

BRIEFING PAPER

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SUBJECT: Overview of recent policy and law reform work regarding the administration of the Disability Support Pension in Australia

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Introduction

This is a briefing paper on policy work being done around reform of the Disability Support Pension (DSP). It provides an overview of the major inquiries, reports and other policy activities around the DSP over the past 2-3 years.

The purpose of this paper is to provide background to a group of concerned community agencies and service providers seeking to coordinate policy and campaign work in this area in 2018. The paper will focus on the work done by key stakeholders and lobbying groups, the issues they have raised and provide some recommendations on areas for further exploration. It is not a 'roadmap' or strategy document for doing law reform around DSP rather than a background document for planning policy work. This paper does not represent fully comprehensive research into or coverage of recent DSP related policy activity, it has been prepared based on desktop research and limited consultation for the purposes outlined above.

The paper will assume that the readers have a fairly sophisticated understanding of how the DSP is administered; and a relative understanding of issues faced by individuals applying for the DSP or who've had their DSP entitlement reviewed or cancelled.

Major Recent Policy Work

The two major recent pieces of inquiry into DSP which are relevant to the work of community services assisting clients with employment and disability issues are the Parliament of the Commonwealth of Australia Joint Committee of Public Accounts and Audit *Report 18 (2015-16)* (The Joint Committee Report)¹ and the National Social Security Rights Network DSP Project Report (the NSSRN DSP Report)². These reports set out the key issues in the administration of DSP and its effect on applicants. They provide recommendations which could inform law reform activities and objectives.

¹ Parliament of the Commonwealth of Australia Joint Committee of Public Accounts and Audit, *Commonwealth Risk Management Inquiry based on Auditor General's Report 18 (2015-16)* May 2017

(https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Public_Accounts_and_Audit/CRM)

² National Social Security Rights Network, *Disability Support Pension Project: A Snapshot of DSP client experiences of claims and assessment since the 2015 changes*. January 2018

Commonwealth Government.

Recent major policy work around Disability Support Pension from the Commonwealth Government has come from the Auditor General Report *Qualifying for the Disability Support Pension*³ (the Audit) and the subsequent Parliamentary Inquiry by the Commonwealth Parliament Joint Committee of Public Accounts and Audit⁴ which lead to the The Joint Committee Report.

The objective of the Audit was to assess the administration of the DSP eligibility process. The Joint Committee of Public Accounts and Audit then conducted an inquiry based on any items, matters or circumstances connected with the following Audit Report. The Audit, and Joint Committee Report, looked at the administration of DSP and made recommendations in 4 areas:

- Qualification process, including how impairment and work capacity were determined and whether Job Capacity Assessments appropriately assessed applicants' eligibility for DSP
- Appeals processes and whether they were effective, efficient and timely
- Reviews of recipients' continued eligibility for DSP and whether they were appropriately targeted; and
- Performance and assessment processes – whether as a program DSP was effectively measured, monitored and reported.

The Joint Committee Report made 9 recommendations. All were supported by the NSSRN. A number of the recommendations are for further reviews into the aspects of the administration of the DSP to be undertaken by the Department of Human Services and Department of Social Services⁵. Other recommendations are for increased reporting on outcomes and responses to the Audit⁶.

Readers of this briefing paper may be interested in the recommendations to review Program of Support requirements⁷, the recommendation to increase time for clients under review to produce documents⁸ and reporting on outcomes of targeted DSP reviews by the Department of Human Services⁹.

Department of Human Services

³ Australian National Audit Office, *Qualifying for the Disability Support Pension*, Report 18 of 2015-2016, January 2016 (<https://www.anao.gov.au/work/performance-audit/qualifying-disability-support-pension>)

⁴ Parliament of the Commonwealth of Australia Joint Committee of Public Accounts and Audit, *Commonwealth Risk Management Inquiry based on Auditor General's Report 18 (2015-16)* May 2017 (https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Public_Accounts_and_Audit/CRM)

⁵ Above n 4, Recommendation 1, 2 and 5

⁶ Above n 4, Recommendations 3 and 9

⁷ Above n 4, Recommendation 7

⁸ Above n 4, Recommendation 6

⁹ Above n 4, Recommendation 3

On 1 June 2017, the Department of Human Services (DHS) announced that it was streamlining the eligibility assessment process for Disability Support Pension¹⁰. This was part of a number of initiatives aimed at streamlining the administration of social security. They were, partly, in response to the Joint Committee Report.

Regarding DSP assessments, the DHS are piloting the following processes:

- Changes to information for claimants and their Treating Health Professionals including a questionnaire which aims to provide a guide on the type of evidence required to support a claim; and
- Early assessment of medical eligibility, where cases which clearly do not meet medical eligibility are identified early and rejected, prior to an assessment of other qualification criteria (such as residency and income and assets assessments).

The National Social Security Rights Network (NSSRN) has consulted on the above changes. It is too early to determine how these changes affect DSP assessments in any substantive way.

NSSRN

The NSSRN is in the process of completing a major research report into client experiences in claims and assessments since the 2015 changes¹¹. The NSSRN Report should be released in February 2018.

The NSSRN Report includes a summary of their submissions to the Joint Committee Report. It also contains a number of recommendations which seek to alleviate issues related to: perceived lack of transparency and consistency in assessments; significant time and other problems in the appeals process; and broad problems with Program of Support requirements. The NSSRN notes that concerns regarding the Program of Support requirements span across both policy and service delivery. Also, that DSS, who make the policy, and DHS, who implement it, don't seem to be working to improve the Program of Support.

Readers of this briefing paper looking to do campaign work to improve the administration of DSP could consider supporting the NSSRN recommendations and working on ways to lobby government to implement them. In particular, the recommendations related to Job Capacity Assessments¹², DSP appeals processes¹³ and the administration of the Program of Support requirements¹⁴ provide practical reforms that alleviate systemic problems encountered by SSRV clients. Feedback from SSRV caseworkers and other NSSRN member centres are that the length of time for reviews in circumstances where clients have deteriorating conditions (which

¹⁰ See <http://dspoverseas.proboards.com/thread/4998/streamline-disability-support-pension-claims?page=1>

¹¹ National Social Security Rights Network, *Disability Support Pension Project: A Snapshot of DSP client experiences of claims and assessment since the 2015 changes*. January 2018

¹² Above n 11, p. 19 (Recommendations 2.1-2.4)

¹³ Above n 11, p. 26 (Recommendation 3)

¹⁴ Above n 11, p. 27-30 (Recommendation 4.1-4.3)

might not qualify them for DSP at the time of application but will likely qualify them for DSP by the time of an Administrative Appeals Tribunal hearing) create circumstances of substantive injustice for vulnerable clients. Further, the DHS don't appear to be doing any work reforming Programs of Support which is also a source of significant misunderstanding and hardship for applicants with multiple medical conditions.

In addition to the NSSRN Report, the NSSRN has produced a number of papers and guides on DSP policy including:

- Statistics on the flow of people from DSP to Newstart Allowance following a DSP rejection¹⁵.
- Statistics on reasons for rejection of DSP, factors affecting the number of people on DSP¹⁶.
A Report containing case studies and analysis of 10 people living on the DSP¹⁷.
- Some work on changes to DSP eligibility for people in psych confinement¹⁸.
- A Practitioners Guide to the DSP¹⁹.

Other Recent Policy and Law Reform work

There is significant concern amongst disability services, Not-for-Profit services, community services providers and the legal assistance sector around the administration of the social security system and its impact on recipients with disabilities. However, it appears based on our research that few of the major stakeholders have done significant policy and law reform work targeted specifically at the administration of the DSP.

Disability Sector

Scanning the policy and law reform work of some of the major disability services and advocacy organisations shows that, while DSP eligibility and administration is widely considered, none have done research or advocacy specifically around DSP.

Inclusion Australia's campaign 'We can work with the right support' aims to organise with people with intellectual disability, their families and supporting organisations to make the promise of inclusion in the workforce a reality. The focus of the campaign is about improving the employment support system to better serve the interests of

¹⁵ See <http://www.nssrn.org.au/social-security-rights-review/budget-2016-more-people-with-a-disability-move-onto-newstart-allowance-but-no-action-to-ensure-its-adequacy/>

¹⁶ National Social Security Rights Network "Facts on the Disability Support Pension" July 2015 (<http://www.nssrn.org.au/wp/wp-content/uploads/2017/02/Welfare-Rights-Facts-about-the-Disability-Support-Pension-July-2015.pdf>)

¹⁷ National Social Security Rights Network, *Living on the Disability Support Pension: 10 case studies and analysis published by the National Welfare Rights Network*, July 2014 (<http://www.nssrn.org.au/wp/wp-content/uploads/2017/01/Living-on-the-Disability-Support-Pension.pdf>)

¹⁸ See <http://www.nssrn.org.au/social-security-rights-review/social-security-changes-in-the-pipeline/> and <http://www.nssrn.org.au/social-security-rights-review/new-bill-to-remove-right-to-disability-pension-for-people-in-psychiatric-confinement/>

¹⁹ See <http://www.nssrn.org.au/social-security-rights-review/practitioners-guide-disability-support-pension>

workers with an intellectual disability. DSP administration is part of this area of work, but the campaign focusses more on areas including disability discrimination and improvements to the Transition to Work program²⁰.

Australian Federation of Disability Organisations policy work around the National Disability Insurance Scheme and Employment and Workforce Participation also touches on DSP administration as well. AFDO's 2015 submission to the Department of Social Services Employment Framework Issues Paper states:

AFDO recommends a policy that encourages DSP recipients to work for as many hours as possible without triggering pension suspension or cancellation. The policy should enable people in receipt of the DSP who choose to work to continue to receive a part pension until paid income reduces the pension to zero dollars when applying the income/assets test. This approach

- removes limitations on hours of work
- encourages DSP recipients to earn as much as possible and increase their hours of work
- addresses the anxiety of the number of hours that can be worked before income support and associated entitlements are affected
- decreases reliance on the DSP as much as possible via the DSP income test

This measure could also have a positive impact on the number of DSP recipients who currently report earned income which sits at around 10%.²¹

A number of other disability service peak bodies do not appear to have undertaken advocacy directly on DSP issues in recent years²².

Not for Profit/Community Services Sector

Australian Council of Social Services

ACOSS have a policy focus on 'Income Support and Employment' and campaign broadly on social security policy. Key areas include *Robodebt*, cashless welfare card, and CDP. They have made a number of submissions to relevant inquiries²³. ACOSS completed a submission to the Joint Committee Inquiry²⁴.

Brotherhood of St Lawrence

²⁰ See <http://www.wecanwork.info/news>

²¹ Australian Federation of Disability Organisations, *A new employment model focused on business and jobseekers: Submission to the Department of Social Services Employment Framework Issues Paper*. July 2015 (<http://www.afdo.org.au/media/1233/afdo-submission-dss-employment-framework-issues-paper-response-final.pdf>)

²² See Disability Advocates Network Australia submission at <http://www.dana.org.au/publications/submissions>; Victorian Advocacy League for Individuals with a Disability at <https://www.valid.org.au/node/37>; and Action on Disability for Ethic Communities <http://www.adec.org.au/> for some examples.

²³ See <http://www.acoss.org.au/income-support-employment/>

²⁴ See <http://www.acoss.org.au/wp-content/uploads/2017/01/Inquiry-into-the-review-of-DSP-10-11-2016.pdf>

The Brotherhood of St Lawrence conducts research into a number of areas of social security policy under the broad policy areas 'Work and economic security', 'Inclusive Ageing' and 'Poverty and Social exclusion'. Their work looks into such things as universal basic, youth employment services and employment services for elder workers²⁵.

While the administration of DSP does not feature centrally in their work, they conduct research in a number of parallel areas. Their research into the operation of the labour market for ageing workers has particular relevance²⁶.

Legal Assistance Sector

Australian Law Reform Commission

The ALRC published report into the effect of Commonwealth Laws on Older Workers²⁷ in 2013. A section of the Report focussed on DSP, recommending that:

The Guide to Social Security Law should be amended to provide that undertaking paid work for fewer than 30 hours per week will not trigger a review of qualification for Disability Support Pension

Another ALRC report in 2014 on the effect of Commonwealth Laws on people with a disability expressly excludes making recommendations on systemic issues related to the administration of DSP and the social security system²⁸.

Victorian Legal Aid (VLA)

VLA has a specialist Commonwealth Entitlements team and, in addition to direct client services, conducts test cases and does law reform work in a number of areas of social security policy. Their most recent and extensive work has been around issues related to *Robodebt*.

²⁵ See <https://www.bsl.org.au/research/research-themes/work-and-economic-security/migration-and-employment>; http://library.bsl.org.au/jspui/bitstream/1/9423/1/Bowman_etal_Understanding_financial_wellbeing_2017.pdf; and <https://www.bsl.org.au/advocacy/youth-employment/youth-unemployment-monitor>

²⁶ Nov 2015, Michael McGann, Dina Bowman, Helen Kimberley and Simon Biggs "Too old for work, too young to retire": <https://www.bsl.org.au/research/browse-publications/too-old-to-work-too-young-to-retire/>

²⁷ Australian Law Reform Commission, *Access All Areas – Older Workers and Commonwealth Laws (ALRC Report 20)*, May 2013 (<https://www.alrc.gov.au/publications/7-social-security/disability-support-pension>)

²⁸ See Australian Law Reform Commission, *Equity, Capacity and disability in Commonwealth laws*, August 2014 (<https://www.alrc.gov.au/publications/equality-capacity-disability-report-124>). Reports states (at 6.37) that "Stakeholders consistently emphasised the complexity of the social security system and the difficulties persons with disability face in navigating the system; difficulties arising in relation to eligibility, participation requirements and the consequences of breach of certain requirements; and appeal and review processes. Stakeholders also highlighted the particular difficulties for persons with disability who are Aboriginal or Torres Strait Islanders, from a culturally and linguistically diverse community, or who live in a rural, regional or remote community. 6.37 While these are important issues in the lives of persons with disability, the issues do not relate directly to individual decision-making, and the ALRC therefore does not make recommendations in these areas"

Regarding DSP administration, VLA have published case studies around issues for Child Support and DSP recipients²⁹, and publicised case studies on DSP appeals³⁰.

VLA also contributed to the ALRC investigation *Equity, Capacity and disability in Commonwealth Laws*³¹, arguing that:

The assessment of eligibility for the DSP should take account of both the person's capacity or 'impairment', as well as the market reality (at p. 9).

VLA's submission to the Joint Committee Report focussed on improving the quality and efficiency of decision making of DSP applications and appeals, and critically analyses the application of the Program of Support.

McClure Report

The Australian Government released the Final Report into the review of Australia's welfare system, *A New System for Better Employment and Social Outcomes* on 25 February 2015³². The review's purpose has been to identify how to make Australia's welfare system fairer, more effective, coherent and sustainable and encourage people to work. The review was chaired by Patrick McClure AO.

Broadly, the report recommends streamlining the number of payments to 5 basic payments and tightening eligibility for all forms of disability support (not just DSP).

At January 2018, the Commonwealth Government hadn't formally responded to or implemented recommendation from the McClure Report.

The McClure Report is included here for the sake of completeness. However, its recommendations do not assist vulnerable members of the community and focus more on perceived inefficiencies and 'red tape'. There are some interesting insights, particularly in the comparisons with the disability support system in the Netherlands and commentary³³ on the Productivity Commission inquiry into the NDIS and the place of DSP alongside that system³⁴. However, overall I recommend against as looking to the McClure report as a basis for informing law reform work by readers of this briefing paper.

Interesting Media Coverage

²⁹ See <https://www.legalaid.vic.gov.au/about-us/news/disability-support-pension-and-child-support-debts-our-clients-experience>

³⁰ See <https://www.legalaid.vic.gov.au/about-us/news/centrelink-decision-to-cancel-disability-pension-overturned-with-our-help>

³¹ See <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-equality-capacity-and-disability-in-commonwealth-laws-submission-to-alrc.doc>

³² Department of Social Services, *A New System for Better Employment and Social Outcomes*, June 2014 (https://www.dss.gov.au/sites/default/files/documents/06_2014/dss001_14_full_report_27_june_tagged.pdf)

³³ Above n 32, p. 37

³⁴ Above n32, p.48

- Tracey Bowden, "Tighter Disability Support Pension rules are hurting, says welfare groups", ABC 7:30. June 2015 (<http://www.nssrn.org.au/social-security-rights-review/7-30-report-looks-at-life-on-newstart-allowance-for-people-with-disability>)
- Peter Whiteford, 'Has there been a blowout in Social Security and Welfare Spending', The Conversation, 18 April 2017 (<https://theconversation.com/budget-explainer-has-there-been-a-blowout-in-social-security-and-welfare-spending-75055>)
- Peter Whiteford, 'Ideas for Australia welfare reform need to be about improving well-being not punishing the poor'. The Conversation, 21 April 2016, <https://theconversation.com/ideas-for-australia-welfare-reform-needs-to-be-about-improving-well-being-not-punishing-the-poor-56355>
- Karen Soldiac 'Giving and taking away: NDIS and disability pension reform', The Conversation, 14 October 2011 (<https://theconversation.com/giving-and-taking-away-ndis-and-disability-pension-reform-3230>)
- Norman Hermant 'Eligibility assessment sees Disability Support Pension claims plummet' ABC Radio AM, 24 June 2016 (<http://www.abc.net.au/am/content/2016/s4488159.htm>)
- Angela Lavoipierre, 'Eight thousand young people kicked off disability support pension' ABC Radio The World Today, 28 January 2016 (<http://www.abc.net.au/worldtoday/content/2015/s4395910.htm>)
- Anna Henderson 'Work Not Welfare' ABC Lateline 30 June 2014 (<http://www.abc.net.au/lateline/work-not-welfare/5561452>)
- Annie Guest 'Concern that changes to disability pensions could further harm sexual abuse survivors' ABC Radio AM, 11 May 2017 (<http://www.abc.net.au/am/content/2016/s4667191.htm>)
- William McInness, 'Australians on disability pensions rise despite fall in mental health symptoms' The Age, 12 June 2017 (<http://www.theage.com.au/national/health/australians-on-disability-pensions-rise-despite-fall-in-mental-health-symptoms-20170611-gwovp3.html>)
- Michaela Whitbourne, 'Vietnam veteran wins pension for PTSD after 15-year legal battle', The Age 24 April 2017 (<http://www.theage.com.au/nsw/vietnam-veteran-wins-pension-for-ptsd-after-15-year-legal-battle-20170424-gvr06k.html>)
- Neelima Choahan, 'Centrelink asks paralysed man to prove he deserved pension', The Age, 23 October 2016 (<http://www.theage.com.au/victoria/centrelink-asks-paralysed-man-to-prove-he-deserved-pension-20161021-gs88ax.html>)
- Noel Towell, 'Disabled lost in benefits limbo amid Centrelink pension crack down', The Age, 15 February 2016 (<http://www.theage.com.au/national/public-service/disabled-lost-in-benefits-limbo-amid-centrelink-pension-crack-down-20160215-gmuas4.html>)
- Editorial, 'Federal government's welfare reviews must put vulnerable first', The Age, 17 January 2016 (<http://www.theage.com.au/comment/the-age-editorial/federal-governments-welfare-reviews-must-put-vulnerable-first-20161017-gs3xxx.html>)
- Peter Hall, 'Amputee Doug Stubbs wins case against Federal Government for his right to a disability pension', Daily Telegraph, 14 November 2017 (<http://www.news.com.au/national/queensland/amputee-doug-stubbs-wins-case-against-federal-government-for-his-right-to-disability-pension/news-story/15b6505d1ebfe4dcae37f94a2700a7d>)
- David Benuik, 'Life on a pension a daily struggle for Rokeby couple', Mercury, 12 March 2017 (<http://www.themercury.com.au/news/tasmania/life-on-a-pension-a-daily-struggle-for-rokeby-couple/news-story/a0381ab2bfca063e80804ef7977a1df>)

- Eden Gillespie, 'Why was Carmel rejected by Centrelink' News.com.au, 9 August 2017 (<http://www.news.com.au/lifestyle/health/health-problems/why-was-carmel-rejected-by-centrelink/news-story/8f85f548af864aea0c03d37abc97effb>)
- Brad Crouch, 'Minister: Disability Pension tests may trigger serious mental health episodes' Adelaide Advertiser, 25 November 2016 (<http://www.news.com.au/national/south-australia/minister-disability-pension-tests-may-trigger-serious-mental-health-episodes/news-story/4f1c8033bbcc5b2be862d460be5c5d27>)

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