

EXPLANATORY STATEMENT

Social Security (Unsuitable Work) Determination 2016

Summary

This Determination is made under subsections 502(4A), 541D(1AC), 601(2AC) and 731B(1C) of the *Social Security Act 1991* (the Act).

The purpose of this Determination is to set out the matters that the Secretary must take into account in determining whether particular paid work is unsuitable. The Determination is relevant to parenting payment, youth allowance (except for people undertaking full-time study or new apprentices), newstart allowance and recipients of special benefit who are nominated visa holders.

Background

Overview

Under the Act, a person's eligibility for participation payments is generally dependent on the person satisfying the relevant activity test or participation requirements. Social security recipients who are subject to the activity test meet that test if they satisfy the Secretary that they are actively seeking, and willing to undertake, paid work in Australia, other than paid work that is unsuitable for them. Alternatively, a person will satisfy the activity test if the Secretary notifies them that they should undertake particular paid work, other than paid work that is unsuitable for them, and they comply with that requirement.

Separately, the Secretary can require parenting payment recipients subject to participation requirements to undertake particular paid work, other than work that is unsuitable for the person.

Particular paid work will be unsuitable for a person if, in the Secretary's opinion, one of the express matters set out in the Act applies. The Act also allows the Secretary to determine that particular paid work is unsuitable for the person for any other reason. The matters in this Determination are not exhaustive as the Act specifically provides that the Secretary may take into account other matters in making a determination that particular paid work is unsuitable for a person.

Specific provisions

The Act provides that particular paid work is unsuitable for a person if, in the Secretary's opinion, any of the specific circumstances set out in sections 502(4) (in relation to parenting payment), 541D (in relation to youth allowance except for people undertaking full-time study or new apprentices), 601(2A) (in relation to newstart) and 731B (in relation to recipients of special benefit who are nominated visa holders) apply to the person.

Subsections 502(4A), 541D(1AC), 601(2AC) and 731B(1C) provide that the Secretary must, by legislative instrument, determine the matters that the Secretary must take into account in deciding whether, for any reason other than those expressly set out in the Act, particular paid work is unsuitable for a person. This Determination sets out those matters.

Revocation of existing determinations

The Determination revokes and replaces the *Social Security (Unsuitable Work) (DEWR) Determination 2006* in relation to what the Secretary must consider when making a determination about recipients of parenting payment, youth allowance (except for people undertaking full-time study or new apprentices) and newstart allowance. The Determination also revokes and replaces the *Social Security (Unsuitable Work) (FaCSIA) Determination 2006* in relation to what the Secretary must consider when making a determination for recipients of special benefit who are nominated visa holders.

Both of these instruments would be repealed on 1 April 2016 by the operation of section 50 of the *Legislative Instruments Act 2003*. As the Act requires the Secretary to make an instrument that determines the matters the Secretary must take into account, the Secretary needs to make a new instrument before the *Legislative Instruments Act 2003* would repeal the current instruments.

The Determination replicates the matters contained in the *Social Security (Unsuitable Work) (DEWR) Determination 2006* and the *Social Security (Unsuitable Work) (FaCSIA) Determination 2006*.

Operation of the provisions

Section 1 states the name of the Determination. Section 2 sets out the commencement date of the Determination as being the day after it is registered on the Federal Register of Legislative Instruments. Section 3 sets out the determinations that are revoked and replaced by this Determination. Section 4 sets out the definitions to be used in the Determination. As provided by the note, terms appearing in the Determination have the same meaning as in the Act.

Section 5 contains the substantive provisions of the Determination. As provided by subsection 5(1), section 5 only applies if a person has a partial capacity to work or is the principal carer of at least one child. The terms 'partial capacity to work' and 'principal carer' are both defined in the Act.

Subsection 5(2) sets out the provisions in the Act that deal with work being unsuitable for a person for any reason other than those expressly set out in the Act. The paragraphs of the Act listed in subsection 5(2) are relevant for parenting payment, youth allowance (except for people undertaking full-time study or new apprentices), newstart allowance and recipients of special benefit who are nominated visa holders.

Subsection 5(3) contains the matters that the Secretary must take into account when determining if work is unsuitable, for any reason other than those expressly set out in the Act, for a recipient of one of the above-mentioned payments who has a partial capacity to work or who is a principal carer.

The first of the matters is contained at paragraph 5(3)(a) and is the amount of time it takes the person to travel to and from work. This factor needs to be considered where the travel time either between the person's home to the person's work would normally exceed 60 minutes or the travel time from the person's work to the person's home would normally exceed 60 minutes. In determining if a journey would normally exceed 60 minutes, subsection 5(4) sets out that the Secretary is to have regard to all forms of transport (whether public or private) that are available to and accessible by the person.

Even if travel may not otherwise be unreasonably difficult, this ensures that the length of time spent travelling to and from work (including via the location of child care) when it is greater than 60 minutes is taken into account, when determining if particular paid work is unsuitable for a person. For example, in considering the form of transport available the Secretary may need to consider whether disability accessible taxis are available to and accessible by a person.

Paragraphs 5(3)(b) and (c) are both matters of a financial nature. Paragraph 5(3)(b) requires consideration of whether a person would be financially worse off because of certain financial costs incurred in undertaking particular paid work. That is, whether in doing the work the person would be worse off than if the person did not do the work. The financial costs that must be taken into account are:

- those that would be incurred in providing appropriate care and supervision to a child for whom the person is a principal carer; and
- travel that would be incurred by the person in undertaking the work.

The effect of paragraph 5(3)(b) is that, after taking into account both work-related child care and travel costs, if a person would be financially worse off in comparison to not doing the particular paid work, the fact that the person would be financially worse off must be considered in determining if the work is unsuitable for the person.

Paragraph 5(3)(c) requires consideration of the financial benefit a person would gain in undertaking particular paid work if there would only be a marginal financial gain. The reason for the marginal gain, however, must be because of the cost of providing appropriate care and supervision to a child for whom the person is a principal carer at the time the person would be working. This acknowledges that it is not appropriate to compel a principal carer parent to undertake work where there is only marginal financial gain when the cost of child care alone is considered.

Consultation

The Department consulted on the draft determination:

- On 6 November 2015 with:
 - Mission Australia;
 - National Welfare Rights; and
 - Uniting Care.
- On 19 November 2015 with:
 - National Employment Services Association; and
 - Jobs Australia.

These stakeholders were given the opportunity to provide comments on the draft Determination. During these consultations, stakeholders raised no concerns with the proposed Determination. The Australian Youth Affairs Coalition, Headspace, Australian Council of Social Service, Homelessness Australia and Catholic Social Services Australia were also invited to take part in the consultations.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Social Security (Unsuitable Work) Determination 2016

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Determination

The *Social Security (Unsuitable Work) Determination 2016* (the Determination) is made by the Secretary under subsections 502(4A), 541D(1AC), 601(2AC) and 731B(1C) of the *Social Security Act 1991* (the Act).

The purpose of this Determination is to set out the matters that the Secretary must take into account in determining whether particular paid work is unsuitable. The Determination is relevant to participation requirements for parenting payment, and the activity test for youth allowance (except for people undertaking full-time study or new apprentices), newstart allowance and recipients of special benefit who are nominated visa holders.

Under the Act, social security recipients are taken to satisfy the activity test, where relevant, if the Secretary is satisfied that the person is actively seeking, and willing to undertake, paid work in Australia other than paid work that is unsuitable for the person.

In addition, under subsections 502(1), 541(2), 601(1A) and 731A(7) of the Act the Secretary can require social security recipients who are subject to participation requirements or the activity test to undertake particular paid work, other than work that is unsuitable.

The Act provides that particular paid work is unsuitable for a person if, in the Secretary's opinion, any of the specific circumstances set out in sections 502(4) (in relation to parenting payment), 541D (in relation to youth allowance except for people undertaking full-time study or new apprentices), 601(2A) (in relation to newstart) and 731B (in relation to recipients of special benefit who are nominated visa holders) apply to the person. For example, paragraphs 502(4)(a) and (b) provide that particular paid work is unsuitable for a person if, and only if, in the Secretary's opinion, the person lacks the particular skills, experience or qualifications that are needed to perform the work, and no training will be provided by the employer; or it has been established that there is medical evidence that the person has an illness, disability or injury that would be aggravated by the conditions in which the work would be performed.

The Act also allows the Secretary to determine that the particular paid work is unsuitable for the person for any other reason. Subsections 502(4A), 541D(1AC), 601(2AC) and 731B(1C) provide that the Secretary must, by legislative instrument, determine the matters that the Secretary must take into account in deciding whether, for any reason other than those expressly set out in the Act, particular paid work is unsuitable for a person. This Determination sets out those matters. The matters in the Determination are not exhaustive as the Act specifically provides that the Secretary may take into account other matters in making a determination that particular paid work is unsuitable for a person.

The Determination revokes and replaces the *Social Security (Unsuitable Work) (DEWR) Determination 2006* and the *Social Security (Unsuitable Work) (FaCSIA) Determination 2006*. Both of these instruments would be repealed on 1 April 2016 by the operation of section 50 of the *Legislative Instruments Act 2003* and would, if not repealed by this Determination, cease to have effect on that date. As the Act requires the Secretary to make an instrument that determines the matters the Secretary must take into account, the Secretary needs to make a new instrument before the *Legislative Instruments Act 2003* would repeal the current instruments.

The Determination replicates the matters that are set out in the *Social Security (Unsuitable Work) (DEWR) Determination 2006* in relation to recipients of parenting payment, youth allowance and newstart allowance. The Determination also replicates the matters that are set out in the *Social Security (Unsuitable Work) (FaCSIA) Determination 2006* in relation to recipients of special benefit.

In summary, the Determination provides that when considering whether particular paid work is unsuitable for a person to whom the Determination applies (ie a person with a partial capacity to work or a person who is the principal carer of at least one child) for any reason other than those expressly set out in the Act, the Secretary must take into account the following matters:

- the journey from the person's home to the place of work (or from the place of work to the person's home) if the time of the journey would exceed 60 minutes;
- if the person would be financially worse off in undertaking the work due to the financial cost to the person in providing care and supervision for their children and of travel in undertaking the work; and
- if the financial benefit in undertaking the work would be marginal due to the financial cost to the person in providing care and supervision for their children.

The effect of the Determination is that if one of the matters set out in section 5 of the Determination applies to a person, the Secretary must consider that matter when determining if the particular paid work is unsuitable for the person. Considered in context, the Determination means that the person only needs to satisfy the Secretary that they are actively seeking and willing to undertake paid work in Australia that is suitable for them, as opposed to unsuitable. In addition, in circumstances where the Secretary requires the person to undertake particular paid work (as part of their activity test or participation requirements), the person cannot be required to undertake paid work that is unsuitable for them.

Human rights implications

The Determination engages the following rights:

- the right to social security in article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR);
- the right to an adequate standard of living in article 11 of the ICESCR; and
- the right to work in article 6 of the ICESCR.

Right to social security and right to an adequate standard of living

Article 9 of the ICESCR recognises the right of everyone to social security. Article 11 of the ICESCR recognises the right of everyone to an adequate standard of living and to the continuous improvement of living conditions.

The Determination itself does not affect the payment of income support. Rather, the Determination expands the circumstances in which the Secretary can consider that paid work is unsuitable for the person. The effect of the Determination is to limit the kind of work that the Secretary can require a person to actively seek, or to undertake, by specifying those matters the Secretary must take into account when deciding whether particular paid work is unsuitable for a person. Accordingly, the Determination is beneficial in nature because it expands on the matters expressly set out in the Act that mean that particular paid work might be unsuitable for a person.

The Determination does not impose any requirements or obligations on a person and, as noted above, has no impact on the payment of a person's income support. If there is an absence of suitable work for a person, that person will continue to receive income support as long as they comply with their other participation or activity test requirements. The Determination does not negatively affect or limit a person's right to social security or their right to an adequate standard of living.

Right to work

Article 6 of the ICESCR recognises the right to work. This includes the right to the opportunity to gain a living by work which the person freely chooses or accepts, and is considered an inherent part of human dignity.¹

To enable people to realise their right to work, States are required, among other things, to assist and support individuals in order to enable them to identify and find available employment, and to protect their right to just and favourable conditions of employment.²

One of the ways the Act promotes the right to work is by requiring a person to be actively seeking and willing to undertake paid work that is suitable for the person. In addition, the Act also promotes the right to work by giving the Secretary the ability to require a person to undertake particular paid work that is suitable for the person.

The Determination engages the right to work of persons who receive income support because it sets out circumstances in which the work might be considered to be unsuitable for them. The Determination provides that the Secretary is required to take into account the duration of the journey from the person's home to the place of work (or from work to home) where the time for the journey would normally exceed 60 minutes.

¹ Committee on Economic, Social and Cultural Rights, General Comment 18, paragraphs 1 and 2.

² Committee on Economic, Social and Cultural Rights, General Comment 18, paragraph 12.

The Determination also provides that the Secretary must take into account whether the person would be financially worse off as a result of undertaking the work because of the financial cost to the person in organising care and supervision for one or more of their children, and the financial cost of travel to the work. Finally, the Determination provides that the Secretary must take into account whether the financial benefit to the person of undertaking the work would be marginal, because of the financial cost in providing appropriate care and supervision for one or more of their children.

If, taking into account these matters, the Secretary decides that the work is unsuitable, that person cannot be *required* to undertake the work, and would not be subject to any penalty or payment suspension for not doing that work.

By ensuring that the Secretary takes into account certain matters that may make paid work unsuitable for a person, the Determination contributes to ensuring that a person cannot be required to work in jobs that are not suitable for them.

Conclusion

The Determination is compatible with human rights because it does not limit the right to social security or the right to an adequate standard of living. The Determination enhances and protects the right to work.