

# 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.

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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**