

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**EMPLOYMENT SERVICES (CONSEQUENTIAL AMENDMENTS) BILL
1994**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment, Education and Training,
the Honourable Simon Crean, MP)

**THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE
HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED**

EMPLOYMENT SERVICES (CONSEQUENTIAL AMENDMENTS) BILL 1994

OUTLINE

This Bill makes consequential amendments arising from the Employment Services Act 1994 to the following legislation:

- . *Employment, Education and Training Act 1988;*
- . *Freedom of Information Act 1982;*
- . *Ombudsman Act 1976;*
- . *Privacy Act 1988;* and
- . *Social Security Act 1991.*

As this Bill amends the *Privacy Act 1988*, the opportunity is being taken to propose a minor technical amendment to *Australian Capital Territory Government Service (Consequential Provisions) Act 1994*.

Amendments to the *Social Security Act 1991* in relation to deferment periods for the payment of Job Search Allowance and Newstart Allowance are also proposed. The proposed amendments would provide for the following:

- . removal of the requirement for any period of notice to be given for the commencement of the deferment period;
- . removal of the requirement for a formal determination of the day a deferment period starts;
- . replacement of the requirement that a deferment period commences after a notice is received to commencement when a notice is given;
- . clarification of the operation of the deferment and waiting period by permitting time spent off allowance after notice is given, to count toward the deferment period; and
- . other technical amendments.

PURPOSE OF THE BILL

The Bill repeals Part VI of the *Employment, Education and Training Act 1988*, under which the Commonwealth Employment Service (CES) is currently established. The CES is being re-established by Clause 8 of the Employment Services Bill 1994.

The purpose of the amendments to the *Freedom of Information Act 1982* and the *Privacy Act 1988* is to extend the operation of those Acts to the case management services provided by private sector case managers.

The amendments to the *Freedom of Information Act 1982* provide for members of the public to have rights of access to documents relating to case management services that are held by contracted case managers.

Amendments to the *Ombudsman Act 1976* provide for the Ombudsman to investigate complaints about contracted case managers and for the Ombudsman to be able to refer those complaints to the Employment Services Regulatory Authority (ESRA) where the Ombudsman considers the complaint could be more appropriately dealt with by ESRA.

The Ombudsman would be able to provide information on matters relevant to the operation of the case management system to ESRA without the need to make a formal report to the responsible Minister in all cases.

The Bill amends a number of provisions in the *Social Security Act 1991* to provide for the disclosure of information to contracted case managers by the Secretary to the Department of Social Security and to insert notes cross referencing relevant provisions to the *Employment Services Act 1994*.

Proposed amendments to the *Social Security Act 1991* address difficulties created by recent amendments to the *Social Security Legislation Amendment Bill (No 2) 1994*. The amendments related to the reciprocal obligations of persons who receive Job Search Allowance or Newstart Allowance under that Act.

The amendments were intended to provide for a period of notice to an allowance recipient before a deferment period was imposed because she or he had breached her or his obligations under the Act. The intended effect was that a person would receive an additional two instalments (four weeks) of Job Search Allowance or Newstart allowance before payment of allowance was cancelled.

In the Working Nation White Paper, to complement the increased assistance to be provided to job seekers, the Government announced enhanced reciprocal obligations for those receiving benefits. The Government believes that provision of a period of notice before payment of an allowance is deferred sends the wrong signals to job seekers in regard to the importance of their reciprocal obligations.

Nevertheless the Government agrees that the legislation should require that allowance recipients be notified of the imposition of a deferment period in order to avoid the situation of people ceasing to receive payment without explanation.

The amendments have also raised a number of matters of administrative and technical concern for both the Department of Social Security and the Department of Employment Education and Training who are responsible for the administration of this legislation. For example, a deferment period cannot be expressed to commence until after the notice specifying the commencement date is actually received by the client. Therefore the decision maker is being asked to make a decision on an event about which he or she could not be certain at the time the decision is made.

FINANCIAL IMPACT

The measures in this Bill have no financial impact on the Commonwealth.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 - Short title

The short title of this Act would be the *Employment Services (Consequential Amendments) Act 1994*.

Clause 2 - Commencement

Part 1 and Part 2 would commence on the day on which the *Employment Services Act 1994* receives Royal Assent.

Subclause (2) would provide for the commencement of the subsection and Division 4 of Part 6 on the day this Bill receives Royal Assent.

The other provisions would commence on the day on which provisions referred to in subsection 2(2) of the *Employment Services Act 1994* commence. These provisions commence by Proclamation, or within 6 months if not earlier proclaimed.

PART 2 - AMENDMENT OF THE EMPLOYMENT, EDUCATION AND TRAINING ACT 1988

Clause 3 - Object of Part

The object of this Part would be to repeal Part VI of the *Employment, Education and Training Act 1988*, under which the Commonwealth Employment Service (CES) is currently established. The CES is proposed to be re-established by Clause 8 of the *Employment Services Bill 1994*.

Clause 4 - Principal Act

Any references to the Principal Act in this Part are references to the *Employment, Education and Training Act 1988*.

Clause 5 - Repeal of Part VI

This clause would repeal Part VI of the *Employment, Education and Training Act 1988*.

Clause 6 - Disclosure of interests

This clause would remove references to committees established under the repealed provisions from section 60 of the Principal Act, which deals with disclosure of interests. Corresponding disclosure requirements are proposed in clause 17 of the *Employment Services Bill 1994*.

Clause 7 - Transitional provision - Commonwealth Employment Service

This clause would be a transitional provision under which the Commonwealth Employment Service, proposed to be established by clause 8 of the Employment Services Bill 1994, would be regarded as a continuation of the service established under section 48 of the Principal Act.

Clause 8 - Transitional provision - continuation of national committee

This clause would be a transitional provision which provides for the national committee appointed under section 50 of the Principal Act to continue as the national committee under clause 11 of the Employment Services Bill 1994.

PART 3 - AMENDMENT OF THE FREEDOM OF INFORMATION ACT 1982

Clause 9 - Object of Part

The object of this Part would be to give members of the public rights of access to certain documents held by contracted case managers.

Clause 10 - Principal Act

Any references to the Principal Act in this Part are references to the *Freedom of Information Act 1982*.

Clause 11 - Interpretation

This clause would give effect to the object of this Part by making minor amendments to section 4 of the Principal Act to make case managers subject to the provisions of the Principal Act.

Clause 12 - Insertion of new section

Eligible Case Managers

Clause 12 would insert a new section 6B in the *Freedom of Information Act 1982*. This would provide for rights of access under the *Freedom of Information Act 1982* to a document of an eligible case manager, if the document relates to the provision of case management services to a person referred under Part 4.3 of the *Employment Services Act 1994* or the performance of a function conferred on a case manager under that Act.

PART 4 - AMENDMENT OF THE OMBUDSMAN ACT 1976

Clause 13 - Objects of Part

The objects of this Part would be to provide for the Ombudsman to investigate complaints about contracted case managers and for the Ombudsman to be able to refer complaints to the Employment Services Regulatory Authority (ESRA).

Clause 14 - Principal Act

Any references to the Principal Act in this Part are references to the *Ombudsman Act 1976*.

Clause 15 - Interpretation

Clause 15 would amend the definition of "officer" to provide for the actions of eligible case managers to be subject to investigation by the Ombudsman.

In addition a definition of **case manager** would be included in section 3 of the Principal Act which would have the same meaning as in the *Employment Services Act 1994*.

This clause would also insert a definition of **ESRA** in section 3 of the Principal Act that would mean the Employment Services Regulatory Authority established under the *Employment Services Act 1994*.

Clause 16 - Functions of Ombudsman

This clause would amend section 5 of the Principal Act to prevent the Ombudsman from investigating complaints about case managers that are not connected with the provision of case management services.

Clause 17 - Discretion not to investigate certain complaints

This clause would provide the Ombudsman with the discretion to refer a complaint to the ESRA where the Ombudsman considers the complaint could be more appropriately dealt with by ESRA.

Clause 18 - Disclosure of information by Ombudsman

New subclause 35A(3A) of the Principle Act would be added to provide that that Act does not prevent the Ombudsman from disclosing information or making a statement to ESRA in the following circumstances:

- the Ombudsman has information about a particular case manager; and
- the information is relevant to the performance of ESRA's functions or the exercise of ESRA's powers; and
- in the opinion of the Ombudsman it is either in the interest of ESRA, the case manager or a complainant, or otherwise in the public interest, to disclose the information or to make a statement to ESRA.

New subclause 35A(3B) would provide that subclause 35A(3A) would not, by implication, limit the generality of subsection 35A(1) which deals with the disclosure of information or the making of a statement to a person or to the public or a section of the public when the Ombudsman considers such disclosure or statement to be in the

interests of a Department, a prescribed authority or person or otherwise in the public interest.

New subclause 35A(3C) would provide that the Ombudsman must not disclose information or make a statement under subclause 35A(3A) if the information was obtained in the course of an investigation and the disclosure or the making of a statement is likely to interfere with that or any other investigation under the Act or the making of a report under the Act.

New subclause 35A(3D) would provide that the Ombudsman must not disclose information or make a statement under subclause 35A(3A) if the information was obtained in the course of making preliminary inquiries under section 7A of the Principal Act and the disclosure or the making of a statement is likely to interfere with those or any other preliminary inquiries, the carrying out of an investigation, or the making of a report under the Act.

New subclause 35A(3E) would provide that the Ombudsman, in disclosing information or making a statement under subclause 35A(3A), must not:

- set out opinions which are critical of a case manager or person unless they have been given the chance to make submissions in relation to the information or statement, either orally or in writing; or
- disclose the name of a complainant or any matter that would allow a complainant to be identified unless it is fair and reasonable in all the circumstances to do so.

PART 5 - AMENDMENT OF THE PRIVACY ACT 1988

Clause 19 - Object of Part

The object of this Part would be to require contracted case managers to comply with the provisions of the *Privacy Act 1988* in providing case management services.

Clause 20 - Principal Act

Any references to the Principal Act in this Part are references to the *Privacy Act 1988*.

Clause 21 - Interpretation

This clause would give effect to the object of this Part by making minor amendments to section 6 of the Principal Act to make case managers subject to the provisions of the Principal Act.

Clause 22 - Acts and practices of agencies etc.

This clause would amend section 7 of the Principal Act to apply the provisions of the Principal Act to acts or practices done by case managers in connection with the provision of case management services.

Clause 23 - Principal executive of agency

This clause would include in the table in section 37 of the Principal Act, those persons to be regarded as **principal executives of an agency** for the purposes of that term as defined. Principal executives of agencies have certain responsibilities under the Principal Act. For a case manager who is an individual, the principal executive would be that individual. For a case manager that is not an individual, the principal executive would be the person primarily responsible for the management of the case manager.

Clause 24 - Registration of determination

This clause would amend section 54 of the Principal Act with the effect that Division 3 of Part 5 of the Act, relating to review and enforcement of determinations by the Privacy Commissioner, will apply to case managers who are not Commonwealth agencies.

Clause 25 - Application of Division

This clause would amend section 57 of the Principal Act with the effect that Division 4 of Part 5 of the Act, relating to review and enforcement of determinations by the Privacy Commissioner, will apply to case managers who are Commonwealth agencies.

Clause 26 - Consequential amendment of the *Australian Capital Territory Government Service (Consequential Provisions) Act 1994*

As this Bill would amend the *Privacy Act 1988*, the opportunity is being taken to propose a minor technical amendment to *Australian Capital Territory Government Service (Consequential Provisions) Act 1994*. The amendment is a technical correction and would change the references at the end of each paragraph from "and" to "or". The amendment does not represent any change in policy.

PART 6 - AMENDMENT OF THE SOCIAL SECURITY ACT 1991

Division 1 - Principal Act

Clause 27 - Principal Act

Any references to the Principal Act in this Part are references to the *Social Security Act 1991*.

Division 2 - Secrecy

Clause 28 - Object of Division

This object of this Division would be to provide for the disclosure of certain information to contracted case managers by the Secretary to the Department of Social Security.

Clause 29 - Secretary's certificate

This clause would provide for the objects of this Part to be effected by amending section 1314 of the Principal Act to provide that the Secretary to the Department of Social Security may disclose information to a contracted case manager which is relevant to the provision of case management services by the case manager.

Division 3 - Insertion of Notes referring readers of the Principal Act to relevant provisions of the Employment Services Act 1994

Clause 30 - Object of Division

The object of this Division is to insert Notes into the Principal Act referring readers to relevant provisions of the *Employment Services Act 1994*.

Clause 31 - Insertion of notes

This clause gives effect to the objects of the Division by amending various sections of the Principal Act to include notes which cross reference the relevant sections of the *Employment Services Act 1994*.

Division 4 - Deferment periods for job search allowance and newstart allowance

Clause 32 - Object of Division

This clause is proposed to be added to state that the object of the Division is to make amendments to the *Social Security Act 1991* relating to deferment periods for job search allowance and newstart allowance.

Clause 33 - Repeal of section and substitution of new sections

This clause would repeal section 546B of the *Social Security Act 1991* and substitute three new sections.

546B - Commencement of activity test deferment periods

New clause 546B would provide that the Secretary must give notice to a person of the commencement of an automatic deferment period and that such period commences on the day the notice is given.

Subclauses 546B(3) & (4) would provide that, if a person is subject to one or more pre-existing deferment periods at the time notice of an additional deferment period is given, then that additional deferment period will commence after the completion of any pre-existing deferment period(s).

The effect of subsection 546B(6) would be that, if a job search allowance has ceased to be payable to a person before what would have been the commencement date of a deferment period, then the period for which the job search allowance has ceased to be

payable will be taken to form part of the deferment period. This allows for a person to serve part or all of a deferment period before reclaiming benefit.

546BA - Application of activity test deferment periods before claims for job search allowance

The effect of this new section would be to allow a person to whom an automatic deferment period applied, because of circumstances that arose before a claim for allowance was made, to be regarded as having served the whole or part of that deferment period prior to making a claim for allowance. The provision would have effect in relation to circumstances in which the person's unemployment was due to his or her voluntary act or misconduct (cf ss 544 & 545 of the *Social Security Act 1991*). Any part of the deferment period remaining to be served when a claim is made will be served in addition to any waiting period that might also apply to the claimant.

546BB - Waiting periods

A new section 546BB would be inserted in the *Social Security Act 1991* to simplify the relationship between a waiting period that a person may be required to serve under that Act and any contemporaneous automatic deferment period that may be imposed. This can occur when a person makes a new claim for benefits and is either already the subject of a deferment period or circumstances are such that an additional deferment period is required to be imposed.

New subsection 546BB(1) would provide that a deferment period that would otherwise have commenced during a waiting period would be taken to commence immediately following the end of that waiting period.

New subsection 546BB(2) would provide that a deferment is suspended for the duration of any waiting period that might be applicable to a person.

546BC - Effect of sections 546B, 546BA and 546BB

The purpose of section 546E would be to make it clear that an automatic deferment period may only commence because of the application of sections 546B, 546BA and 546BB but that these clauses do not prevent an allowance ceasing to be payable for reasons other than the application of an automatic deferment period.

Clause 34 - Repeal of section and substitution of new sections

This clause would repeal section 547B of the *Social Security Act 1991* and substitute three new sections.

547B - Commencement of administrative breach deferment period

A new section 547B of the *Social Security Act 1991* would provide that the Secretary must give notice to a person of the commencement of an automatic deferment period and that such period commences on the day the notice is given.

Subsections 547B(3) & (4) would provide that, if a person is subject to one or more pre-existing deferment periods at the time notice of an additional deferment period is given, then that additional deferment period will commence after the completion of any pre-existing deferment period(s).

The effect of subsection 547B(6) would be that, if a job search allowance has ceased to be payable to a person before what would have been the commencement date of a deferment period, then the period for which the job search allowance has ceased to be payable will be taken to form part of the deferment period. This allows for a person to serve part or all of a deferment period before reclaiming benefit.

547C - Waiting periods

A new section 547C would be inserted in the *Social Security Act 1991* to simplify the relationship between a waiting period that a person may be required to serve under that Act and any contemporaneous automatic deferment period that may be imposed. This can occur when a person makes a new claim for benefits and is either already the subject of a deferment period or circumstances are such that an additional deferment period is required to be imposed.

Subsection 547C(1) would provide that a deferment period that would otherwise have commenced during a waiting period would be taken to commence immediately following the end of that waiting period.

Subsection 547C(2) would provide that a deferment period is suspended for the duration of any waiting period that might be applicable to a person.

Subsection 547C(3) would provide that where a person is the subject of waiting periods that overlap, then the reference to the end of a waiting period under subclauses (1) & (2) is a reference to the end of the later waiting period.

Subsection 547C(4) would provide that "waiting period" includes a liquid assets test waiting period under section 519 of the *Social Security Act 1991*.

547D - Effect of sections 547B and 547C

The purpose of section 547D would be to make it clear that an automatic deferment period may only commence because of the application of sections 547B and 547C but that these clauses do not prevent an allowance ceasing to be payable for reasons other than the application of an automatic deferment period.

Clause 35 - Repeal of section and substitution of new section

This clause would repeal section 630B of the *Social Security Act 1991* and substitute four new sections.

630B - Commencement of activity test deferment periods

New section 630B of the *Social Security Act 1991* would provide that the Secretary must give notice to a person of the commencement of an automatic deferment period and that such period commences on the day the notice is given.

Subsections 630B(3) & (4) would provide that, if a person is subject to one or more pre-existing deferment periods at the time notice of an additional deferment period is given, then that additional deferment period will commence after the completion of any pre-existing deferment period(s).

The effect of subsection 630B(6) would be that, if a newstart allowance has ceased to be payable to a person before what would have been the commencement date of a deferment period, then the period for which the newstart allowance has ceased to be payable will be taken to form part of the deferment period. This allows for a person to serve part or all of a deferment period before reclaiming benefit.

630BA - Application of activity test deferment periods before claims for newstart allowance

The effect of this section would be to allow a person to whom an automatic deferment period applied, because of circumstances that arose before a claim for allowance was made, to be regarded as having served the whole or part of that deferment period prior to making a claim for allowance. The provision would have effect in relation to circumstances in which the person's unemployment was due to his or her voluntary act or misconduct (cf ss 628 & 629 of the *Social Security Act 1991*). Any part of the deferment period remaining to be served when a claim is made will be served in addition to any waiting period that might also apply to the claimant.

630BB - Waiting periods

A new section 630BB would be inserted in the *Social Security Act 1991* to simplify the relationship between a waiting period that a person may be required to serve under that Act and any contemporaneous automatic deferment period that may be imposed. This can occur when a person makes a new claim for benefits and is either already the subject of a deferment period or circumstances are such that an additional deferment period is required to be imposed.

Subsection 630BB(1) would provide that a deferment period that would otherwise have commenced during a waiting period would be taken to commence immediately following the end of that waiting period.

Subsection 630BB(2) would provide that a deferment is suspended for the duration of any waiting period that might be applicable to a person.

Subsection 630BB(3) would provide that where a person is the subject of waiting periods that overlap, then the reference to the end of a waiting period under subclauses (1) & (2) is a reference to the end of the later waiting period.

Subsection 630BB(4) would provide that "waiting period" includes a liquid assets test waiting period under section 598 of the *Social Security Act 1991*.

630BC - Effect of sections 630B, 630BA and 630BB

The purpose of section 630BC would be to make it clear that an automatic deferment period may only commence because of the application of sections 630B, 630BA and 630BB but that these clauses do not prevent an allowance ceasing to be payable for reasons other than the application of an automatic deferment period.

Clause 36 - Repeal of section and substitution of new sections

This clause would repeal section 631B of the *Social Security Act 1991* and substitute three new sections.

631B - Commencement of administrative breach deferment periods

A new section 631B of the *Social Security Act 1991* would provide that the Secretary must give notice to a person of the commencement of an automatic deferment period and that such period commences on the day the notice is given.

Subsections 631B(3) & (4) would provide that, if a person is subject to one or more pre-existing deferment periods at the time notice of an additional deferment period is given, then that additional deferment period will commence after the completion of any pre-existing deferment period(s).

The effect of subsection 631B(6) would be that, if a newstart allowance has ceased to be payable to a person before what would have been the commencement date of a deferment period, then the period for which the newstart allowance has ceased to be payable will be taken to form part of the deferment period. This allows for a person to serve part or all of a deferment period before reclaiming benefit.

631C - Waiting periods

A new section 631C would be inserted in the *Social Security Act 1991* to simplify the relationship between a waiting period that a person may be required to serve under that Act and any contemporaneous automatic deferment period that may be imposed. This can occur when a person makes a new claim for benefits and is either already the subject of a deferment period or circumstances are such that an additional deferment period is required to be imposed.

Subsection 631C(1) would provide that a deferment period that would otherwise have commenced during a waiting period would be taken to commence immediately following the end of that waiting period.

Subsection 631C(2) would provide that a deferment is suspended for the duration of any waiting period that might be applicable to a person.

Subsection 631C(3) would provide that where a person is the subject of waiting periods that overlap, then the reference to the end of a waiting period under subclauses (1) & (2) is a reference to the end of the later waiting period.

Subsection 631C(4) would provide that "waiting period" includes a liquid assets test waiting period under section 598 of the *Social Security Act 1991*.

631D - Effect of sections 631B and 631C

The purpose of section 631D would be to make it clear that an automatic deferment period may only commence because of the application of sections 631B and 631C but that these clauses do not prevent an allowance ceasing to be payable for reasons other than the application of an automatic deferment period.

Clause 37 - Further amendments relating to deferment periods

This clause provides for further amendments relating to deferment periods.

Amendments are required to the index of terms in the *Social Security Act 1991*.

Subsection 23(1) of the *Social Security Act 1991* would be amended to include a definition of "deferment period".

Consequential amendments are proposed to certain provisions in the *Social Security Act 1991* relating to activity test deferment periods because of the previous amendments which would provide that a deferment period would commence upon the giving of the appropriate notice. Those provisions are: subsections 542(1), 542A(1), 542B(1) which relate to job search activity test breaches and subsections 624(1), 625(1) and 626(1) which relate to newstart activity test breaches.

A minor technical amendment is proposed for section 630A(6)(b) of the *Social Security Act 1991* to correct the reference to become "job search allowance".

Other technical amendments are proposed to correct subdivision headings in relevant areas of the *Social Security Act 1991* and item references in Schedule 1A to that Act.



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