Social Security and Other Legislation Amendment Bill 2011

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Social Security and Other Legislation Amendment Bill 2011

Date introduced: 6 July 2011

House: House of Representatives

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Commencement: Sections 1–3 on Royal Assent; Schedules 4–6 on the day after Royal Assent; and Schedules 1–3 on 1 January 2012

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The Social Security and Other Legislation Amendment Bill 2011 (the Bill) seeks to introduce a range of budget and non-budget measures. They are:

- the provision of access to Bereavement Allowance to recipients of Parenting Payment on the death of a partner
- the removal of the family member exemption from the newly arrived resident's waiting period served before Special Benefit is payable
- the removal of the current impairment tables used to assess eligibility for Disability Support Pension from the Social Security Act 1991 (SSA) and their replacement with new impairment tables through a legislative instrument
- the introduction of a third party certification quality assurance system for disability advocacy services
- the amendment of provisions relating to the treatment of self-managed superannuation funds and small Australian Prudential Regulatory Authority (APRA) funds to strengthen the existing rules and clarify existing policy, and
- the clarification of the treatment under the social security legislation of certain termination payments.

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Committee consideration

On 7 July 2011, the Senate referred Schedule 3 of the Bill—that is, the Impairment Tables for DSP changes—to the Senate Standing Committee on Community Affairs for inquiry and report. The reporting date is 15 September 2011.\(^1\)

Financial implications

Those measures with financial implications are outlined in the Explanatory Memorandum as follows:\(^2\)

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Background issues and key provisions

Schedule 1—Bereavement Allowance

Bereavement Allowance is a payment which is payable under the pension income and asset tests to a man or a woman who has recently been widowed. It is intended to ensure an adequate level of income for a recently widowed person in the 14 weeks immediately following the death of a partner. Bereavement allowance is paid at the single pension rate.

Section 18 of the SSA contains the definition of ‘parenting payment’ being either pension Parenting Payment (Single), or benefit Parenting Payment (Partnered). Up until September 2009, a person receiving Parenting Payment (Partnered) would transfer to Parenting Payment (Single) in the case of the death of a partner. Access to Bereavement Allowance is currently excluded by section 315 of the SSA. The rationale for the exclusion was that Parenting Payment (Single) was payable at the same

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2. Explanatory Memorandum, Social Security and Other Legislation Amendment Bill 2011.

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rate as that for Bereavement Allowance. That being the case, there was no financial advantage in transferring the bereaved person temporarily to that payment.

However, after September 2009, that situation changed. From that time, Parenting Payment (Single) was payable at a rate that is lower than the single pension rate that applies to all other pensions. The one off increase in the rate of the pension that applied from that date did not apply to Parenting Payment (Single).

Consequently, there is now a financial advantage to a bereaved person who was formerly in receipt of Parenting Payment (Partnered) if they can be transferred to Bereavement Allowance for 14 weeks immediately following the death of their partner. As such, this amendment proposes to allow recipients of Parenting Payment (Partnered) to qualify for Bereavement Allowance on the death of a partner.

**Item 1 of schedule 1** repeals paragraph 315(1)(c) of the SSA so that a person who is qualified for Parenting Payment (Partnered) will, upon bereavement, qualify for Bereavement Allowance.

**Schedule 2—Special Benefit**

A ‘newly arrived resident’s waiting period’ restricts access to welfare payment to a person who has newly arrived in Australia, for a period of two years. However, a newly arrived resident may gain access to Special Benefit if the person experiences hardship and there has been a substantial change in their circumstances beyond their control. Special Benefit is the most restrictive welfare payment available. It has a dollar for dollar income test, and a severe assets test that prevents access to Special Benefit if an applicant has funds equivalent to two week’s worth of the payment.

There is, however, a family member exemption that allows easier access to Special Benefit for family members (generally partners or dependent children) of Australian citizens, permanent residents and refugees. This group can access Special Benefit without the need to show that there has been a substantial change in their circumstances beyond their control. Hardship is sufficient.

**Item 1 of Schedule 2** to the Bill proposes to add new paragraph 739A(8) to the SSA. The effect of this amendment is that Provisional Partner Visa Holders who are applying for Special Benefit will no longer be exempt from the need to demonstrate a substantial change in their circumstances beyond their control. The Government says that this change ‘reflects the community’s expectation that new migrants to Australia should be able to support themselves, or be supported by their families and partners unless they are impacted by circumstances outside of their control’.

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Schedule 3—Impairment Tables for Disability Support Pension

The Commonwealth Government has been progressively introducing disability-related reforms with a view to reducing the number of people in receipt of the Disability Support Pension (DSP) and increasing the workforce participation of people with disabilities. The reforms are based on the principle that work capacity assessments, and disability employment policy as a whole, should focus on a person’s ability to participate in paid employment, rather than on their disability. The DSP reforms of this and previous governments also have their origins in the burgeoning number of people receiving DSP, which is the sole remaining payment to people of working age which is not activity tested. In 1990 there were 316 713 DSP recipients, in 2005, 706 782, and, in 2010, 792 581.4

In the context of the 2009–10 Budget, the Commonwealth Government made a commitment to update the Impairment Tables.5 The Impairment Tables are used as a part of the broader Job Capacity Assessment (JCA) process, which helps in the assessment of a person’s work capacity and with the identification of any barriers they may face in gaining employment. The JCA is used as an aid in the assessment of whether or not a person has the capacity to work 15 hours or more per week, and, thus, whether or not they qualify for the DSP. To qualify for DSP a person must achieve a minimum of 20 points of impairment as set out in the Impairment Tables.6 If 20 points is not achieved, then the person cannot qualify for DSP. If 20 points is achieved, then the second part of DSP qualification is implemented. This is an assessment of whether the person is able to work for 15 hours a week or more.7 A person may have 20 or more points of impairment, but still not qualify for DSP. This is because a person may have a high impairment points rating but also be assessed as being able to work for 15 hours a week or more.

As a part of its reform of the DSP assessment process, the Government commissioned an Advisory Committee to review and update the Impairment Tables to ensure that they are consistent with contemporary medical and rehabilitation practice. The Advisory Committee’s final report was submitted to the Minister on 30 June 2011.8 Essentially, the Advisory Committee found that the existing Impairment Tables ‘are outdated and inappropriate for current use’.9 It recommended that the current medical diagnosis, body system-based approach contained in the Impairment Tables be done away with. In its place, the Advisory Committee proposed a functional approach to work-

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9. Ibid., p. 2.

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related impairment assessment as being more appropriate and productive. The Advisory Committee’s draft Impairment Tables reflects this changed approach.

It should be noted that the revised Impairment Tables are not to be introduced until January 2012, and that the changes proposed in this Bill are not related to the substance of the new Impairment Tables. The Commonwealth Government is to release the draft Impairment Tables shortly for public comment. It proposes to delete the DSP Impairment Tables from the SSA and allow for the Minister to introduce new Impairment Tables through a legislative instrument.

Currently, the Impairment Tables are in Schedule 1B to the SSA. This has been the case since the DSP replaced the preceding Invalid Pension from November 1991. The Impairment Tables were deliberately placed into the SSA, and not in an associated policy document, in order to give them greater legal status and to provide an authoritative basis for DSP decision making.

Under the proposed amendment the new Impairment Tables will be a creature of subordinate legislation. As noted in the Explanatory Memorandum, this change will ‘enable the Impairment Tables to be updated regularly in response to developments in medical or rehabilitation practice’.

It is worth noting that very few changes have been made to the Impairment Tables since 1997. This is despite the fact that a substantial revision has been in order for some time. During the past few years this is likely to have been, in part, because it was assumed that changes made to DSP qualification requirements as a part of the 2006 ‘Welfare to Work’ reforms would be sufficient to reduce the number of people in receipt of DSP. These changes reduced from 30 to 15 hours per week the number of hours that a person must be unable to work in order to qualify for the DSP. Given the failure of this measure to slow the growth in the number of DSP recipients, and the Government’s stated commitment to increasing the workforce participation of people with disabilities, it is likely that changes to the Impairment Tables could no longer be put off.

The proposal to include the Impairment Tables in a legislative instrument attempts to strike a balance between allowing for increased flexibility while ensuring an appropriate level of Parliamentary scrutiny. At present, any amendment to the Impairment Tables (or the rules relating to their application) has to be achieved by a bill to amend the SSA which is subject to scrutiny by Committees from either, or both, chambers and must be passed in both chambers of the Parliament. While the proposed change does not diminish the legal force of the Impairment Tables in terms of DSP assessments and decision making, it nevertheless has the potential to reduce parliamentary scrutiny of any future changes made to them. The Impairment Tables would be considered by the Senate Standing Committee on Regulation and Ordinances and subject to disallowance. However,


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the onus will be on Members and Senators to seek out the legislative instrument and to determine within 15 sitting days after tabling whether or not changes made to the tables are or are not appropriate.

Under **new subsection 27(1)** of the SSA, where a person makes a new claim for DSP (or is taken to have made a claim under the *Social Security (Administration) Act 1999*) this claim will be assessed on the basis of the Impairment Tables that are in force on the date of the claim (or the date on which the claim is taken to have been made). Similarly, in reviewing any decisions relating to a DSP claim, the Secretary, Social Security Appeals Tribunal or the Administrative Appeals Tribunal must, under **new subsection 27(2)**, apply the Impairment Tables that were in effect at the time that the claim was made, or was taken to have been made.

However, under **new subsection 27(3)**, if a person in receipt of DSP is given an ‘**assessment notice**’, in relation to assessing the person’s continuing qualification for DSP, then the assessment will be based on the Impairment Tables that are current at the time the assessment notice was given.

Where a determination is made by the Secretary to cancel or suspend a person’s DSP payment under **new subsection 27(4)**, any reviews of this determination must apply the Impairment Tables that were in effect on the date the assessment notice was given.

**Item 5** of **Schedule 3** to the Bill is an applications provision. It operates so that, following 1 January 2012, the new Impairment Tables are to be applied in relation to all new claims for DSP, as well as reviews of DSP-related determinations.

**Schedule 4—Disability advocacy services**

**Schedule 4** to the Bill provides for the introduction of a third party certification quality assurance system for disability advocacy services.

**National Disability Advocacy Program**

Disability advocacy is intended to assist people with disability to overcome barriers such as physical access, discriminatory attitudes, abuse and neglect, that impact on their daily life and their ability to participate in the community. According to the Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA):

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... advocacy for people with disability can be defined as speaking, acting or writing with minimal conflict of interest on behalf of the interests of a person or group, in order to promote, protect and defend the welfare of and justice for either the person or group...  

There are six broad models of disability advocacy:

- individual advocacy
- citizen advocacy
- family advocacy
- self advocacy
- legal advocacy and
- systemic advocacy.  

The Commonwealth Government provides funding for disability advocacy through the National Disability Advocacy Program (NDAP). The NDAP provides funding to disability advocacy agencies under the Disability Services Act 1986 (Disability Services Act). In 2010-11, NDAP funding of approximately $15.5 million will be provided to 62 organisations throughout Australia.

The target group under the NDAP is people with a disability that:

- is attributable to an intellectual, psychiatric, sensory or physical impairment or a combination of such impairments
- is permanent or likely to be permanent, and
- results in a substantially reduced capacity of the person for communication, learning or mobility; and the need for ongoing support services.

Quality Improvement Strategy

A 2005-06 review of the NDAP found that the current system of annual self-assessments by disability advocacy agencies and five-yearly departmental audits did not provide an effective quality assurance framework for NDAP funded agencies. As such, the review recommended the introduction of performance improvement strategies as part of the NDAP.

This led the Commonwealth Government, in consultation with the sector, to develop a Quality Improvement Strategy for funded disability advocacy agencies. According to FAHCSIA, the purpose

14. Ibid.
15. Ibid.
16. Ibid.
17. Ibid.

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of the strategy ‘is to provide people with disability, the disability sector and Government with assurances about the quality of disability advocacy support being delivered’.19

Key features of the proposed new Quality Assurance (QA) system include:

- 11 draft Disability Advocacy Standards
- 24 Key Performance Indicators and
- certification of compliance against these Standards by independent, accredited certification bodies.

The new QA system was trialed with 13 agencies between 2009-10. A December 2010 evaluation of the trial recommended implementation of the new QA system.20 It also made a number of recommendations for ensuring successful implementation of the system across the NDAP sector.

Proposed amendments

Schedule 4 provides for the introduction of the new QA system discussed above. The new Disability Advocacy Standards will be set out in a legislative instrument: new paragraph 5A(1)(ba). The Minister must also approve key performance indicators to be applied in assessing whether the standards have been observed. This is also to be done by legislative instrument: subsection 5A(2).

Under the system, compliance of disability advocacy services with the new standards will be assessed by an independent certification body over a three year cycle. The system is to be based on the Joint Accreditation System of Australian and New Zealand (JAS-ANZ). JAS-ANZ is to be the accreditation body that accredits certification bodies to undertake certification assessments of disability advocacy services.

There are already similar third-party certification systems in place for disability employment services and rehabilitation services. As such, new section 6DA, dealing with certification of advocacy services, is expressed in similar terms to existing sections 6D (employment services) and 6E (rehabilitation services) of the Disability Services Act.

Item 7 of Schedule 4 also inserts a new definition of ‘advocacy service’ into section 7 of the Disability Services Act. The definition reflects the findings of the National Disability Advocacy Framework that people with disability should be enabled to participate in the decision-making processes that safeguard and advance their human rights as provided by the United Nations Convention on the Rights of Persons with Disabilities, to which Australia is a party. The new definition in section 7 provides for three broad types of ‘advocacy service’. This comprises two

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current types (‘individual’ and ‘systemic’ advocacy) and a third type, which may be approved by the Minister in the future.

The holding of a certificate of compliance by disability advocacy organizations is to be compulsory. Where an organisation fails to hold a certificate of compliance, the Minister may make a declaration stating that the organisation is in breach of the condition of the grant of financial assistance: **new subsection 14GA(2).** The Minister’s declaration is to specify actions that will be taken as a result of the organisation’s breach of that condition: **new paragraph 14GA(2)(b).**

**New section 13** sets out the conditions for approval of a grant of financial assistance for advocacy services, which generally are that the making of the grant would further the objects of the Disability Services Act and that the state, or eligible organisation, (as applicable) must hold a current certificate of compliance.**

**Schedule 5—Asset-test exempt income streams**

Lifetime and Life expectancy income streams are generally not considered under the pension assets test when calculating the rate of pension a person may be entitled to. However it is necessary to establish that the provider of the income stream has the capacity to pay the income stream for the required period.

In the case of self-managed superannuation funds (SMSFs) and small APRA funds (SAFs) this requirement is met by an actuary providing a certificate stating that there is a high probability that the income stream provider can comply.

The amendments in this Bill seek to improve the existing rules by:

- clarifying that SMSFs and SAFs can only give one actuarial certificate for each financial year, and
- clarifying that this certificate must be provided within 26 weeks of the beginning of the financial year.

**Item 4** repeals and substitutes subsection 9A(1C) into the SSA which sets out the requirement for the certificate to be provided within 26 weeks of the beginning of the financial year.

**Item 5** inserts **new subsection 9A(1D)** which explicitly states that only one certificate may be provided for each financial year.

**Items 14–15** make amendments to the **Veterans’ Entitlements Act 1986** which have the same effect as those for the SSA which are contained in **items 4–5** of Schedule 5 to the Bill.

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21. Item 15 of Schedule 4 to the Bill.
22. Item 14 of Schedule 4 to the Bill.

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Schedule 6—Termination payments

When a claim is made for an income support payment such as Newstart Allowance, Youth Allowance, Partner Allowance, Austudy Payment, Widow Allowance, Parenting Payment, Disability Support Pension or Sickness Allowance, an ‘income maintenance period’ may be applied. The income maintenance period is the period of time in which people who have received redundancy or leave payments have these amounts treated as income. The income maintenance period can delay the start date for the payment of income support so that people claiming income support must live on their redundancy or leave payments for a period of time.

Items 1–7 of Schedule 6 to the Bill amend the definition of ‘redundancy payment’ as it occurs in various Rate Calculators to include ‘payments in lieu of notice’. The effect of the amendment is to clarify that these payments are included when calculating an income maintenance period.