



Social Security Amendment (2007 Measures No. 2) Bill 2007

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Social Security Amendment (2007 Measures No. 2) Bill 2007

Date introduced: 16 August 2007

House: House of Representatives

Portfolio: Workforce Participation

Commencement: There are various commencement dates for different schedules and sections in this Bill and these are set out in the Table in **Clause 2** of the Bill. Some sections commence from Royal Assent. The commencement of others is consequential upon the commencement of other legislation.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To provide for legislation necessary to implement government initiatives announced in the 2007-08 Budget. The changes are:

- providing the Minister with the power to write guidelines, in a Legislative Instrument, about work capacity assessments and that the Secretary must comply with these Ministerial guidelines
- changes to who provides the impairment points ratings for the Disability Support Pension (DSP)
- the introduction of a new participation requirement exemption category for a relative caring for a child where that relative is also subject to a family law order, and
- smoother transfers from one payment to another, where the Secretary has decided the person should be transferred and removing the need for a claim for the new payment.

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Background

Schedule 1 – Amendments

Definition of relatives (other than parents)

Introduction

Schedule 1 inserts a new definition of ‘relatives (other than parents)’ into the *Social Security Act 1991* (SSA). This definition will be used in the context of the work search and work participation requirements for persons receiving:

- newstart allowance
- parenting payment - partnered (PPP)¹
- parenting payment - single (PPS)²
- youth allowance (other),³ and
- special benefit.⁴

Background

Participation requirements have been in place for newstart allowance, youth allowance (other) and special benefit (unemployed jobseeker) for a long period. New participation requirements for PPS and PPP were introduced with the Welfare to Work changes that commenced from 1 July 2006.⁵ Under the Welfare to Work changes, people who are

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1. A person may qualify for PPP, either as a parent, grandparent or a foster carer, where they are partnered and have at least one child aged under 6 who is wholly or substantially in their care and they and their partner's income and assets are below a certain amount.
 2. A person may qualify for PPS, either as a parent, grandparent or foster carer, where they are single and have at least one child aged under 8 who is wholly or substantially in their care. They have part-time participation requirements from when their youngest child is aged 6.
 3. Youth allowance (other) refers to youth allowance paid to unemployed jobseeker aged 16 to 20 and in terms of participation requirements it is virtually identical to newstart allowance paid to unemployed jobseekers aged 21 or more.
 4. Special benefit is payable where the person is in severe financial hardship and cannot qualify for any other income support payment. Some special benefit categories require the same work search and participation requirements as newstart allowance.
 5. Dale Daniels and Peter Yeend, *Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Bill 2005*, *Bills Digest No. 70, 2005-06*, Parliamentary Library, Canberra, Australia, 6 December 2005.
<http://www.aph.gov.au/library/pubs/bd/bd05-06.htm>

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principal carers⁶ on newstart allowance, PPP or PPS with a youngest child aged 6 or more can be subject to participation requirements which might require them to look for and accept work. There are specified circumstances where a principal carer might be exempted from these participation requirements, for example where:

- the person is an active, registered foster carer
- the person is providing home schooling for their child(ren)
- the person is facilitating distance education for their child(ren), or
- the person is caring for a large family (4 or more children aged between 6 and 15 years).

The SSA allows the Secretary to set the length of the period of a participation exemption as a matter of policy and that period is currently for up to 12 months.

Exemption from participation requirements for relative principal carer and a higher payment rate

Provisions to provide for a new category of participation requirement exemption are presented in **Schedule 1** of the Bill. Where a principal carer is providing care for a child, as a result of a family law order under the *Family Law Act 1975* (FLA) and the person meets the ‘relatives (other than parents)’ definition for a child, they will also be allowed access to a participation requirement exemption. It is not necessary that the child for whom the person is a relative and also the principal carer of is also the child who is subject to the family law order; the participation exemption being designed to recognise the extra effort required to take on the care of a child.

In adding this category of relative who is a principal carer but not a parent as an participation exemption category, this will also allow the person, where they are single and they receive newstart or youth allowance, access to the higher PPS payment rate.⁷

Comment

It is not uncommon for a relative to take on the care of a child. The child’s parent may not be willing to care for the child, or are ill, or are in jail, or their whereabouts are unknown etc. In these cases, the relative can qualify for Family Tax Benefit (FTB) if they are the principal carer of the child and can make the primary decisions about the care of the child. The provisions presented in **Schedule 1** will allow a relative principal carer of a child

6. A person is a principal carer of a child where the child is a dependent child of the person and the child has not turned 16.

7. PPS was formerly called sole parent pension and is paid at the single pension rate - as at September 2007 \$525.10 per fortnight (pf). The newstart allowance single rate as at September 2007 is \$424.30pf.

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exemption from the participation requirements for up to 12 months. There is no minimum age requirement of the child for the person to qualify for this participation requirement exemption.

These amendments essentially follow on from participation requirements exemptions that were contained in the original Welfare to Work legislation for persons caring for a child.⁸ This new exemption category is probably being presented as a refinement of the SSA after the experience of cases where the person caring for a child is a relative but not the parent.

Incapacity for work assessments

Introduction

The government announced the intention to reinforce the role of job capacity assessment providers⁹ in the 2007-08 Budget.¹⁰ The Budget initiative detailed that the SSA would be amended to ensure that decisions made by the Social Security Appeals Tribunal (SSAT) and the Administrative Appeals Tribunal (AAT) would take into account evidence of work capacity.¹¹

Cost

The announcement of the initiative in the Budget detailed the estimated cost of the changes to the work capacity assessment provisions in the Bill would be \$1.9 million in 2007-08, \$0.5 million in 2008-09, \$0.1 million in 2009-10 and \$-0.5 million in 2010-2011.

The savings figure in 2010-2011 probably reflects tighter work capacity assessments and decision making in the out years.

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8. Dale Daniels and Peter Yeend, *Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Bill 2005*, op. cit.
 9. Job capacity assessment (JCA) providers are organisations contracted to the Department of Human Services to provide a consolidated assessment of an individual's barriers to participation (including medical), capacity to work and appropriate interventions. In some cases, a person may require a more complex assessment, where for example, the person has multiple physical and/or psychological barriers. The JCA provider draws upon appropriate specialist input to inform the assessment (eg. neuropsychological assessment).
 10. Department of Treasury, Budget Paper No. 2 - Budget Measures 2007-08, *Job capacity Assessment – reinforcing the role*, Canberra, 8 May 2007, pp. 135-136.
<http://www.aph.gov.au/budget/2007-08/bp2/html/index.htm>
 11. *ibid.*

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Work capacity assessments

Work capacity assessments are primarily made as a part of determining qualification for payments, especially the Disability Support Pension (DSP). The two main qualification requirements for DSP are:

- the person has a minimum impairment of 20 points or more as provided by the Impairment Tables in Schedule 1B of the SSA, and
- the person is assessed as being unable to work for at least 15 hours a week at or above the minimum level wage for the next two years.¹²

Work capacity assessments are also made for other purposes, for example where an unemployed jobseeker on newstart allowance has a medical condition rendering him or her unable to work for a temporary period, or where a person is able to work for more than 15 hours a week but less than 30 hours a week and therefore has a partial work capacity.

Job capacity assessors

Job Capacity Assessors (JCA) have their origins in a government initiative in the 2001-02 Budget to make more use of independent expert assessors when assessing a persons work capacity.¹³ In that initiative, the government allocated \$65 million over 4 years to allow the greater use of external expertise in work capacity assessments. Prior to this initiative, it was rare to obtain an external expert opinion on work capacity by for example an occupational therapist for a DSP claim assessment. The vast majority of work capacity assessments used the Commonwealth Medical Officer's report and reference to the reports provided by the claimant and the occasional medical specialist report.

Work capacity assessment guidelines

At present, decisions about work capacity under the SSA use guidelines written by the Secretary. These guidelines are descriptive and provide considerable detail. In all work capacity assessments the assessment and determination of a person's work capacity is

12. 94.(5) In this section:

"work" means work:

- (a) that is for at least 15 hours per week on wages that are at or above the relevant minimum wage; and
- (b) that exists in Australia, even if not within the person's locally accessible labour market.

13. Department of Treasury, Budget Related Paper No. 1.8 – Portfolio Budget Statements 2001-02, Family and Community Services Portfolio, *Australians Working Together – A Better Deal for People with Disabilities*, Canberra, 8 May 2001, pp. 161-162.

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subjective; it is not solely a quantifiable assessment. It is a matter of judgement. This is necessary because the way a medical condition affects an individual and also affects their work capacity varies between individuals. A medical condition may render one person unable to work for at least 15 hours a week yet the exact same condition may allow another person to work for 20 hours a week. In work capacity assessments other factors are at play like the person's age, their work history and experience, their work skills, their communication skills, their response to medication or other medical interventions, their capacity to deal with and respond to their medical condition etc.

Work capacity assessments and access to Disability Support Pension or other payments

Work capacity assessments are important as they can determine if a person is qualified to access certain payments, like DSP, which requires that the person is unable to work for at least 15 hours a week at full award wages for at least the next two years.¹⁴ Where it is considered that a person can work for more than 15 hours a week (and therefore is not entitled to DSP), then another income support payment might be more appropriate, like newstart allowance or PPP.

Newstart allowance (and sometimes PPP) requires the person to look for and accept work. This is where a partial work capacity assessment might be used, that is for a person who has been assessed as being able to work for more than 15 hours a week, and therefore not entitled to DSP, but less than 30 hours a week. Likewise, for PPP (where the youngest qualifying child is aged 6 or more), work capacity assessments can apply as the participation requirements might require the person to look for and accept work.

Work capacity assessment guidelines to be written by the Minister

A significant change presented in the Bill to the work capacity assessment provisions in the SSA is to replace the guidelines for making these work capacity assessments from those made by the Secretary with guidelines to be set out in a Legislative Instrument by the Minister. The changes will also require the Secretary to comply with these guidelines.

The Explanatory Memorandum does note that there are currently no Secretary's guidelines in a Legislative Instrument. The current guidelines being used are those authorised by the Secretary, but not currently set out in any Legislative Instrument.

Legislative Instrument written by the Minister

Why change the Secretary's guidelines to Minister's guidelines in a Legislative Instrument?

As they currently exist, the Secretary's guidelines are not law and are merely descriptions or clarification of how the law should be applied or interpreted and they do not bind

14. *ibid.*

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decisions makers. By comparison, requiring the guidelines to be made via a legislative instrument, will give the guidelines the force of law. The guidelines will also be disallowable by either House of Parliament in the usual manner under the *Legislative Instruments Act 2003* (LIA).¹⁵ Thus there will be the potential for improved Parliamentary scrutiny of the guidelines. The guidelines will also be available on-line via the Federal Register of Legislative Instruments.

Legislative Instruments and the Social Security Act 1991

Historically, the use of Legislative Instruments attached to the SSA has been very minimal. Where there needs to be qualification or payment requirements spelt out, this has been generally placed inside the SSA, not in an attached Legislative Instrument. The culture has been one of; if you are to make payments to a person, the qualification requirements and the payment conditions should be spelt out in legislation. More recently this has changed. For example, in the major legislation supporting the government's Welfare to Work initiatives was the *Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Act 2005*.¹⁶ This Welfare to Work Act did make extensive use of attached Legislative Instruments to spell out in more detail the conditions of payment eligibility, activity testing exemptions and other matters.

Minister's Legislative Instruments will be descriptive

The provisions presented in this Bill are aimed at making work capacity assessment decisions more secure at law. It will also more closely confine the Secretary to decisions made within the descriptions and restrictions as set out in the words in the Legislative Instrument. While the Legislative Instruments provided for this have not been tabled in the Parliament yet, it is probably safe to assume (from the words in the initiative announced in the Budget),¹⁷ that the Instruments will be detailed, descriptive and specific about work capacity assessments.

Secretary's decisions under the Social Security Act 1991

The Secretary is the primary decision maker under the SSA. Obviously the Secretary cannot actually make every decision, so section 234 of the *Social Security*

15. Moira Coombs, Legislative Instruments Bill 2003, *Bills Digest No. 26 2003-04*, Parliamentary Library, Canberra, Australia, 8 September 2003. <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd026.htm#Contact>

16. Dale Daniels and Peter Yeend, *Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Bill 2005*, op. cit.

17. Department of Treasury, Budget Paper No. 2 - Budget Measures 2007-08, *Job capacity Assessment – reinforcing the role*, op. cit.

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(Administration) Act 1999 (SSAA) allows the Secretary to delegate powers to other officers.¹⁸

Social Security Appeals Tribunal has Secretary's powers

The SSAT is established by provisions in the SSA and provides a separate appeal forum for persons affected by a decision made under the SSA. The SSAT is given the same decision making powers as the Secretary under the SSA by section 151 of the SSAA.¹⁹ So the SSAT can affirm a decision or substitute a different decision under the SSA. Therefore, the words in the Bill that will require that the Secretary is to comply with guidelines written in a Legislative Instrument by the Minister will also equally apply to work capacity decisions made by the SSAT.

Administrative Appeals Tribunal may review Social Security Appeals Tribunal decisions

Section 179 of the SSAA empowers the Administrative Review Tribunal (AAT) to review decisions of the SSAT.²⁰ So like the SSAT, the AAT can change a decision under the

18. 234. Delegation

234. (1) Subject to subsection (3), the Secretary may, in writing, delegate to an officer all or any of the powers of the Secretary under the social security law.

234. (2) Subject to subsection (3), the Secretary may, in writing and in accordance with service arrangements, delegate to the CEO or an employee of the Agency all or any of the powers of the Secretary under the social security law.

234. (3) The Secretary cannot delegate to anyone except the CEO the Secretary's power under subsection 208(1) to disclose information to a person referred to in subparagraph 208(1)(b)(i).

234.(4) If the Secretary delegates to the CEO the Secretary's power under subsection 208(1) to disclose information to a person referred to in subparagraph 208(1)(b)(i), the CEO cannot, in spite of any provision to the contrary in the Agency Act, delegate the power to an employee of the Agency.

19. 151. Powers of the SSAT

151.(1) Subject to subsection (2), the SSAT may, for the purpose of reviewing a decision under the social security law, exercise all the powers and discretions that are conferred by the social security law on the Secretary.

20. 179. Review of decisions by AAT

179.(1) If:

(a) a decision has been reviewed by the SSAT; and

(b) the decision has been affirmed, varied or set aside by the SSAT;

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SSA. So the words in the Bill that will require the Secretary to comply with guidelines written in a Legislative Instrument by the Minister will also equally apply to decisions about work capacity made by the AAT.

Impairment Tables assessments

There are provisions in the Bill to alter Schedule 1B of the SSA, which is used to provide the impairment points rating for DSP. For DSP, before the continuing inability for work requirements (see above) can be considered, the claimant must have a minimum impairment of 20 points, as provided for by the Impairment Tables in Schedule 1B of the SSA.²¹ Currently Schedule 1B refers to a 'medical officer' providing the impairment points rating using the Schedule. References to the 'medical officer' in the Schedule are to be replaced with 'assessor', being the JCA.

There is a long history of using medical officers (doctors) to provide work capacity assessments for DSP and previously Invalid Pension (IP). For a long time the assessment of the Commonwealth Medical Officer' as to whether a person was 85 per cent permanently incapacitated for work' was rarely challenged and usually accepted. This is the main reason there is the references to 'medical officer' in Schedule 1B of the SSA, being the tables for the assessment of work related impairment for DSP. The point scoring arrived at by use of the tables is designed to arrive at a level of work impediment arising from a medical condition/s.²² A medical officer qualification is not required for the attribution of points using the table and reference to medical officers is as much a

application may be made to the AAT for review of the decision of the SSAT.

21. 94. Qualification for disability support pension—continuing inability to work

94.(1) A person is qualified for disability support pension if:

- (a) the person has a physical, intellectual or psychiatric impairment; and
- (b) the person's impairment is of 20 points or more under the Impairment Tables; and
- (c) one of the following applies:
 - (i) the person has a continuing inability to work;

22. The Tables represent an empirically agreed set of criteria for assessing the severity of functional limitations for work related tasks and do not take into account the broader impact of a functional impairment in a societal sense. For this reason, no specific adjustments are made for age and gender. The outcome of the application of these Tables following a medical assessment is termed work-related impairment and this term is used throughout this document.

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carryover of the long-standing practice of using medical officers as work capacity assessors.

Main provisions

Schedule 1 – Amendments

Item 1 inserts a new definition into the SSA for ‘relatives (other than parents)’.

Items 2, 3 and 4 amend provisions in section 16(B) of the SSA to alter the word ‘Secretary’ to ‘Minister’ and to also insert words ‘complied with by the Secretary’. This will mean it will be the Minister rather than the Secretary who is ultimately responsible for the guidelines about partial work capacity assessments.

Item 5 inserts a new definition of ‘Aboriginal or Torres Strait Islander child’ into the SSA.

Item 7 inserts a definition of ‘family law order’ into the SSA.

Items 8 and 10 inserts provisions into the SSA referring to the qualification provisions for Disability Support Pension (DSP) that empower the Minister to write guidelines about DSP work capacity assessments and that the Secretary must comply with any guidelines in force at the time of the assessment.

Items 17, 18, 25 and 33 insert new provisions into the SSA regarding assessments of temporary incapacity for work. These assessments commonly occur when a person who is otherwise required to undertake work search activity test requirements or participation requirements might be temporarily unable to comply with those requirements due to a medical condition.

Items 36 to 46 amend Schedule 1B of the SSA being the Impairment Tables used to determine qualification to DSP. The provisions remove references to ‘medical officer’ in Schedule 1B and substitutes ‘assessor’ and also replaces the words ‘medical officers using their clinical judgements’ with ‘assessor using their judgement’. This will make it clear that it is not medical officers who provide impairment rating assessments or work capacity assessments but the Work Capacity Assessor. This is based on the principle that while medical officers provide opinions about a medical condition and about work capacity, it is the assessor who makes the assessment of the impairment rating and also the assessment of work capacity.

Items 47 and 48 inserts provisions into the *Social Security (Administration) Act 1999* (SSAA) about the Secretary’s power to deem that a person lodged a claim, even though they didn’t actually physically make a claim. This deeming of a claim lodgement is usually done in a beneficial way especially where a person transfers from one payment to

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another. For example, where a male DSP recipient reaches age 65 and is transferred to age pension.

Concluding Comments

Work capacity assessments

The work capacity assessments made under the SSA have always been contentious but they have been much more in focus since the Welfare to Work legislation came into effect from 1 July 2006.²³ The DSP qualification requirements were altered from being unable to work for 30 hours a week down to being unable to work for 15 hours a week. This made the incapacity for work requirements for DSP much tougher. Also, there are now work search and work participation requirements for some payments that did not previously have participation requirements. These payments are PPP and PPS.²⁴ There is some incentive for persons to access DSP rather than newstart allowance or PPP. DSP, being a pension payment has a higher rate of payment and more generous income and asset testing.²⁵ DSP is also not taxable income and does not have any participation requirements.

As said, the work capacity assessments for DSP, and previously Invalid Pension,²⁶ have always been a matter of contention. It is the nature of both the claim and the decision. A person claims DSP thinking they are unable to work for at least 15 hours a week and supplies medical evidence supporting their claim from their treating doctor/s. However, when the Secretary then provides a decision that they can work for more than 15 hours a week, it is often a matter of angst and contest. These decisions about work capacity are subjective, a matter of judgement. It is worth noting that notwithstanding that for a long period, and even now, many think that it is the Commonwealth Medical Officer who made the decision about work capacity; however this decision has always been a matter for the Secretary.

The provisions presented in **Schedule 1** of the Bill that empower the Minister to write guidelines in a Legislative Instrument for work capacity assessments and that also compel

23. Dale Daniels and Peter Yeend, Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Bill 2005, op. cit.

24. The exception is PPP, which had participation requirements where the youngest child was aged 13 or more.

25. DSP for a single person \$525.10 per fortnight (pf) (as at September 2007). The newstart allowance single rate as at September 2007 is \$424.30pf.

26. DSP replace invalid pension from November 1991. Previously Invalid Pension required the claimant to have an 85% permanent incapacity for work and at least a 50% medically based incapacity.

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the Secretary to comply with these guidelines are significant. Currently, guidelines for the application of work capacity assessments are written by the Secretary. Placing the guidelines into a Legislative Instrument will give them more status in application, as they will be guidelines in law, not just written guidelines separate to the legislation to be used to interpret and apply legislation. The Minister's work capacity assessment guidelines that this Bill will provide for have not been tabled in the Parliament yet but it is probable that to achieve the intention of the Government's Budget initiative they will be detailed, descriptive and prescriptive.

While the Government's initiative about work capacity assessments announced in the 2007-08 Budget does set out what the intention of the provisions presented in the Bill are aimed at (as does the Explanatory Memorandum), what is not detailed are the factors and matters that lead to the Government to make these changes.

This likewise applies to the provisions presented in the Bill, to alter the words in Schedule 1B of the SSA, to remove impairment point decisions from medical officers to be replaced with Work Capacity Assessors. The Government has provided no explicit policy rationale as to why they want to alter the words in Schedule 1B of the SSA to remove impairment point decisions from medical officers to be replaced with Work Capacity Assessors. Along with the other changes to work capacity assessments in the SSA elsewhere in the Bill, it is perhaps open to speculation that the Government considers that some medical officer decisions about impairment points have been overly generous in favour of applicants for the various social security benefits.

Relative caring for a child

The provisions to add another participation requirement exemption category for a principal carer who is a relative other than a parent is refinement of the SSA, adding to the other participation exemptions categories originally contained in the Welfare to Work Act.²⁷ It is probable that there have been cases of relatives other than a parent providing principal care for a child that have lead the Government to conclude that amending the SSA to provide for these cases is appropriate.

27. Dale Daniels and Peter Yeend, Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Bill 2005, op. cit.

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