delays people with significant disabilities and limited work capacity from receiving the DSP.

One problem is that periods the person is exempt from participating in their program of support, because the person is unable to participate due to their impairments, do not count towards the 18 months requirement. This often means that the more significant a person’s disabilities and their impact on a person’s functioning, the longer it will take them to acquire the necessary 18 months of participation in a program of support.

Whilst the Determination suggests that a person will not need to participate for a full 18 months if they are considered unable to improve their work capacity due to their impairments, in practice it is extremely difficult for a person to meet the strict requirements.

- Clause 5(4) cannot apply as employment and disability employment services cannot ‘terminate’ a person from their program. A person can be ‘exited’ but this is not considered a ‘termination’ and therefore clause 5(4) has no practical effect.
- Clause 5(5) rarely applies due to the strict requirements of this exemption from the 18 months rule. It requires that the person is actively participating in the program at the time they make their claim for DSP. In our experience, people often make a claim for the DSP during periods they are exempt from participating in their program. This is because they are considered too unwell to participate due to their impairments and they are encouraged to test their eligibility for DSP at that time. Further, clause 5(5) requires evidence that the person ‘is prevented, solely because of their impairment, from improving their capacity to find, gain or obtain employment through continued participation’. The expectation is that the person’s employment or disability employment services provider will confirm they are unable to assist the person with employment. This requires the provider admitting they are unable to perform the tasks they are contracted to do, and unsurprisingly, many are not willing to make statements.

- Finally, clause 5(3) rarely applies as employment service programs are not time limited.

We propose changes to the Determination which allow for the following to be counted as participation for the purposes of the program of support requirement:

- periods of time where Centrelink have medically exempted a person from participating in a program of support; and
- periods of time where a person is assessed as having an inability to work more than 15 hours per week and are not required to attend a program of support.

Given the understandable reluctance of program of support providers to admit they are unable to perform the tasks they are contracted to do, and considering the current burden on applicants in providing evidence of their difficulties participating in a program of support, we propose changes to the Determination which allow for:

- A wide range of evidence to be accepted illustrating a person is unlikely to benefit from a program of support (including medical reports).
- Program of Support providers being able to report to Centrelink at any time if they do not believe a person will benefit from a program of support because of their disabilities, with the person receiving confirmation they then satisfy the program of support requirement.
- Centrelink assessors and Job Capacity Assessors being able to assess, based on medical or other evidence supplied with a DSP claim form, that a person is unlikely to be benefit from a program of support.

We believe these changes will provide a mechanism through which some of the most vulnerable DSP claimants who have multiple medical conditions and program of support exemptions will be able to satisfy the program of support requirement and seek that the assessment of their ability to participate in a program of support be reviewed.

Recommendation 10: Participation in Program of Support

The *Social Security (Active Participation for Disability Support Pension) Determination 2014* be amended so that the following be counted as participation for the purposes of the program of support requirement:

- periods of time where Centrelink have medically exempted a person from participating in a program of support; and
- periods of time where a person is assessed as having an inability to work more than 15 hours per week and are not required to attend a program of support

Recommendation 11: Evidence of benefit from Program of Support

A wide range of evidence to be accepted illustrating a person is unlikely to benefit from a program of support (including medical reports).

Recommendation 12: Evidence from providers about Program of Support

That Program of Support providers are able to report to Centrelink at any time if they do not believe a person will benefit from a program of support because of their disabilities, with the person receiving confirmation they then satisfy the program of support requirement.

Recommendation 13: Assessment of benefit from Program of Support

That Centrelink assessors and Job Capacity Assessors can assess, based on medical or other evidence supplied with a DSP claim form, that a person is unlikely to be benefit from a program of support.



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