THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

ADVISORY REPORT
ON

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

House of Representatives Standing Committee on
Legal and Constitutional Affairs

SEPTEMBER 1994

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FOREWORD

The Committee is pleased to present this advisory report on the Employment Services Bill 1994 and the Employment Services (Consequential Amendments) Bill 1994.

The purpose of the Bills is to give effect to the government's labour market policy announced in *Working Nation*, the white paper on employment and growth. The policies promote the full use of the skills and energies of Australian workers.

The legislation provides the framework for the development over time of an open competitive environment for the supply of case management services to people who have been unemployed for a long term. Not only will the federal government continue to provide free services, but community groups, state and local governments, private organisations and training institutions will be able to join this innovative approach to assisting job seekers in obtaining work.

The Committee urges the Parliament to pass both Bills as soon as possible having allowed sufficient time to consider this advisory report. Enacting the legislation as soon as possible will assist Australia in achieving full employment and in raising the standard of living for all Australians.

Daryl Melham MP
Chair

22 September 1994

Membership of the Committee

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Mr Daryl Williams AM QC MP

Committee Secretariat

Committee Secretary:	Ms Judy Middlebrook
Research Officers:	Ms Robyn Oswald
	Ms Claressa Surtees
	Ms Kelly Williams
Executive Assistant:	Ms Lynda Gay
	Ms Gemma Searles
	Ms Di Singleton

House of Representatives
Parliament House
CANBERRA ACT 2600
Telephone: (06) 277 2358

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Acronyms and abbreviations

AARNET	Australian Academic Research Network
AAT	Administrative Appeals Tribunal
AYPAC	Australian Youth Policy and Action Coalition
ACC	Area Consultative Committees
ACROD	Australian Council for the Rehabilitation of the Disabled
ACOSS	Australian Council of Social Services
AG	Attorney-General
AI	*Acts Interpretation Act 1901*
ATSIC	Aboriginal and Torres Strait Islander Commission
CCM	Contracted Case Manager
CDEP	Community Development Employment Program
CES	Commonwealth Employment Service
CMAA	Case Management Activity Agreement
DEET	Department of Employment, Education and Training
DPI(A)	Disabled Peoples' International (Australia) Ltd
DSS	Department of Social Security
EAA	Employment Assistance Australia
ESRA	Employment Services Regulatory Authority
FOI	Freedom of Information
INTERNET	International network
JSA/NSA	Job Search Allowance or Newstart Allowance
LEAP	Landcare and Environment Action Program
LMP	Labour market program
NSA	National Skillshare Association Ltd
TAFE	Technical and Further Education

Chapter 1 Introduction

1.1 Background

1.1.1 The Employment Services Bill 1994 (the main Bill) and the Employment Services (Consequential Amendments) Bill 1994 were introduced to the House of Representatives and read a first time on 30 June 1994. The second reading debate was held on 24 and 25 August with the Bills being referred to the Legal and Constitutional Affairs Committee at the adjournment of the debate. In addition to the Bills themselves 'the amendments, new headings and new clauses to be moved on behalf of the Government' in relation to both Bills were also referred to the Committee.[1]

1.1.2 The main Bill deals with the provision of services. It does not, in itself, establish labour market programs but it is an approach to delivering labour market assistance to job seekers. The provision of employment services will continue to be free of charge to job seekers.

1.2 Development of the legislation

1.2.1 In May 1993 the Committee on Employment Opportunities was established to review assistance measures and labour market interventions in the context of the Government's economic and social objectives. The Committee conducted extensive consultations with the community through a telephone 'hotline', written submissions and a series of meetings in each State and Territory.

1.2.2 That consultative process generated 2,200 responses from a variety of individuals and organisations, including members of the public, employers and industry bodies, community organisations, all levels of government and education and training providers.

1.2.3 The Committee on Employment Opportunities presented its Green Paper, *Restoring Full Employment*, to the Government in December 1993. The paper proposed that the introduction of case management would assist the placement of long-term unemployed people into work and that non-government organisations should have an increased role in providing counselling and training assistance to unemployed people.

1.2.4 The Green Paper was followed in May 1994 by the White Paper on Employment and Growth, *Working Nation*. The White Paper announced a range of initiatives to achieve the Government's objectives of promoting economic growth and ensuring that those who are most disadvantaged in the labour market share in the benefits of recovery.

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1 House of Representatives *Hansard*, 25 August 1994, p. 366.

1.2.5 Central to the White Paper's initiatives is the reform of labour market assistance. Major changes to the way in which services are delivered to unemployed people are introduced through the main Bill. These changes include:

(a) the introduction of competition to the delivery of case management services;

(b) the establishment of the Employment Services Regulatory Authority (ESRA) to set up and regulate the case management system; and

(c) the establishment of Employment Assistance Australia (EAA), the Government's case management organisation.

1.2.6 Accompanying the main Bill is the Employment Services (Consequential Amendments) Bill 1994 (the Consequential Amendments Bill). This Bill provides for amendments to be made to the:

(a) *Employment, Education and Training Act 1988;*

(b) *Freedom of Information Act 1982;*

(c) *Ombudsman Act 1976;*

(d) *Privacy Act 1988;* and

(e) *Social Security Act 1991.*

1.2.7 The main Bill as introduced, is amended by 44 Government amendments. Both the main Bill and the Consequential Amendments Bill, according to the Department of Employment, Education and Training (DEET), were the subject of consultations with the Attorney-General's Department (AGD), the Department of the Prime Minister and Cabinet (PM&C), the Department of Social Security (DSS), Australian Archives and the offices of the Privacy Commissioner and the Commonwealth and Defence Force Ombudsman.[2]

1.2.8 Two sets of proposed amendments to the Consequential Amendments Bill have been put forward. The first set of amendments provides for '. . . provisions relating to extension of the *Freedom of Information Act 1982* and the *Privacy Act 1988* to operate in an alternative way to the current provisions of the Bill.'[3]

1.2.9 The second set of amendments is necessary to '. . . address difficulties created by recent amendments to the *Social Security Legislation Amendment Bill (No 2) 1994.*'[4]

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2 DEET, *Submissions*, p. S18.

3 *Employment Services (Consequential Amendments) Bill 1994*, Supplementary Explanatory Memorandum, p. 2.

4 *Employment Services (Consequential Amendments) Bill 1994*, Additional Supplementary Explanatory Memorandum. p. 2.

They concern changes to the reciprocal obligations of persons receiving certain allowances under that Act.

1.2.10 The main Bill provides for the making of thirteen disallowable instruments that contain much of the finer detail of the operations of the main Bill. The Committee encountered some difficulty in its consideration of the Bills because the disallowable instruments were not available for the Committee's deliberations. The issue of the use of these disallowable instruments is discussed in Chapter 3 of the report.

1.3 Principal innovations of the Bills

1.3.1 The main Bill establishes EAA and ESRA and clause 8 of the Bill re-establishes the Commonwealth Employment Service (CES). The CES operated previously under Part VI of the *Employment, Education and Training Act 1988* which is repealed by the Consequential Amendments Bill.

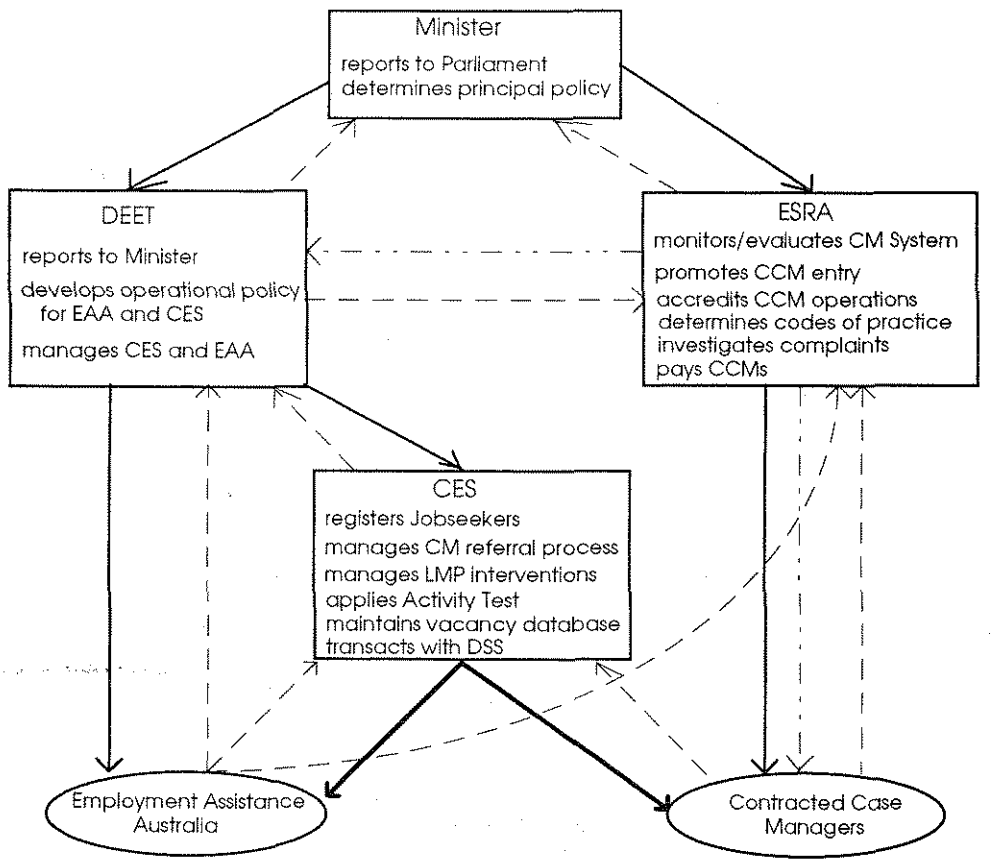
1.3.2 ESRA is an independent statutory authority established to set up and regulate the case management system and advise the Minister independently of DEET. ESRA will encourage and facilitate competition with the DEET-based case management organisation, EAA. ESRA will monitor EAA and contracted case managers (CCMs) and report to the Minister on the operations of EAA and CCMs, including arrangements to pay EAA for case management services.

1.3.3 EAA will be formed from the areas of the CES that are currently providing intensive assistance to long-term unemployed and disadvantaged job seekers. EAA will still form a part of DEET but will not remain as part of the CES structure, although co-location of services may occur. The Secretary of DEET will be the National Director of EAA and EAA will report to both DEET and ESRA. EAA will handle the majority of case managed clients in the first few years of operation of the case management system. The flow chart at Figure 1 (prepared by DEET) provides a graphic representation of these organisations and their relationships.

1.3.4 The next chapter of this report describes in detail the case management system and explains how the new arrangements differ from current processes and procedures.

Roles and Responsibilities of the entities involved in the Case Management System

The diagram below places in context the main organisational entities associated with the provision of services within the case management system and describes their principal functions.



Case Managers:

* assess clients
* negotiate Case Management Actvitity Agreements
* manage progress against plan
* canvas employment/match against vacancies
* report to CES/ESRA as required
* submit claims for payment (CCM only)

Key

Major lines of management control

Reporting Obligations

Jobseeker Referral

Regulatory and Information Requirements

1.4 Outline of the main Bill

1.4.1 The principal provisions of the main Bill are:

(a) the establishment of the Commonwealth Employment Service (CES)

(i) previously established under the *Employment, Education and Training Act 1988* and removed from that Act by the Consequential Amendments Bill

(b) the establishment of Employment Assistance Australia (EAA)

(i) DEET's case management organisation formed from part of the CES

(c) the establishment and regulation of the case management system

(i) case managers will have the function of assisting participants (long-term unemployed or those at risk of becoming so) to find employment

(ii) while the system will impose obligations on the case managers it will require reciprocal commitments from participants – in particular, participants will be required to enter a case management activity agreement

(iii) case managers may be in the public sector (including the EAA) or non-government agencies may enter into contracts to provide case management services

(d) the establishment of the Employment Services Regulatory Authority (ESRA)

(i) ESRA will be an independent statutory authority responsible for regulating the case management system

(ii) ESRA will have the power to investigate matters relating to the operation of the case management system

(iii) the agency will be located within the Employment, Education and Training portfolio but will be independent of the Department of Employment, Education and Training.

1.5 Outline of the Consequential Amendments Bill

1.5.1 The principal provisions of the Consequential Amendments Bill are:

(a) the establishment of the CES is moved from Part VI of the *Employment, Education and Training Act 1988* to clause 8 of the Employment Services Bill

(b) the Commonwealth Ombudsman is given power to investigate complaints about contracted case managers

(i) the Ombudsman can refer complaints to ESRA if she/he thinks it more appropriate

(c) the *Freedom of Information Act 1982* is amended to extend the public's right of access to documents relating to case management services held by (non-government) contracted case managers

(d) the *Privacy Act 1988* is extended to contracted case managers in connection with the provision of case management services

(e) the *Social Security Act 1991* is amended to permit the disclosure of information to contracted cases managers and to permit cross-referencing notes to be inserted

1.6 The proposed amendments to the Bills

1.6.1 As noted in 1.1.1 the Committee has had referred to it not only the two Bills but also the amendments to be moved on behalf of the Government. The amendments consist of twenty-one pages of amendments to the main Bill and two sets of amendments (about fourteen pages in all) to the Consequential Amendments Bill.

1.6.2 The amendments to the main Bill and the first two pages of amendments to the Consequential Amendments Bill were available throughout the Committee's consideration of the Bills. The majority of amendments to the Consequential Amendments Bill were received by the Committee on 7 September, well after the public hearings. This has made it very difficult to subject these amendments to proper scrutiny, although the Committee has been able to receive some comments on them.

1.6.3 The large number of amendments has resulted from the haste with which the legislation was prepared. The haste in turn was occasioned by the desire to have the legislation in place in time to establish ESRA (to replace the Interim ESRA) by January 1995. A further feature of the legislation, arising at least in part from the speed with which the Bills were drafted, is the amount of detail left to be provided

in disallowable instruments.[5] The Committee is firmly of the view that some of this detail should be incorporated into the primary legislation but accepts that it is impractical to do this until the legislation has been in operation for some time. This matter is explored further in section 3.8 of this report.

1.6.4 While there might be good reasons to introduce the legislation as quickly as possible, it is obviously unsatisfactory from the point of view of scrutinising the legislation. The Committee encourages departments to allow adequate time to produce the best possible draft legislation before introducing it to the Parliament.

1.7 The reference of the Bills to the Committee

1.7.1 This is the third time this Committee has provided advisory reports on bills to the House, but it is the first time the Committee has been asked to consider bills outside the law and justice portfolio.

1.7.2 Initial discussions on referring the Bills focussed on legal issues such as the privacy implication of extending aspects of the freedom of information, Ombudsman and privacy legislation to the private sector.[6] This Committee has had a long-standing interest in the protection of confidential information held by the Commonwealth and has a general reference on the topic.

1.7.3 The Committee considered whether its report should be limited, in the main, to questions of a legal nature arising from the Bills. It rejected this narrow treatment of the Bills on two grounds. First, such an approach would be of doubtful value to the House which referred the Bills in total. In addition there would be a high likelihood of another committee being asked to consider the Bills, involving a duplication of effort and expense which might be avoided if this report satisfies the needs of both Houses. In this context the Committee notes that the Bills were referred by the Selection of Bills Committee in the Senate to the Senate Standing Committee on Employment, Education and Training. Activity on the Senate reference has been postponed because of the duplication of work with this Committee's reference.

1.8 Structure of the advisory report

1.8.1 The remainder of this advisory report deals with the issues arising from the Bills in two sections: general issues (chapter 2) and legal issues (chapter 3). The report concludes with an amalgamated list of recommendations.

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5 Mr Ruddock commented "So far it is really a shell. Until we see its internal workings, we will not know a great deal about it." House of Representatives, *Hansard*, 24 August 1994, p. 260.

6 Dr David Kemp, the Opposition spokesperson on employment noted that many of the important issues in the legislation are of a legal character and it is therefore appropriate that the Bills be considered by the legal committee.

1.9 Support for the Bills

1.9.1 Some members have expressed concern at the proposal that the EAA be established separately from the CES. The requirement for continuity in the oversight of employment, education and training for the long term unemployed is recognised. Those expressing these concerns questioned whether such continuity could be equally well provided by restructuring within the CES, where face to face contact with unemployed persons is of such importance. However, on balance the Committee accepts the proposed structure of the case management system.

1.9.2 The Bills attempt to deal with an important issue of prime concern to all Australians. The Committee supports the thrust of the Bills, and notes that the evidence expressed support for the objectives of the Bills.

Recommendation 1

The Committee recommends that the Bills be passed by the House after the acceptance of this report.

Chapter 2 General issues

2.1 Introduction

2.1.1 The submissions received by the Committee expressed strong support for the introduction of the case management system, while acknowledging the complexity of implementing an initiative that has not been tried elsewhere. The introduction of a competitive environment for the delivery of services to unemployed people was also generally supported.

2.1.2 This chapter of the report focuses on:

(a) case management;

(b) the differences between case management and the current system for delivering employment services;

(c) particular issues relating to service delivery;

(d) the concept of operating in a competitive environment; and

(e) the notion of reciprocal obligations and the consequences of breaching obligations.

2.2 Case management

2.2.1 The case management approach established by the Bill is strongly supported as a strategy for assisting unemployed people. The Welfare Rights Centre '. . . supports the Government's intention to provide a case management system'[7] and the Australian Council for Social Services (ACOSS) is '. . . strongly supportive of the directions proposed by the Government in the White Paper'.[8]

2.2.2 Disabled Peoples' International (Australia) [DPI(A)] '. . . supports the broad thrust of the legislation, and in particular the introduction of the case management approach'[9] and '. . .the introduction of case management . . . has been welcomed by ACROD members'.[10]

2.2.3 Case management services are defined in the Bill at clause 30(1) as 'assisting a participant in the case management system to find employment'. The ESRA Board is empowered to make a written determination extending or contracting the meaning

7 Welfare Rights Centre, *Submissions*, p. S1.

8 ACOSS, *Submissions*, p. S28.

9 DPI(A), *Submissions*, p. S36.

10 ACROD, *Submissions*, p. S50.

ascribed to 'case management services', which would form one of the thirteen disallowable instruments created by the Bill.

2.2.4 The Explanatory Memorandum to the Bill sheds more light on the nature of case management. It describes case management as:

> . . . a one-to-one service provided by a case manager . . . to assist job seekers . . . back into employment of a lasting nature. . . . Case managers will provide counselling and job search assistance. This will be supported by access to programs, vocational training, relevant remedial courses in literacy, numeracy or English language skills and community-based work experience or subsidised employment.[11]

2.2.5 DEET's supplementary submission to the Committee provided an extended definition of case management services that includes:

(a) identification and assessment of a job seeker's employment aspirations, capacities, needs and barriers to employment;

(b) negotiating a return to work plan as part of a CMAA;

(c) active and regular assistance to each job seeker, including job placement assistance and post-placement assistance;

(d) monitoring and reporting activity agreement breaches to the CES;

(e) maintaining and storing proper records; and

(f) reporting to ESRA.[12]

2.2.6 DPI(A) believes that the model in the legislation is not a case management model, which it believes is characterised by clearly defined roles and responsibilities that apply equally to the case manager and the person whose case is being managed.[13] DPI(A) is also of the opinion that case management as a process requires great flexibility and that it is very difficult to legislate for this flexibility.[14] The Committee recognises DPI(A)'s concerns but believes that the case management model traditionally used by organisations such as DPI(A) will have to be adapted to this new purpose and may not, therefore, fit any existing model. The Committee agrees that flexibility is necessary and notes that the use of disallowable instruments to specify much of the detail of the Bill will allow sufficient flexibility for processes to be adjusted over time.

2.2.7 ACOSS '. . . strongly endorses the explicit identification of employment as the objective . . .' for the case management process but recognises that it may take some

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11 Employment Services Bill, Explanatory Memorandum, pp. 4-5.

12 DEET, *Submissions*, pp. S72–73.

13 DPI(A), *Submissions*, p. S145.

14 DPI(A), *Submissions*, p. S146.

time to achieve this outcome for many unemployed people.[15] ACOSS recommends that the definition of case management services be adjusted to reflect the primary support role of the case management function. Its suggested definition of the function of case management is '. . . the process of assisting (disadvantaged or long-term unemployed people) to become job ready and subsequently to maintain secure employment'.[16]

2.2.8 The Committee notes that additional information concerning case management will be included in the disallowable instrument and this issue is discussed further in chapter 3. The Committee feels however, that the definition in the Bill does not highlight sufficiently the case manager's responsibility for assisting the job seeker to maintain as well as to secure employment.

Recommendation 2

The Committee recommends that the definition of case management services in the Bill be adjusted to reflect more accurately the case manager's responsibility to assist job seekers both to find and to maintain secure employment.

A. Eligibility

2.2.9 Eligibility for participation in the case management system is not specified in detail in the Bill, but is the subject of another disallowable instrument.[17] The Minister may make a determination relating to specific classes of persons and the Employment Secretary, or his/her delegate, may determine that a specified person becomes a participant in the system at a specified time. The White Paper, *Working Nation*, identifies potential participants[18] and the DEET submission to the Committee[19] listed as eligible for case management:

(a) registered job seekers who are assessed during their first 12 months of unemployment as being at high risk of becoming long-term unemployed;

(b) registered job seekers who have reached 52 weeks or more of continuous CES registration as unemployed;

15 ACOSS, *Submissions*, p. S30.

16 ACOSS, *Submissions*, p. S30.

17 Employment Services Bill, clause 21(3).

18 *Working Nation* 4 May 1994, p. 129.

19 DEET, *Submissions*, p. S22.

2.2.18 DPI(A) expressed concern that people with disabilities would be excluded from the Job Compact.[31] The Bill provides for the Minister to make a written determination that is a disallowable instrument specifying Job Compact eligibility. The Committee believes that the Minister should consider the needs of people with disabilities when determining eligibility for the Job Compact.

C. Measurement of outcomes

2.2.19 According to evidence given to the Committee by the Chairperson of ESRA, Mrs Kirner, case managers will be paid a case management fee when the job seeker is taken on, and a placement fee, three months after a person is placed.[32] Mrs Kirner explained that the total fee would be between $250 and $1,000, according to the job seeker's characteristics. Mrs Kirner identified four key outcomes:

(a) full-time employment;

(b) part-time employment;

(c) full-time education or training that is not an LMP; and

(d) White Paper initiatives, such as New Work Opportunities or NETTFORCE traineeships.[33]

2.2.20 The Committee understands that some of the programs that will be covered by New Work Opportunities or the Job Compact include the Jobskills and LEAP initiatives. These programs use brokers to arrange training and employment placements. The Committee is concerned that the Commonwealth may pay a case manager for arranging a placement that a broker is also paid to organise. This possible 'double dipping' may also occur with initiatives other than those mentioned here.

2.2.21 Concern was expressed during the hearings about reclassification of the Jobskills and LEAP programs that has the effect of altering the status of program participants.[34] Prior to the introduction of the Bill, participants in these programs were considered to be unemployed during their Jobskills or LEAP placement and thus retained eligibility for LMP assistance at the end of their program. The Bill has the effect of changing this status, so that the participant is considered to be employed during the program placement and may, therefore, no longer be eligible for program assistance at the end of the placement. This change in status also allows a CCM to be paid for a placement in these programs.

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31 DPI(A), *Submissions*, p. S37.

32 Mrs J. Kirner, ESRA, *Transcript*, p. 10.

33 Mrs J. Kirner, ESRA, *Transcript*, p. 10.

34 Employment Services Bill, clause 32(2) (d) and (e).

2.2.22 Mr Brain expressed particular concerns about eligibility for the Jobstart program following a Jobskills or LEAP placement. He stated that:

> . . . by considering these individuals as being employed . . . they then lose their entitlement to additional support . . . particularly the jobstart program. . . What this means is that a person who is disadvantaged comes into case management and they can be put into either of these two programs . . . and the impact would bear directly on them once they conclude that course of action: they would then lose their entitlement to jobstart. We know we can take the successful placement rate from jobskills from 40 per cent to 80 per cent by use of the jobstart subsidy.[35]

2.2.23 DEET explained in its supplementary submission that the change brings Jobskills and LEAP into line with other employment based LMPs. DEET also stated that:

> . . . job seekers who become unemployed at the completion of [a] job placement under LEAP, Jobskills, Jobstart, National Training Wage or New Work Opportunities as part of the Job Compact will be entitled to thirteen weeks intensive job search assistance following their Job Compact placement.[36]

2.2.24 DEET further noted that job seekers re-registering with the CES will go through normal registration processes, where they will be assessed to determine if they are at high risk of becoming long-term unemployed. In that case, they will become eligible immediately for case management and most labour market programs.

Recommendation 4

The Committee recommends that ESRA and DEET examine closely the payment for outcomes, particularly payment for placement into subsidised employment, to ensure that Commonwealth funds are being expended appropriately and that the Commonwealth is not paying twice for an individual placement to be arranged.

D. Quality of outcomes

2.2.25 Mr Ramsay from the Aboriginal and Torres Strait Islander Commission (ATSIC) noted that '. . . in remote communities, isolated from the mainstream labour market, it should be recognised that case management and job compact may not deliver lasting job outcomes'.[37]

35 Mr I. Brain, Brotherhood of St Laurence, *Transcript*, pp. 89–90.

36 DEET, *Submissions*, p. S81.

37 Mr J. Ramsay, ATSIC, *Transcript*, p. 110.

2.2.26 The ACT Chamber of Commerce and Industry Ltd in its submission recognised the focus on job placements and felt that there is '. . . little incentive or recognition for ensuring a level of quality in the placement which takes into account the real needs of both the unemployed and the employer'.[38] It also felt that it was '. . . unclear as to when it would be considered that the Case Manager's responsibility for a client has ceased'.[39] Mrs Kirner stated that ESRA '. . . will not be setting a limit on the length of time people are case managed' but expected that '. . . the average length of time might be about six months'.[40]

2.2.27 The Committee considers that measurement of the quality of a job placement is not possible as the match between a person and her/his employment involves a variety of intangible elements. The government amendments to the Bill provide that a person is required to '. . . accept any offer of paid work, other than work that is unsuitable'.[41] Government amendment number 16 proposes a new provision at 32C(1) that defines 'unsuitable work'. The Committee notes that the appeal and review processes that the Bill provides for will ensure that participants who may be coerced into unsuitable employment have recourse to a review of any decision made about them. The Committee acknowledges the point made by Mr Ramsay and agrees that outcomes in rural and remote areas may be difficult to obtain.

2.2.28 ESRA will need to take into account the difficulties of obtaining outcomes in rural and remote areas when measuring the success of case management organisations.

Recommendation 5

The Committee recommends that ESRA's measurement of outcomes take into consideration:

(a) the difficulty of obtaining outcomes in rural and remote areas; and

(b) the need to maintain services in these areas, regardless of their cost-effectiveness.

2.3 Changes to current processes

2.3.1 The introduction of case management and competition in service delivery are departures from current arrangements. The CES is responsible currently for

38 ACT Chamber of Commerce and Industry Ltd, *Submissions*, p. S46.

39 ACT Chamber of Commerce and Industry Ltd, *Submissions*, p. S48.

40 Mrs J. Kirner, ESRA, *Transcript*, p. 10.

41 Employment Services Bill, clause 32(2)(a), amended by Government Amendment number 10.

providing all assistance to long-term unemployed job seekers and those at risk of becoming long-term unemployed. These groups will now, through the passage of the Bills, be able to access additional assistance from community or private sector providers who contract to ESRA to provide case management services. A publicly-funded case management organisation, EAA, will be formed from part of the CES but will be separated in management and costing structures from mainstream CES services. EAA may remain co-located with CES offices but will be responsible to DEET and also report to ESRA, from whom it and all other case managers will obtain funding.

2.3.2 Some members of the Committee considered that the integrated approach of case management should lessen the problem that some long term unemployed identified, in which different people in the CES arranged for them to undertake numbers of courses, which did not, in the end result in employment.

2.3.3 Current arrangements require job seekers to enter into Job Search Activity Agreements in certain circumstances and Newstart Activity Agreements after 12 months' receipt of Job Search Allowance. The proposed legislation provides for CMAAs to supersede these other forms of agreement. The relationship between CMAAs and Newstart Activity Agreements is however, somewhat unclear. This issue is discussed further at paragraph 2.6.16.

2.3.4 The jurisdictions of the Ombudsman and of the Privacy Commissioner are extended by the Bill to cover contracted case managers. The extension of the administrative law package to 'outsourced' community or private sector case managers will require these organisations to adhere to legislation that is traditionally associated with public sector activities.

2.3.5 The Committee recognises that adherence to some pieces of legislation will be a new experience for many case management organisations. The ACT Chamber of Commerce and Industry Ltd argued that a potential case manager's administrative overheads could be prohibitively expensive:

> The cost to a single, private Case Manager of getting a legal opinion on his or her obligations against (the *Privacy Act*, the *FOI Act* and the *Ombudsman Act*) may be out of all proportion to the remuneration for the service they provide.[42]

2.3.6 The Chamber of Commerce also expected that there would be problems with case managers adjusting to their multiple responsibilities, such as those to the client, DEET, ESRA and the employer.[43] The Committee accepts that attention will have to be paid to an education and training strategy for potential case managers and discusses this issue further in Chapter 3.

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42 ACT Chamber of Commerce and Industry, *Submissions*, p. S48.

43 ACT Chamber of Commerce and Industry, *Submissions*, p. S48.

2.4 Area Consultative Committees

2.4.1 The Bill provides for the establishment of Area Consultative Committees (ACCs) at clause 11(2) but does not specify the role or purpose of these committees, other than their responsibility to '. . . advise the National Director of the (CES) on the operations of the (CES) in that area'.[44]

2.4.2 The Explanatory Memorandum states that the initiative was announced in the White Paper, *Working Nation*, and that up to 60 committees can be created, consisting of representatives from business, community organisations, local and state governments, regional development bodies, training providers and unions. The committees are designed to '. . . provide an avenue for local input to program and service delivery decisions to ensure that CES services will complement local development and employment initiatives'.[45]

2.4.3 ACOSS registers '. . . surprise that [clause 11(2)] doesn't also outline the purpose of such committees, since they are intended to play a key role'.[46] DPI(A) believes that:

> . . . the legislation would be strengthened if such Advisory bodies were made compulsory, rather than subject to Ministerial discretion . . .[and] if it were to set out in more detail the broad composition of such Committees.[47]

2.4.4 DPI(A) is particularly concerned that people with disabilities are represented on any advisory committee. These comments were endorsed by ACROD, who added that potential employers and employees should also be represented on the Committees.[48]

2.4.5 In the Committee's opinion, it is not appropriate that the ACCs become compulsory, as there may not be appropriate mechanisms in all locations throughout Australia. The Committee acknowledges, however, that more information should be provided in the Bill concerning the purpose and composition of the ACCs.

Recommendation 6

The Committee recommends that the Employment Services Bill be amended to include more information on the purpose of the Area Consultative Committees and an indication of their composition.

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44 Employment Services Bill, clause 11(2).

45 Employment Services Bill, Explanatory Memorandum, p. 4.

46 ACOSS, *Submissions*, p. S29.

47 DPI(A), *Submissions*, p. S36.

48 ACROD, *Submissions*, p. S52.

2.5 Extension of statutory framework

2.5.1 The Bill establishes a legislative framework for the delivery of case management services. DEET's labour market programs operate currently without any legislative basis, which limits opportunities for administrative review of decision making processes. Mr Thompson believes that:

> . . . at some time in the future . . . there is a case for expanding coverage of the legislation to provide the same sort of framework for other labour market assistance programs like skillshare and many others, given the scale of the public resources involved and . . . the significance of decisions made under those programs to hundreds of thousands of unemployed Australians.[49]

2.5.2 Mr Thompson also expresses concerns about the:

> . . . possibility that decisions about other labour market programs not regulated by the proposed legislation could impact on the ability of our providers and others to maintain infrastructure which would support their involvement in case management, given that the same Commonwealth officers who will make decisions about other labour market program funding will also have a role in operating the competition to the recipients of that funding.[50]

The Committee acknowledges that reviews and appeals concerning LMP decisions are not readily available and that this may be a matter of concern to both job seekers and contracted case managers.

Recommendation 7

The Committee recommends that the government give detailed consideration to the introduction of a statutory framework for DEET's labour market programs.

2.6 Service delivery issues

2.6.1 This part will examine the issues associated with the delivery of services through the case management process, as set up in the Bill.

A. Interview process

2.6.2 Clauses 23 to 28 of the Bill outline the processes that the CES must undertake in referring an individual to a case manager. Clause 23(1) requires that the CES notify a person of her/his eligibility for case management and conduct an interview.

49 Mr D. Thompson, NSA, *Transcript*, pp. 54–55.

50 Mr D. Thompson, NSA, *Transcript*, p. 55.

If the person does not attend or take part in the interview and is a participant in the case management system, the CES can ask the person to take part in another interview [clause 23(5)].

2.6.3 The Welfare Rights Centre expressed concern in its submission to the Committee that '. . . process[es] would dominate outcome[s]. . .'[51] and felt that there was significant scope for waste of resources if suitable opportunities were not made available for case managed job seekers. It acknowledged however, that the introduction of the Job Compact and the referral processes associated with case management would address its concerns.

2.6.4 The Welfare Rights Centre also recommended that:

> . . . the mandatory requirements for all participants to attend CES interviews imposed by Clause 23 should be deleted and replaced by provisions allowing for CES to require interviews, in certain circumstances.[52]

2.6.5 ACOSS agreed that:

> . . . the requirement to attend an interview may be redundant in some cases (and) it is not desirable to require interviews which are not necessary . . . The purpose of the interview must . . . be made far clearer.[53]

2.6.6 Mr Farrar from ACOSS also commented that:

> . . . in the subsequent amendments it is possible for somebody to be referred to a new case manager, but without a subsequent interview . . . the requirement to attend an interview is appropriate in that case and should be specified.[54]

2.6.7 DEET responded that:

> . . . the pre-referral interview is conducted by the CES in order to allow for a preliminary assessment of the client, inform them of how the case management system works and discuss with the job seeker the case management options available. Where a job seeker requires referral to a second or subsequent case manager, a further interview may not be necessary. . . . The CES may consider that a job seeker's circumstances have not changed sufficiently to warrant a second . . . interview.[55]

2.6.8 ACOSS considered that there were inadequate mechanisms for a participant to choose to change case managers and for the CES to review the effectiveness of case management arrangements.[56] The Australian Youth Policy and Action Coalition (AYPAC) also commented that participants should be able to initiate a

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51 Welfare Rights Centre, *Submissions*, p. S5.

52 Welfare Rights Centre, *Submissions*, p. S2.

53 ACOSS, *Submissions*, p. S30.

54 Mr A. Farrar, ACOSS, *Transcript*, p. 67.

55 DEET, *Submissions*, p. S72.

56 ACOSS, *Submissions*, p. S30.

change of case manager at any time.[57] The proposed government amendments to the main Bill enable the CES to terminate a referral to a case manager [cl. 26(2)] and refer the person to another case manager [cl. 26(4)]. In making this subsequent referral, the CES must take into account the person's preferred case manager and give the greatest weight to that preference [cl. 26B(4)(a)]. In the Committee's opinion, the amended Bill provides sufficient mechanisms for a participant in the case management system to request that the CES terminate a referral to a case manager and make a referral to a new, preferred case manager.

2.6.9 In the Committee's opinion, the initial interview is an opportunity for job seekers to be informed about the case management system by a comparatively independent organisation, the CES. The Committee notes that it is very important that this information is tailored to the needs of particular groups, such as job seekers with language or literacy needs. The Committee believes that it is appropriate that the first interview is mandatory, but that second or subsequent interviews should be left to the discretion of the CES. The Committee agrees that individual interviews may not, in all cases, be necessary and that interviews could be conducted as seminars for groups of job seekers. The Committee notes that a seminar approach would offer the opportunity for case management organisations to communicate directly with groups of job seekers under CES supervision.

B. Length of case management assistance

2.6.10 The Committee examined the issue of the length of time that case management assistance is provided to a person. The Bill provides that a participant remains in the case management system until a 'terminating event' occurs. The Minister may make a written determination that is a disallowable instrument specifying the events or circumstances that constitute a 'terminating event' [clause 22(5)]. The Explanatory Memorandum to the Bill suggests that three months in unsubsidised employment or 18 months in case management may be examples of 'terminating events'. ACOSS makes the point that:

> . . . 3 months in unsubsidised employment might be a cut off point, but for a number of disadvantaged groups, post placement support after this time may still be crucial. Similarly, an upper limit on case management times, may fail to meet the needs of extremely labour market disadvantaged people.[58]

2.6.11 Mr Farrar stated that it is '. . . difficult to suggest an artificial cut-off point . . . we would argue for a more flexible model to be provided in the disallowable instruments to reflect particular circumstances'.[59] DEET considers that:

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57 AYPAC, *Submissions*, p. S136.

58 ACOSS, *Submissions*, p. S30.

59 Mr. A. Farrar, ACOSS, *Transcript*, p. 71.

> . . . needs beyond three months are likely to be experienced by only a small minority of cases [and that it is] . . . reasonable that support needs extending beyond three months should properly be regarded as the responsibility of the employer.[60]

2.6.12 The Committee believes that for some very disadvantaged job seekers, ongoing support may be crucial to retaining employment. The Committee therefore concurs with ACOSS that in special circumstances, support may be provided for an extended period of time but notes that it will be the case manager's decision to provide that support, as extra funds should not be provided specifically for this purpose. This matter is considered further in the section on disallowable instruments in Chapter 3.

C. Case load characteristics

2.6.13 In making referrals to case managers, the CES must have regard to a number of matters, including some that will be included in a ministerial determination that will be a disallowable instrument (clause 25). Examples of criteria that may be used for this purpose include '. . . the need for case managers to have a case load involving a reasonable mix of clients of different classification levels'.[61] ACOSS noted that this criteria '. . . does not appear to be referred to in the Bill. Such a requirement, and any exceptions to it, should be contained in the Bill itself'.[62]

2.6.14 Mrs Kirner stated that '. . . once a job seeker determines to go to a particular case manager, the case manager cannot refuse them'. Mrs Kirner went on to say:

> In terms, other than specialisation, of ensuring that there is not a creaming from either EAA or ESRA by community and private providers, it is going to depend a lot on the referral system of the CES and on our monitoring of that referral system.[63]

2.6.15 The Committee notes that dealing with the issue of 'creaming' is vital to the success of the case management system and agrees with Mrs Kirner that monitoring of the operation of the system will be essential to ensure that this problem does not occur. The Committee does not believe that, at this point in time, the Bill should contain relevant provisions, but that any disallowable instrument should specify all relevant matters. This issue is discussed further in Chapter 3.

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60 DEET, *Submissions*, p. S75.

61 Employment Services Bill, Explanatory Memorandum, p. 20.

62 ACOSS, *Submissions*, p. S31.

63 Mrs J. Kirner, ESRA, *Transcript*, p. 19.

Recommendation 8

The Committee recommends that case managers should not be able to refuse clients and that case loads should involve a mix of clients, where possible, unless the case manager is a 'specialist' under clause 44(1) of the Bill.

D. CMAA and Newstart Activity Agreement

2.6.16 Comments to the Committee indicate that the relationship between Newstart or Job Search Activity Agreements and the CMAA is not clear. The Welfare Rights Centre recommended that the following should be abolished:

(a) the requirement that everyone unemployed for more than 12 months should enter into a Newstart Activity Agreement; and

(b) the non-Job Compact provisions from the CMAAs.[64]

2.6.17 DEET stated in its submission that '. . . for JSA/NSA[65] recipients, the Case Management Activity Agreement will take the place of the Newstart and Job Search Activity Agreements'.[66] In the public hearings, Mr Campbell stated that it is not correct that:

> . . . people who get to 12 months, and therefore are eligible for a newstart activity agreement, will sign both an activity agreement and a case management activity agreement. . . They will only complete one, which is the case management activity agreement.[67]

2.6.18 ACOSS '. . . would prefer to see Newstart Agreements formally replaced by Case Management Activity Agreements in the Social Security Act'.[68] Mr Farrar noted that '. . . potential duplication of effort seems to be both a waste of resources and a potential cause for confusion'.[69]

2.6.19 Mr Thompson observed that '. . . there will be a question to be asked down the track . . . about whether the newstart arrangements are needed at all, given some of these new arrangements'.[70]

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64 Welfare Rights Centre, *Submissions*, p. S6.

65 Job Search Allowance (JSA) and Newstart Allowance (NSA).

66 DEET, *Submissions*, p. S23.

67 Mr I. Campbell, DEET, *Transcript*, p. 30.

68 ACOSS, *Submissions*, p. S30.

69 Mr A. Farrar, ACOSS, *Transcript*, p. 67.

70 Mr D. Thompson, NSA, *Transcript*, pp. 55–56.

2.6.20 In a supplementary submission, DEET clarified the relationship between Newstart Activity Agreements and the case management process. DEET stated that:

> . . . by December 1998, all eligible job seekers [will be] in the case management system. During the intervening period, job seekers who have Newstart Agreements in force will be required to fulfil the terms of those agreements until such time as they are case managed. Those who enter case management are likely to do so either when they come on to allowances, or at the point of 12 months unemployment. For those who enter when they come on to allowances the CMAA and associated processes will replace Job Search and Newstart Activity Agreements and processes. For those who enter at 12 months unemployment the CMAA will replace the Newstart Activity Agreement and related processes. Consequently, individual job seekers will not experience any increase in complexity.[71]

2.6.21 The Committee believes that a staged implementation for the case management process is necessary and that, in the interim period, it is necessary to maintain both the Newstart/Job Search Activity Agreements and CMAAs.

E. Application of the Bill to special groups

2.6.22 Clause 44 of the Bill provides for the accreditation scheme to specify special classes of case management services. Entities can be accredited either generally or as specialists in one or more of the classes identified in the accreditation scheme. The Committee recognises that special consideration may need to be given to groups of job seekers to address particular barriers that these groups may face. In particular, issues that may need to be addressed include access for people with disabilities and service delivery to Aboriginal and Torres Strait Islander people, including cultural considerations. The Committee also notes that the use of bilingual case managers will be important in areas with high non-English speaking background populations.

2.6.23 ACOSS is supportive of cl. 44 of the Bill that allows for classes of specialised case management services.[72] ACOSS notes, however, that there is the possibility that unemployed people could be channelled into '. . . low skilled marginal industries . . .' if specialisation in particular industries is allowed. ACROD welcomed the '. . . recognition of the need for specialist case managers for different priority groups'.[73]

2.6.24 Mr Ramsay from ATSIC stated that '. . . Aboriginal and Torres Strait Islander people should be given every opportunity to become case managers of their own people'.[74] Mr Ramsay acknowledges that there would have to be '. . . suitable training for these organisations and . . . sufficient flexibility within the spirit of the

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71 DEET, *Submissions*, p. S71.

72 ACOSS, *Submissions*, p. S31.

73 ACROD, *Submissions*, p. S50.

74 Mr J. Ramsay, ATSIC, *Transcript*, p. 109.

act in order to cater for some of the cultural differences that might arise.[75] DEET stated that:

> . . . ESRA will be actively seeking the participation of Aboriginal and Torres Strait Islander organisations as contracted case managers in the case management system so that Aboriginal and Torres Strait Islander job seekers have the opportunity to select a case manager which has the skills to deliver case management services in a culturally appropriate manner.[76]

Recommendation 9

The Committee recommends that ESRA monitor closely the development of specialist case managers to ensure that all job seekers are adequately catered for, particularly those groups where cultural considerations may need special attention.

2.7 Operating in a competitive environment

2.7.1 The Second Reading Speech for the main Bill highlighted its effect in providing:

> . . . the framework for the development over time of an open competitive environment for the supply of case management services . . . [and the role of ESRA in promoting] . . . competition and fair and efficient market conduct.[77]

Mr Brain commented in the public hearings that:

> . . . I equally want to see cooperation and coordination . . . it proves to be very difficult when you are competing for tenders but, if you can break through that and work cooperatively, then that is an active function that needs to be encouraged.[78]

2.7.2 DEET identifies three advantages for competitive case management:

(a) the increase in the number of case management services available;

(b) the availability of choice of case manager for job seekers; and

(c) the cost-effectiveness of utilising public, community and private sector resources to achieve the Government's objectives.[79]

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75 Mr J. Ramsay, ATSIC, *Transcript*, p. 111.

76 DEET, *Submissions*, p. S79.

77 House of Representatives *Hansard*, 24 August 1994, p. 245.

78 Mr I. Brain, Brotherhood of St Laurence, *Transcript*, p. 87.

79 DEET, *Submissions*, p. S23.

2.7.3 The Committee recognises that the introduction of competition into the area of case management services for unemployed people is a new initiative that may take some time and effort to establish. The Committee believes that ESRA will have a crucial role to play in fostering both competition and cooperation between case management entities.

2.8 The level playing field

2.8.1 DEET noted that the functions of ESRA '. . . include responsibility for introducing and maintaining a competitive and level playing field'.[80] The DPI(A) and ACROD expressed concern that the EAA is obtaining a competitive advantage by being established immediately, while private sector organisations will need to be accredited, which could take some months.[81] The ACT Chamber of Commerce and Industry Ltd echoed this concern, stating that in it's opinion, EAA '. . . will have the advantage of prior knowledge and experience and a pre-existing infrastructure'.[82]

2.8.2 ACROD was further concerned about the CES referring equal numbers of job seekers to the two groups of case managers.[83] The Committee notes that the CES is bound by the proposed Act to give greatest weight, in making a referral, to the job seeker's preferred case manager.[84] In most cases, the Committee expects that job seekers will be making decisions as to where they will be referred for case management assistance and the CES will respect that decision. It is not appropriate that the CES be encouraged to attempt to influence the job seeker's decision in order to make equal numbers of referrals. It will be the case manager's responsibility to ensure that the CES has sufficient relevant information about the case management organisation to inform eligible job seekers.

2.8.3 The Committee recognises that a 'level playing field' will be difficult for a number of reasons, including:

(a) community non-profit organisations may be able to use volunteer workers; and

(b) EAA must employ its staff under the provisions of the *Public Service Act 1922*, by which private sector organisations competing with EAA will not be bound.

2.8.4 The Committee believes that these are operational issues that should be monitored by ESRA over time.

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80 DEET, *Submissions*, p. S76.

81 DPI(A), *Submissions*, p. S37.

82 ACT Chamber of Commerce and Industry Ltd, *Submissions*, p. S44.

83 ACROD, *Submissions*, p. S51.

84 Employment Services Bill, clause 25(5).

2.9 Access to LMP funds

2.9.1 In evidence before the Committee, Mr Brain stated that:

> . . . there is talk of a bonus system for training funds that are underutilised: if training funds are not utilised for each individual, they can be returned, possibly to the case manager as a form of bonus. We have some concerns with that . . . (people) may be looking to maximise their own incomes and thereby they might minimise the training, when the training may be appropriate and needed for the individual . . . you may have the worst people ripping off the system.[85]

2.9.2 DEET stated that:

> . . . funding for case management itself does not include funding for labour market program access, such as training courses. These are appropriated separately and case managers will be made aware of each job seeker's eligibility for such programs.[86]

2.9.3 The Committee believes that monies appropriated for labour market programs should be used for that purpose and not redirected to case managers as an incentive to minimise LMP assistance to case managed job seekers. The Committee concurs with Mr Brain's concerns about this approach and accepts DEET's assertion that LMP funds are a separate appropriation and should be kept as such. The Committee believes, however, that flexibility could be introduced into usage of LMP funds by enabling CCMs to exceed a job seeker's allocation in certain circumstances, based on the individual CCM's history of LMP usage.

Recommendation 10

The Committee recommends that labour market program funds should not be used as an incentive for minimising job seeker access to labour market programs.

2.10 Course planning and vacancy canvassing

2.10.1 The introduction of numerous players into the employment service arena will bring with it a number of coordination problems. ACOSS notes that coordination of activities is:

> . . . one of the crucial areas for the effective operation of the system. . . [and that case managers] . . . will be making demands on future TAFE training places and other training places and will be canvassing potential employers.[87]

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85 Mr I. Brain, Brotherhood of St Laurence, *Transcript*, pp. 88–89.

86 DEET, *Submissions* p. S78.

87 Mr A. Farrar, ACOSS, *Transcript*, p. 70.

2.10.2 ACOSS also suggests that there is a danger of:

> . . . excessive and duplicatory employer canvassing . . . [and that relevant information about vacancies or training opportunities] . . . can only be co-ordinated through the CES and must be gathered from and made available to all case managers.[88]

2.10.3 The Bill at clause 52(1) provides for the formulation of a Departmental information technology assistance scheme to address some of these problems, particularly the question of access to vacancies. Clause 52(3) provides for the relevant Ministerial determination to be a disallowable instrument which, according to DEET, is in the process of being drafted.[89]

2.10.4 The Committee believes that there is considerable scope for the use of new technology in disseminating publicly available information, such as education and training opportunities. The Committee acknowledges that coordination of vacancy canvassing will be an issue, but believes that these operational issues should be resolved at local or area levels with input from all relevant stakeholders. The Committee notes that Area Consultative Committees will have employer and industry representatives and may be appropriate fora in which these matters can be discussed and resolved. In addition, DEET should examine the use of the Australian Academic Research Network (AARNET) and the international network, INTERNET, for the collection and dissemination of education and training information.

2.11 Reciprocal Obligation

2.11.1 The operation of the case management system revolves around the concept of reciprocal obligation. The Committee's understanding of this term is that the government provides services and income support and, in return, people in receipt of Job Search or Newstart Allowances must comply with certain requirements, or risk losing their allowance for a period of time. Mr White from DPI(A) commented in the hearings that '. . . the whole case management approach seems to leave out the concept of shared responsibility'.[90]

2.11.2 ACOSS believes that the CMAA is a:

> . . . mutual agreement about activities which will be undertaken by *both the participant and the case manager* to achieve the employment outcome. . . . [The] reciprocal obligation of the case manager to effectively broker a sequence of activities and provide ongoing support, including post placement support . . . must be more clearly specified. The use of disallowable instruments to specify this role may not be adequate.[91]

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88 ACOSS, *Submissions*, p. S32.

89 DEET, *Submissions*, p. S75.

90 Mr M. White, DPI(A), *Transcript*, p. 98.

91 ACOSS, *Submissions*, pp. S31–32.

2.11.3 ACOSS recognises that administering an activity test is a difficult task and stated that there is '. . . potential for serious problems to flow [from] the requirement that case managers provide information to . . . DEET on compliance with a CMAA'.[92] ACOSS identifies these problems as opportunities for conflict and abuse, conflict between the support and mentor role of a CCM and the requirement that CMAAs must be policed.

2.11.4 Mr Thompson from the NSA also registered:

> . . . concerns with respect to the requirement contained in the Bill that contracted case managers be required to report on the participation of unemployed people to the employment secretary or his delegates . . . [and would] . . . prefer not to have to do that.[93]

Mr Thompson acknowledged, however, that '. . . it is intrinsic in the notion of the active society and . . . that if we choose to become contracted case managers we will have to become involved in that'.[94]

2.11.5 Mr Eldridge, ESRA Board member, also commented on the potential barrier that could arise in the case management relationship due to the fact that a job seeker could lose benefits as a result of that relationship.[95] Mr Eldridge saw, as the solution to this problem, the setting of:

> . . . professional standards that agencies have to commit themselves to in terms of the way the relationship evolves and the recording of the relationship between the job seeker and the case manager.[96]

2.11.6 ATSIC also commented on this issue. Mr Ramsay stated that:

> . . . ATSIC has a concern about the potential punitive nature of some clauses in the legislation – for example, sections 22(4) and 24 – particularly for its CDEP recipients. There would need to be some sensitivity and flexibility on the part of case managers dealing with such clients.[97]

2.11.7 In a supplementary submission, DEET explained that the functions of case managers '. . . place considerable obligations and expectations on case managers, both to assist the job seekers and to report job seeker breaches of the activity agreement'.[98]

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92 ACOSS, *Submissions*, p. S32.

93 Mr D. Thompson, NSA, *Transcript*, p. 53.

94 Mr D. Thompson, NSA, *Transcript*, p. 53.

95 Mr D. Eldridge, ESRA, *Transcript*, p. 16.

96 Mr D. Eldridge, ESRA, *Transcript*, p. 16.

97 Mr J. Ramsay, ATSIC, *Transcript*, p. 109.

98 DEET, *Submissions*, p. S73.

2.11.8 DEET further explained that:

> . . . activity testing provisions are already in place within the CES such that CES case managers already have responsibilities in this area. If case managers played no part in activity testing arrangements, there would be no effective way to administer the corresponding requirements of the *Social Security Act 1991* . . . It will be the CES' role to investigate and decide if a breach has occurred.[99]

2.11.9 The Committee recognises that community organisations may feel that the compliance aspect of the case management process is alien to their traditional methods of dealing with unemployed people. The concept of reciprocal obligation is, however, inherent in the case management system and, in the Committee's opinion, organisations or individuals must be willing to act as the Bill requires of them if they are to become case managers.

2.12 Breaches of Obligations

2.12.1 A second set of amendments to the Consequential Amendments Bill was received by the Committee after the public hearings were conducted. The Committee consequently did not have sufficient time to consult widely on these proposed amendments. The Committee notes that examination of these Bills has been affected adversely by the short time frame in which matters could be investigated.

2.12.2 The *Social Security Legislation Amendment Act 1994*, which came into effect on 12 July 1994, increased penalties for breaching obligations when in receipt of JSA or NSA. Prior to the passage of this legislation, activity test and administrative breaches each incurred the same penalties. These penalties began with a two week non-payment period that increased to six weeks for a second breach. Each subsequent breach incurred a six week penalty in addition to the term of a previous breach, measured over a three year period beginning from the date of the first breach.

2.12.3 The *Social Security Legislation Amendment Act 1994* provided for a differentiation to be made between the treatment of activity test breaches and administrative breaches. Activity test breaches occur when a person does not comply with a condition for receiving JSA or NSA, such as actively seeking or taking up suitable paid work, or entering into an activity agreement. An administrative breach occurs when a person fails to comply with a reasonable requirement to attend or contact the CES or DSS, give requested information or comply with a notification requirement.

2.12.4 Administrative breaches were not affected by the changes in the Act and retained the same penalties as outlined above. Activity test breaches were increased by the *Social Security Legislation Amendment Act 1994* according to the length of time a person has been unemployed: the longer the period of unemployment, the

99 DEET, *Submissions*, p. S73.

longer the non-payment period for failing an activity test. For example, a person unemployed for 18 months or longer would incur a penalty of a six week non-payment period for his or her first activity test breach, compared with a two week non-payment period for a person unemployed for less than 12 months. Each subsequent breach would then incur an additional non-payment period of six weeks.

2.12.5 In recognition of these increased penalties, a non-government amendment in the Senate to the social security legislation provided that suspension, due to a breach of obligations under the Act, could only take effect following two further payments (covering 28 days) of JSA or NSA.

2.12.6 The proposed changes in the Consequential Amendments Bill will remove these two additional payment periods. According to the explanatory memorandum:

> . . . 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.[100]

2.12.7 The changes will still require that a JSA/NSA recipient be notified of the deferral of their allowance. The proposed amendments allow for this deferral however, to operate from the time that notification is sent to the person and not from the time that it is received by him or her. The decision maker deferring the allowance could not, with certainty, determine a date of receipt of the notification.

2.12.8 ACOSS is '. . . extremely concerned by the most recent proposed amendments. . .' and is also concerned that tighter reciprocal obligations constitute a '. . . punitive approach . . .' that is '. . . unhelpful and runs entirely counter to the case management approach'.[101] ACOSS agrees that the amendment to allow deferral periods to operate from the time that notice is sent is necessary but believes that '. . . this is only acceptable if there is a period of notice'.[102]

2.12.9 The Welfare Rights Centre explained that the extra two payments are most important to allow recipients time to:

(a) lodge an appeal against the decision before any financial loss is incurred; and

(b) arrange their financial affairs before the penalty period takes effect.[103]

2.12.10 The Committee investigated this issue and noted that the system has some in-built safeguards that may make the additional two payment periods unnecessary

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100 Consequential Amendments Bill, Additional Supplementary Explanatory Memorandum, p. 2.

101 ACOSS, *Submissions*, p. S138.

102 ACOSS, *Submissions*, p. S139.

103 Welfare Rights Centre, *Submissions*, p. S141.

on the above grounds. Before allowances are deferred because of a failure of the activity test, a person must be interviewed by the CES and sign an activity test declaration, setting out the circumstances that resulted in the breach from both the CES' and the individual's perspectives. The person is advised of her/his rights of appeal, including the opportunity for immediate internal review of the decision by an Authorised Review Officer.

2.12.11 In the case of an administrative breach, a person is sent a letter requesting that he/she contact either the CES or DSS, which would include a warning that allowances may be terminated if no reply is received. If there is no response after 21 days, the system generates a notification to the person telling him/her that payment of the allowance will be deferred. Fourteen days are allowed for this notification to be received before any further action is taken.

2.12.12 From these examples, in the case of administrative breaches it can be seen that the additional 28 days' payment may result in an extra payment period of over 60 days from the receipt of the first notification to the actual deferment of payments. The Committee believes that this length of time makes it very difficult for the penalty to be linked to the original offence, due to the excessive delay between the action and its effect.

2.12.13 The Committee recognises that the main issue to be addressed is the amount of notice that should be given to a person before allowance payments are deferred. In the case of activity test breaches, the process ensures that people are informed of the impending breach and their rights of appeal, and are given every opportunity to record their version of events. The Committee believes that it is reasonable to assume that the date on which a person signs an activity breach form is the date that he/she is informed that a deferment of allowance is likely to happen.

2.12.14 The case is not so clear for administrative breaches. The nature of an administrative breach is that a person cannot be contacted. Every attempt is made by CES and DSS to make contact and a total of 35 days is allowed for a person to respond. This entails more than two pay periods. If a person is not responding to this correspondence because he or she is no longer looking for work and therefore no longer eligible for payment, then the concept of making an additional two payments to the person does not seem to fit with responsible financial management practices. It could also result in a large increase in the number of overpayments and a corresponding increase in administrative workload.

2.12.15 It is suggested that the administrative processes used before the 12 July changes, provided sufficient notice of deferment of income support, without the need for additional payment periods. The Committee notes that in the case of JSA or NSA recipients with dependant spouses and children, the changes to benefit structures introduced on 1 January 1994 ensure that family payments for dependent children are not terminated by breaches of obligations. The Committee also recognises that dependant spouses can claim either special benefit or JSA/NSA payments in their own right if a breach of obligation has occurred. This ensures that families are not left without any income support if a deferment is imposed. This

issue of deferment of allowances is a complex policy matter that the Committee has not had sufficient time to investigate.

Recommendation 11

The Committee recommends that it is essential that sufficient notice be given before income support payments are deferred due to a breach of obligations.

2.12.16 A further matter is the location of the proposed amendments in the Consequential Amendments Bill, which is discussed below at paragraph 3.7.[104]

104 See p. 51.

3 Legal issues

3.1 Introduction

3.1.1 This chapter will focus on matters specifically associated with the legal basis for decision making and on the appropriateness of the approach taken in including certain matters within these Bills, rather than in other pieces of legislation.

3.1.2 Firstly the Committee considers the placement of the provisions within the main Bill and examines the regulatory schema contained within the legislation, and considers the wide scope of ESRA's powers.

3.1.3 Next, the Committee considers the review mechanisms provided for by the Bills. Then the need for the protection of privacy and confidential information is addressed, and the Committee also discusses the extension of the other administrative law measures into the private sector, including the associated resource implications.

3.1.4 Finally the use of disallowable instruments within the Bills is examined, including the expected impact of the Legislative Instruments Bill 1994, and each proposed disallowable instrument is scrutinised.

3.2 Should the provisions in the main Bill be placed in the *Social Security Act 1991*?

3.2.1 Clearly the Bills contain elements from both the employment and the social security portfolios. During the Committee's inquiry, the issue arose of whether the provisions in the main Bill should be included within the legislative structure of the employment, education and training portfolio or of the social security portfolio. The Welfare Rights Centre commented that:

> . . . in placing the Case Management Activity Agreement process in another Act [other than the Social Security Act], significant complexities are created. For instance, there are something like 30 references back to the Social Security Act within the Bill. . . . Having two Acts which are attempting to achieve the same purpose will be very cumbersome.[105]

The submission suggests that Chapter 4, Parts 1–5 and Part 10 of the Bill be placed in the Social Security Act.

3.2.2 ACOSS concurs with this view and points out that amendments in the future to either the proposed Employment Services Act or the Social Security Act will have a flow-on effect to related legislation and may '. . . result in the two [Acts] moving apart in their approaches and requirements'.[106]

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105 Welfare Rights Centre, *Submissions*, p. S4.

106 ACOSS, *Submissions*, p. S29.

3.2.3 The Committee notes that the case management process is an extension of the Newstart arrangements which are outlined in a protocol between DEET and DSS.[107] This protocol sets out 'the details of the administrative arrangements agreed pursuant to Section 1298A of the *Social Security Act 1991*.'[108] The protocol specifies that the '. . . powers of the [Social Security] Secretary in relation to activity testing for newstart allowance shall be delegated exclusively to DEET officers nominated by the Employment Secretary.'[109]

3.2.4 Provisions in the main Bill that relate to income security entitlements provide for the negotiation of a CMAA, reporting by case managers to the CES on compliance with CMAAs and cessation of entitlement if a job seeker fails to comply with requirements. DEET believes that these elements are central to the Bill as without them '. . . the Bill would not accurately reflect the case management system being established under it.'[110]

3.2.5 On the relationship between the *Social Security Act 1991* and the Employment Services Bill, DEET has responded that '. . . both pieces of legislation need to work closely together and require a number of cross references between the two. This is commonplace in income security legislation.'[111]

3.2.6 The Committee recognises the concerns of ACOSS and the Welfare Rights Centre but believes that the case management process established by the Bill is an extension of current arrangements. It does not, therefore, see any persuasive reason for either relocating the provisions of the main Bill to the *Social Security Act 1991*, of for altering the current protocol between DEET and DSS. The Committee agrees with DEET that the number of cross references between the two statutes is not an unusual occurrence and notes that care will need to be taken in amending either piece of legislation.

3.3 Regulation of the case management system

3.3.1 The Employment Services Regulatory Authority (ESRA), is established under cl. 55, and cl. 56 lists its main functions as being:

(a) to regulate the case management system;

(b) to promote competition in the provision of case management services; and

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107 DEET, *Submissions*, pp. S110–S127.

108 DEET, *Submissions*, p. S70.

109 DEET, *Submissions*, p. S112. Activity testing is the process by which a job seeker's activities are examined to determine whether they are sufficient for payment of income support to continue.

110 DEET, *Submissions*, p. S70.

111 DEET, *Submissions*, p. S70.

(c) to monitor, evaluate and report to the Minister on the operations of the case management system.

3.3.2 The evidence addressed many elements of the regulatory scheme:

(a) accreditation scheme;

(b) codes of practice;

(c) investigations;

(d) monitoring and compliance powers; and

(e) information gathering powers.

3.3.3 The Committee's review of this evidence informs the discussion of whether ESRA's powers are too wide. First, the Committee addressed the issue of self regulation by case managers.

A. Might self regulation by case managers be more appropriate?

3.3.4 The ACT Chamber of Commerce and Industry argued that the proposed regulatory regime should be abandoned in favour of self regulation.[112] It suggested that case managers could form their own industry association which could then develop a code of practice and accredit case managers.

3.3.5 The Committee does not favour a self regulatory approach given the level of government funding involved. It is appropriate that a more formal regulatory approach is taken.

3.3.6 The ACT Chamber of Commerce and Industry further argued that ESRA would be 'dominated by career public servants with little industry experience or knowledge of case management outside of the existing CES.'[113]

3.3.7 The Committee notes that the staff of ESRA will be employed under the *Public Service Act 1922* [cl. 97]. The Bill also provides for the establishment of the ESRA Board and for the number of members of the Board [cl. 61]. The Bill does not prescribe what the qualifications or experience of the members should be. The Committee notes that the interim Board has members drawn from a variety of sectors in the community.[114]

112 ACT Chamber of Commerce and Industry Ltd, *Submissions*, p. S47.

113 ACT Chamber of Commerce and Industry, *Submissions*, p. S47.

114 Refer Appendix 4 for a list of board members as at 26 August 1994.

3.3.8 Clause 62 provides for the Board to determine the policy of ESRA with respect to any matter and to give directions to the chief executive officer. Moreover, the Board has responsibility to ensure the proper and efficient performance of the functions of ESRA.

3.3.9 The Committee agrees with Mrs Kirner's opening remarks in the public hearing that 'the task ESRA has to do is both new to government and quite complicated'.[115] The Committee considers that the powers of the Board are sufficient to provide for a properly functioning regulatory body.

B. Accreditation scheme

3.3.10 Only accredited case managers can become contracted case managers (CCMs). Clause 39 provides for the ESRA Board to formulate a scheme of accreditation for case managers by way of a disallowable instrument. Clause 44 of the Bill also allows for the accreditation scheme to specify special classes of case management services, such as services provided to people with disabilities or to people in rural and remote areas.

3.3.11 In the public hearings, Mr Ian Brain, a Director with the Brotherhood of St Laurence, spoke of his 'concerns about the controlling devices of ESRA . . .' and considered that '. . . ESRA's only big stick . . . is to withdraw accreditation.'[116] He advocated the allocation of powers to ESRA to limit the number of participants that a case manager could assist. In response to this comment, DEET emphasised the drastic and permanent nature of disaccreditation and noted a number of other controlling measures that ESRA could use, including 'breach of contract; discontinuing of contracting with a case manager; and information and search powers.[117]

3.3.12 The Committee believes that it will be necessary to monitor the effectiveness of these controlling mechanisms as the case management system becomes established. The Committee agrees with Mr Brain that there should be an upper limit on the number of referrals and participants, based on the number of case managers available in a case management organisation. The Committee also recognises that there is a need to be able to increase an organisation's potential case load when or if extra case managers are employed. Mrs Kirner advised that 'the agencies have to decide, within their budget, how many case managers they will apply to that task . . . a working case load, according to DEET is about 40 people at any one time.'[118]

115 Mrs Kirner, *Transcript*, p. 4.

116 Mr I. Brain, Brotherhood of St Laurence, *Transcript*, p. 91.

117 DEET, *Submissions*, p. S77.

118 Mrs J. Kirner, ESRA, *Transcript*, p. 12.

3.3.13 The Committee is not satisfied that the quality of service provided to participants in the case management system can be guaranteed without a prescribed case load limit. If limits are not set, the Committee believes that organisations may be tempted to increase profits at the expense of quality of service.

Recommendation 12

The Committee recommends that the accreditation scheme created by clause 39 of the Employment Services Bill include a determination of an appropriate ratio of participants to case managers and that this ratio be used to determine an upper limit to referrals and participants for any individual case management organisation.

The Committee also recommends that ESRA monitor its ability to control contracted case managers and report any problems in this area to the Minister.

C. Codes of practice

3.3.14 Clause 50 provides for the ESRA Board to declare and publish codes of practice relating to the provision of case management services by way of a disallowable instrument.

3.3.15 Four codes of practice have already been developed by interim ESRA:

(a) service ethics and standards;

(b) standards of premises and facilities;

(c) advertising; and

(d) financial and resources management.[119]

3.3.16 The Committee recognises that the government has an obligation to ensure that job seekers are protected from outsourced organisations that may not have the same standards and scrutiny as the public service. Contracted case managers will be in a position to coerce job seekers through recommending the termination of benefits if the job seeker does not comply with a direction.

3.3.17 At clause 40, the Bill provides for the accreditation scheme to make the application of the codes of practice a condition of accreditation. The codes of practice are otherwise advisory only, except if they are applied by a law of the Commonwealth or of a State or Territory, or by an instrument under such a law

119 Mrs Kirner, *Transcript*, p. 16.

[clause 50(2)]. Mr Brain supported the concept of codes of practice but expressed concern that the codes were to be merely advisory. He made the point that the Bill provided for strong investigative powers to scrutinise financial management, but that the codes of practice to ensure the quality of service provision were only advisory.[120]

3.3.18 DEET believes that the provision allows sufficiently for case managers to be required (as distinct from advised) to follow codes of practice in appropriate circumstances.'[121]

3.3.19 The Committee finds it difficult to imagine a situation in which an organisation would be exempted from providing appropriate standards of service under any of the areas identified by Mrs Kirner.

Recommendation 13

The Committee recommends that the application of the codes of practice be included in the accreditation scheme and that DEET investigate the possibility of removing from the Employment Services Bill the potential for the codes of practice to be advisory only.

D. Investigations by ESRA

3.3.20 Clauses 103–117 provide powers for ESRA to investigate matters relating to the case management system. ESRA can investigate matters in its own right, and refer matters to Departmental Secretaries, the Ombudsman, the Trade Practices Commission and the Privacy Commissioner.

3.3.21 ESRA has discretionary power to investigate a matter after it has received a written complaint or of its own accord. However, ESRA is compelled to investigate a matter at the request of the Minister (cll. 105 and 106). Under cl. 107 ESRA may make preliminary inquiries to determine whether it has the power, or whether it should, investigate a matter.

3.3.22 The Committee was keen to establish the appropriateness of the investigative powers conferred on ESRA by the Bill. DEET believes that ESRA's powers of investigation are 'central to the performance of ESRA's functions as an industry regulator'.[122] The 'proposed powers are not general and could only be exercised in respect of the specific matters listed in clause 104'.[123] Clause 117 provides for

120 Mr I. Brain, Brotherhood of St Laurence, *Transcript*, p. 92.

121 DEET, *Submissions*, p. S81.

122 DEET, *Submissions*, p. S18.

123 DEET, *Submissions*, p. S18.

a register of investigations to be kept and after discussions with the Privacy Commissioner, DEET agreed to an amendment (proposed government amendment number 35) to ensure that information that identifies an individual will only be kept on the register with the consent of that individual.

E. Monitoring of compliance, and general information-gathering powers

3.3.23 The extent of powers granted to inspectors under the Bill was questioned by the Committee. On the issue of powers of search and entry, DEET stated that 'clauses 118–120 would provide for the appointment of inspectors and the issue of identity cards so that only appropriately authorised persons could use the powers of entry and search'.[124] According to DEET, provisions are 'generally based on those applying to AUSTEL under Division 3, Part 16 of the *Telecommunications Act 1*'.[125] Clauses 121, 122 and 123 of the Bill relate to search-related information gathering powers. Clause 125 outlines general information gathering powers. The Privacy Commissioner expressed concerns about these powers (cll. 121–131) in the original Bill but is satisfied that the proposed amendments significantly limit these powers and that they 'are to be used in exceptional circumstances only'.[126]

3.3.24 The Commonwealth Ombudsman found the search and document removal powers conferred on ESRA to be wide, and lacking 'the usual safeguards, such as a requirement to seek warrants or summons from magistrates or authorisation from senior staff of ESRA.'[127]

3.3.25 The Attorney General's Department noted that clause 122 is acceptable criminal law policy as reflected in the standards set by the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*.[128]

3.3.26 The Attorney-General's Department considered that the monitoring powers are much more limited than those usually found acceptable.[129] It reasoned that the powers conferred under clause 121 are justified in relation to registered case managers, because the government has a financial interest to protect together with a public interest in ensuring that private case managers carry out their functions properly because they will be responsible for unemployed person.[130]

3.3.27 The Attorney-General's Department relies on the Ozone Protection Act 1989 as 'the currently accepted precedent for such monitoring powers'. It considers that

124 DEET, *Submissions*, p. S18.

125 DEET, *Submissions*, p. S19.

126 Privacy Commission, *Submissions*, p. S26.

127 Commonwealth Ombudsman, *Submissions*, p. S56.

128 Attorney-General's Department, *Submissions*, p. S119.

129 Attorney-General's Department, *Submissions*, p. S130.

130 Attorney-General's Department, Submissions, p. S129.

the monitoring provision in this Bill is available for a more limited purpose and contains more safeguards than does the Ozone Protection Act precedent. The Attorney-General's Department highlights that the powers do not apply broadly 'for the purposes of the Act'. They are exercisable to monitor compliance with regard to accreditation or an agreement, not to obtain evidence in relation to suspected offences.

3.3.28 The Attorney-General's Department identified various 'safeguards' on the use of these powers by ESRA. Monitoring can only be carried out at certain premises and must not be carried out at residential premises without the consent of the occupier. Furthermore, an inspector must produce proof of identity.

3.3.29 Proposed amendments 36 and 37 to the main Bill contain further limitations on an inspector's powers to search. The effect of these proposals would be that monitoring functions would only be carried out during business hours, and only as a last resort.

3.3.30 The Privacy Commissioner considers that the proposed amendments would significantly limit ESRA's powers, and notes that the powers are to be used only in exceptional circumstances.[131]

3.3.31 The Committee notes that inspectors must be expressly appointed by the Chief Executive Officer (cl. 118), and that proposed amendment 37 would have the effect of enabling ESRA to exercise such powers only as a last resort. The Committee considers that amending the Bill to also require that individual searches under clause 121 be authorised by a senior executive of ESRA, such as the Chief Executive Officer, would not provide a greater safeguard than the measure proposed in amendment 37. The Committee agrees that proposed amendments 36 and 37 should be adopted.

3.3.32 The Attorney-General's Department considers these powers to be acceptable because a person may be excused if claiming self incrimination.[132]

F. Are ESRA's powers too wide?

3.3.33 As the discussion above highlights, ESRA's powers are many and varied. The Committee examined ESRA's responsibilities and the potential for a conflict of interest to arise due to the range of duties ESRA has under the Bill. When the Committee queried whether ESRA's duties were too variable – for example: registration processes, payments, contracting, regulation, control, policing the system and financial management – Mr Thompson from the National Skillshare Association (NSA) said that 'I would not like to see ESRA become a huge alternative

131 Privacy Commissioner, *Submissions*, p. S26.

132 Attorney-General's Department, *Submissions*, p. S131.

bureaucracy' however, he thought 'it is better to have them all being dealt with by one agency rather than setting up a series of agencies.'[133]

3.3.34 Mr Richard Morgan from the Family and Administrative Law Branch of the Attorney-General's Department, responded to a similar query that:

> . . . the breadth of those powers has a certain similarity to the breadth of the powers given to other regulatory bodies currently, such as a Trade Practices Commission or the ASC, and I do not know that there has ever been a concern about the breadth of their powers.[134]

3.3.35 In a submission to the Committee, the Attorney-General's Department stated that the powers of ESRA to inspect premises 'are not in fact as wide as those found in other legislation'.[135] On the subject of monitoring powers in the Bill, Attorney-General's believes that:

> . . . these powers are justified in relation to registered case managers as the Government has a financial interest to protect, together with a public interest in ensuring that the private case managers carry out their functions properly.[136]

Attorney-General's went on to comment that '. . . these monitoring powers are much more limited than those usually found acceptable . . . [in] recognition that those subject to monitoring will more commonly be individuals rather than companies.'[137]

3.3.36 The Ombudsman feels that the main Bill does not distinguish sufficiently between ESRA's complaints jurisdiction and that of the Ombudsman. She argues that the respective roles should be clarified in the legislation to avoid unnecessary confusion and possible duplication of effort.[138]

3.3.37 The Ombudsman considers that cl. 104 is too broad and that all of the matters listed as complaints subjects were likely to be within the Ombudsman's power to review administrative practices and procedures. She suggests that Part 4.7 should be amended to define ESRA's complaint jurisdiction in terms of complaints that highlight improper or unfair market practices and fraudulent practices of contracted case managers.[139]

3.3.38 The Committee agrees that overlap should be avoided where it is likely to lead to wasteful duplication of effort. However, the Committee is not convinced that

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133 Mr D. Thompson, NSA, *Transcript*, p. 59.

134 Mr R. Morgan, AGD, *Transcript*, p. 80.

135 Attorney-General's Department, *Submissions*, p. S128.

136 Attorney-General's Department, *Submissions*, p. S129.

137 Attorney-General's Department, *Submissions*, p. S130.

138 Commonwealth Ombudsman, *Submissions*, p. S54

139 Commonwealth Ombudsman, *Submissions*, pp. S54–55.

the overlap resulting from these provisions will necessarily create confusion and wasteful duplication between ESRA and the Ombudsman's office. Moreover, cl. 111 provides for ESRA to transfer matters to the Ombudsman, and for matters so transferred to be taken to be a complaint made to the Ombudsman under the Ombudsman's Act.

3.3.39 The Ombudsman accepts that the transfer provisions are adequate.[140] Importantly, in referring to the protocol for referral of complaints to be developed between ESRA and the Ombudsman, she states that her understanding is, that the protocol '. . . will recognise that ESRA's prime responsibility and investigatory functions are focussed at the accreditation and broad regulatory functions and in ensuring a fair market place. Most complaints from job seekers and others will be handled by my office.'[141]

3.3.40 The Committee considers that rather than reduce the scope of ESRA's complaints jurisdiction contained within the Bill, this protocol could be relied on to avoid the wasteful effects of the overlap between the jurisdictions of ESRA and the Ombudsman. The Committee considers that the overlap of their jurisdictions is acceptable, and that there is no need to amend the scope of ESRA's investigatory jurisdiction at this stage.

3.3.41 Clause 113 contains similar provisions to those in cl.111, and enables ESRA to transfer complaints to the Privacy Commissioner. ESRA must advise the complainant in writing of the transfer and provide the Privacy Commissioner with information and documents that relate to the complaint. The Committee notes this practical measure for reducing potentially wasteful overlap of the jurisdictions of ESRA and the Privacy Commissioner.

3.3.42 In summary, the Committee was not persuaded by the evidence that ESRA's powers are too wide for performing the functions provide for in the Bill. The Committee notes the safeguards that are built in to relevant provisions.

3.4 Review and appeal processes

3.4.1 The Bill has similar review procedures to decisions taken under the *Social Security Act 1991*. Decisions of the CES or an officer of DEET concerning the referral of unemployed people to case managers, and decisions relating to Case Management Activity Agreements are subject to review at three levels. Clause 134 provides for the DEET Secretary to carry out an internal review of a decision of the CES or of an officer of DEET. If the person feels this is unsatisfactory, cl. 138 provides for review of a decision by the Social Security Appeals Tribunal (SSAT), and if necessary the Administrative Appeals Tribunal (AAT). DEET states that,

140 Commonwealth Ombudsman, *Submissions*, p. S55.

141 Commonwealth Ombudsman, *Submissions*, p. S55.

> . . . the provisions would be appropriate given that many decisions under the Employment Services Act would have a direct impact upon benefit entitlement under the *Social Security Act 1991* (and) the proposed provisions are modelled on Part 6 of the *Social Security Act 1991*.[142]

3.4.2 Clause 139 incorporates proposed rights of review to the SSAT and the AAT under the *Social Security Act 1991* by reference to certain parts of that Act, subject to any regulations made under the main Bill. Proposed amendments 42, 43 and 44 to the main Bill are intended to simplify the review provisions by including substantive provisions relating to review rights in the main Bill.

3.4.3 Part 4.11 of the Bill allows reviews of ESRA decisions concerning the accreditation scheme, conditions of accreditation or disqualification for fraud, dishonesty, etc, as identified at clause 45 of the Bill.

3.4.4 The Administrative Review Council welcomes the provision of merits review of decisions that will affect the interests of persons in the employment services sector.[143] The ARC notes with approval that the review mechanisms provides firstly for internal review of decisions by DEET or ESRA, which it considers to be less expensive. It also approves of two tiers of external merits review because of the potentially high volume of reviewable decisions that will be made.

3.5 Privacy and the protection of confidential information

3.5.1 The case management system requires that substantial amounts of personal information be transferred between organisations. In Mrs Kirner's words:

> . . . ESRA does not believe that a lot of the information transferred from the CES . . . should be transferred to the case manager. . . . People need to know the name, the suburb, maybe the labour market program involvement up until now . . . [and] . . . the actual file that is transferred from the CES should be a minimum one.[144]

The Committee agrees with this view.

3.5.2 ACOSS queries the extent of the confidentiality which should exist between a case manager and a participant, and states that protection for confidential information should be extended to information provided to the CES by the case manager.[145]

3.5.3 Clause 53 of the Bill provides for the ESRA Board to formulate rules for the control of case management documents and is amended by Government amendments numbers 31, 32 and 33. Clause 54 provides for the ESRA Board to create duties of

142 DEET, *Submissions*, p. S20.

143 Administrative Review Council, *Submissions*, p. S133.

144 Mrs J. Kirner, ESRA, *Transcript*, p. 14.

145 ACOSS, *Submissions*, pp. S33–S34.

non-disclosure for case managers for the purposes of the application of section 70 of the *Crimes Act 1914*.

3.5.4 Amendment number 31 proposes an increase in the scope of these rules. These rules and the specification of case management documents will be a disallowable instrument under clause 53(7). Proposed amendment 32 to the main Bill would insert new subclause 53(6A) to require the case management document rules to be consistent with the *Privacy Act 1988*, and new subclause 53(6B) to ensure the ESRA Board consults with the Privacy Commissioner prior to making determinations on case management documents and case management document rules under existing subclauses 53(2) and (3).

3.5.5 DEET considered that these proposed amendments were required '. . . in the interest of clients to protect the use of personal information provided to case managers'.[146]

3.5.6 In the Privacy Commissioner's opinion 'the details of information to be collected or disclosed by the case manager should, in the interests of transparency in government, be included in the primary legislation rather than being dealt with by way of disallowable instruments.'[147]

3.5.7 The Privacy Commissioner acknowledges however, that the government amendments represent a '. . . reasonable compromise'.[148] DEET states that the provisions were developed in consultation with the Attorney-General's Department and the Privacy Commissioner's office.[149]

3.5.8 One of the reasons for asking the Legal and Consitutional Affairs Committee to advise on the Bills was that there may have been issues related to privacy and confidentiality which should be brought to the attention of the Parliament. The provision of confidential information on individuals to contracted case managers who would not necessarily share the public sector's culture of protecting confidential information, was of initial concern to the Committee. This concern appears to have been addressed by the legislation and the Committee believes that the arrangements for protecting sensitive information on individuals are satisfactory.

3.6 Extension of the administrative law package

3.6.1 The Consequential Amendments Bill complements the merits review regime by providing for the extension of the 'administrative law package' to the delivery of employment services.

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146 DEET, *Submissions*, p. S20.

147 Privacy Commissioner, *Submissions*, p. S26.

148 Privacy Commissioner, *Submissions*, p. S26.

149 DEET, *Submissions*, p. S20.

3.6.2 The Committee agrees with the ARC's observation that,

> . . . as the government services are increasingly opened to competition and market reform, the issue of the application of the administrative law package to private sector participants in those sectors will arise with increasing frequency.[150]

A. Amendment of the *Freedom of Information Act 1982*

3.6.3 Clauses 10–13 of the Consequential Amendments Bill provide for amendment of the Freedom of Information Act (FOI Act) to enable members of the public to have rights of access to documents relating to case management services that are held by contracted case managers.

3.6.4 The ARC advised that together with the Australian Law Reform Commission it was conducting a joint inquiry into the freedom of information legislation.[151] The Committee notes that the inquiry is to report by 31 December 1994, and that the issues to be considered include whether the FOI Act should be extended to the private sector.[152]

B. Amendment of the *Ombudsman Act 1976*

3.6.5 Clauses 14–18 of the Consequential Amendments Bill provides for the Ombudsman to investigate individual complaints about contract case managers and for the Ombudsman to be able to refer those complaints to ESRA where appropriate. The Ombudsman also has a role to investigate complaints from contract case managers or other interested parties about ESRA.

3.6.6 In the public hearings Ms Philippa Smith, Commonwealth Ombudsman, provided the following evidence:

> Our jurisdiction . . . has been extended to cover case managers in so far as the cases that have been referred by the CES, ESRA and (EAA) are concerned . . . we saw it as being important that coverage was extended because it provides . . . a one-stop shop for individuals who may wish to lodge a complaint in terms of the fairness of actions. . . . I would see the Ombudsman's role as being primarily to investigate individual complaints, including the systemic issues behind the complaints that come to us.[153]

3.6.7 The Commonwealth Ombudsman welcomes the extension of the jurisdiction to include contract case managers.[154] She cautions that this approach will be less

150 Administrative Review Council, *Submissions*, p. S134.

151 Administrative Review Council, *Submissions*, p. S134.

152 Administrative Review Council, *Submissions*, Exhibit 3.

153 Ms P. Smith, Ombudsman, *Transcript*, pp. 25–26.

154 Commonwealth Ombudsman, *Submissions*, p. S53.

confusing for job seekers given that several administrative actions and agencies are involved in each case.

3.6.8 Clause 111 enables ESRA to transfer complaints to the Commonwealth Ombudsman. ESRA must advise the complainant in writing of the transfer and provide the Ombudsman with information and documents that relate to the complaint. The Ombudsman supports the provisions for the transfer of complaints to the Ombudsman.[155] She also considers that it should be able to advise ESRA directly about complaints it receives because they will be relevant to ESRA's accreditation and monitoring functions.[156] At present the Bills make no provision for ESRA to be directly advised and all such advice and information would need to be made to the Minister. DEET supports the Ombudsman's proposal.[157]

3.6.9 The Committee agrees that it is appropriate and would be more practical for the Ombudsman to be able to inform ESRA directly about complaints. It agrees with the Ombudsman's suggestion that the natural justice safeguards under the Ombudsman Act which apply to the Ombudsman's reports to Ministers and the Government should also apply to such reports.

Recommendation 14

The Committee recommends that the legislation should be amended to provide for the Commonwealth Ombudsman to be able to advise ESRA directly about complaints where they will be relevant to ESRA's functions.

The natural justice safeguards under the *Ombudsman Act 1976* which apply to reports to ministers and the government should apply to such reports to ESRA.

C. Amendment of the *Privacy Act 1988*

3.6.10 Clauses 19–25 of the Consequential Amendments Bill provide for the amendment of the Privacy Act to apply provisions of it to contracted case managers in connection with the provision of case management services.

3.6.11 The Privacy Commissioner has argued for the establishment of 'national privacy standards which are not limited to the public sector and which would deal consistently with interferences with privacy.'[158] Based on concerns for a universal approach to privacy standards, he argues that it would not be desirable for privacy

155 Commonwealth Ombudsman, *Submissions*, p. S55.

156 Commonwealth Ombudsman, *Submissions*, p. S55.

157 DEET, *Submissions*, p. S78.

158 Privacy Commissioner, *Submissions*, p. S24.

protection to come from different standards in different contexts and with differing levels of legal force.

3.6.12 Although the proposed extension of the Privacy Act is regarded as a 'lesser option' than the national position the Privacy Commissioner is advocating, he welcomed the proposal because it will mean that a consistent set of standards will apply whether a person is dealing with a public, community or private sector case manager.

3.6.13 The ACT Chamber of Commerce and Industry expressed concern that case managers would experience great costs and delays because of their obligations under the FOI Act, the Ombudsman Act and the Privacy Act.[159] It argued that the cost of meeting these obligations should not be borne by case managers, and further argued that other reporting requirements should not be such that they distract case managers from their responsibilities to their clients.

3.6.14 The Committee recognises that the requirement to adhere to a variety of Acts will be a new experience for many contracted case managers. The ARC believes that the 'extension of the administrative law package to the private sector is in many ways a novel development'[160] and that this issue will arise more frequently in the future.

3.6.15 Mrs Kirner made the point that it will be very important to ensure that all case managers and agencies understand their obligations under the *Privacy Act 1988*. In the opinion of the Privacy Commissioner, a significant consequence of the extension of the Privacy Act as outlined in cll. 19–25 of the Consequential Amendments Bill will be 'the collection and handling of quite sensitive personal information in an environment that is not currently subject to privacy regulation.'[161]

3.6.16 The Privacy Commissioner also noted that the Information Privacy Principles may need to be tailored '. . . to meet the particular circumstances of the case management system . . .' and indicated that he is '. . . open to considering a Public Interest Determination to deal with the sort of issue referred to above'.[162]

3.6.17 A like belief is held by the Ombudsman,

> . . . many contract case managers will know little about the Ombudsman and other accountability aspects of the new arrangements which have been traditionally confined to the public sector, such as the Freedom of Information package and Privacy Act requirements.[163]

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159 ACT Chamber of Commerce and Industry, *Submissions*, p. S48.

160 ARC, *Submissions*, p. S134.

161 Privacy Commissioner, *Submissions*, p. S24.

162 Privacy Commissioner, *Submissions*, p. S25.

163 Commonwealth Ombudsman, *Submissions*, p. S56.

3.6.18 The Ombudsman has stated that, in consultation with ESRA, she intends to develop reporting procedures to ensure that her office provides information relevant to ESRA's broader regulatory and accreditation procedures.[164]

3.6.19 The Committee agrees that the provision of information to job seekers and case managers is most important and supports the proposal that ESRA and the Ombudsman jointly develop a program of education about ESRA's and the Ombudsman's roles. The Committee further considers that all relevant agencies should work towards the development of an education program about rights and obligations that arise under administrative law.

Recommendation 15

The Committee recommends that ESRA, in consultation with the Attorney-General, the Commonwealth Ombudsman, the Privacy Commissioner and other appropriate organisations, develop and implement an education and training strategy for case managers to ensure that they are aware of their legal obligations when delivering case management services.

D. Resource implications

3.6.20 The Privacy Commissioner was concerned that the proposed extension of the Privacy Act would have significant resource implications, both in relation to performing compliance and complaint handling functions and to establishing an education and training strategy which will assist the industry in meeting its obligations under the Privacy Act. Based on its experience with other sectors, the Commissioner expects the education activities to be resource intensive.[165]

3.6.21 The question of additional resources to deal with increased workloads was discussed at the public hearings. The Privacy Commissioner noted that the extension of the Privacy Act in the Consequential Amendments Bill to the activities of case managers in providing case management services had resource implications for his office. Although the number of potential case managers in the submission from the Privacy Branch was overstated, DEET agreed that there would be additional demands placed on the Commissioner's office as a result of the extension to the Privacy Act. The submission noted that 'the current staffing levels of the Commissioner's office will be insufficient to cope with additional demands.'[166]

3.6.22 As discussed above an intensive education and training strategy will be necessary to assist case managers with meeting their obligations under the *Privacy*

164 Commonwealth Ombudsman, *Submissions*, p. S54.

165 Privacy Commissioner, *Submissions*, p. S25.

166 Privacy Commissioner, *Submissions*, p. S25.

Act 1988, the *Freedom of Information Act 1982* and the *Ombudsman Act 1976*. Ms Smith observed that the Ombudsman's office could take on:

> . . . a greater educative role than we have in the past in terms of the need for preparing material and, through ESRA workshops, discussing the principles of fair practice in an administrative sense [such as] some basics about keeping of records, giving clients reasons for decisions, allowing the right to respond, and telling clients where they can go for a right of review if that is necessary.[167]

3.6.23 These initiatives will have resource implications for the Ombudsman's office, estimated by the Ombudsman at one full time officer for one year, together with funding for associated materials and travel. A representative from the Attorney-General's Department stated that 'the Attorney General's Department currently does provide training and so does the Privacy Commission, and it may be possible to extend that.'[168]

3.6.24 The Ombudsman's office was not allocated extra resources to deal with the additional workload generated by the new arrangements. Ms Smith explained that she had been asked what the resource implications were, and had responded that she '. . . would monitor what the implications were and provide further information at a later point'.[169]

3.6.25 In a supplementary submission, DEET stated that '4 complaints were received by the Privacy Commissioner in 1993/94 in relation to the CES [and] . . . the Ombudsman received approximately 400 complaints (oral and written) concerning the CES in 1993/94.'[170]

3.6.26 In the Committee's opinion, additional resources will be required to ensure that an appropriate education and training strategy can be developed and implemented for all case management organisations. The question of additional resources for extra workload associated with complaints is not as clear and the Committee believes that it is appropriate that ESRA monitor this matter and report to the Minister as necessary.

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167 Ms P. Smith, Ombudsman, *Transcript*, pp. 27–28.

168 Ms K. Leigh, Attorney-General's Department, *Transcript*, p. 82.

169 Ms P. Smith, Commonwealth Ombudsman, *Transcript*, p. 27.

170 DEET, *Submissions*, p. S79.

Recommendation 16

The Committee recommends that resources be made available for:

(a) the extension of the administrative law package to the activities of case managers; and

(b) conducting an intensive education and training strategy for case managers.

3.7 Placement of proposed provisions in the Consequential Amendments Bill

3.7.1 The Committee was concerned about the placement of proposed amendment 3 – of the additional amendments to the Consequential Amendments Bill, removing the additional two payments following deferment of benefits because of breaches of obligations – in the Employment Services (Consequential Amendments) Bill. The employment policy aspects of the changes proposed by this amendment are discussed above at section 2.12, however the Committee considered that it was necessary to comment on the desirability of the placement of such measures in this Consequential Amendments Bill.

3.7.2 The proposed clauses, propose amendments to the *Social Security Act 1991* that are not directly consequent upon the proposed enactment of the Employment Services Bill. The Committee notes the Welfare Rights Centre's concerns on this matter.[171] The Committee accepts that such provisions are not outside the broad scope of the long title of the Consequential Amendments Bill, which states that it is to amend laws 'in consequence of the enactment of the *Employment Services Act 1994*, and for other purposes'. The Committee considers however, that such proposed provisions which affect the rights of individuals and are significant in terms of policy, should be introduced to the Parliament by means of a Bill intended principally to amend the relevant Act rather than by means of a Bill that deals predominantly with consequential amendments to a related Act.

3.8 Disallowable Instruments

3.8.1 The Employment Services Bill contains provision for thirteen determinations and instruments that are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901* (the AI Act). Where an enabling law provides that an instrument is a disallowable instrument for the purposes of section 46A of the AI Act, the instrument becomes subject to the scrutiny regime of that Act.[172]

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171 Welfare Rights Centre, *Submissions*, pp. S147–149.

172 Administrative Review Council, *Rule Making by Commonwealth Agencies* Report No. 35, AGPS, Canberra, 1992, p. 44.

DEET is responsible for eight of the instruments relevant to the Employment Services Bill and ESRA is responsible for the remaining instruments.

3.8.2 Disallowable instruments are secondary legislation. Either House may, within fifteen sitting days after the instrument has been laid before that House, in pursuance of a motion of which notice has been given, pass a resolution disallowing an instrument and that instrument has no effect. Disallowable instruments cannot be made until the relevant bill comes into force as an Act.

3.8.3 If a motion for disallowance is moved in relation to a disallowable instrument, the relevant Minister may talk to the parties involved and give an undertaking. An undertaking is a promise, given in writing, by a Minister of the Government to a parliamentary committee, to the effect that the concerns of the committee about the effects of the Executive law-making on personal rights will be allayed by amendment.[173] An undertaking is not viewed lightly because it is accepted as an alternative to recommending disallowance.[174] Discussion relating to undertakings may delay implementation of the instrument.

A. The use of secondary legislation

3.8.4 There has been a vast growth in the volume and diversity of delegated legislative instruments.[175] A fundamental issue is whether certain matters should be included in primary or secondary legislation. Significant questions of policy, including new policy or fundamental changes to existing policy, and procedural matters that go to the essence of a legislative scheme should only be implemented through Acts of Parliament.[176] Examples of circumstances where matters could be left to subordinate legislation include where:

(a) there was insufficient time to include all aspects of the legislative scheme in the Bill;

(b) the inclusion of certain matters would rob the Act of a desirable flexibility, especially the need to respond quickly to change; and

(c) the legislative scheme in the Act would be swamped by the inclusion of elaborate detail.[177]

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173 *Senate Standing Committee on Regulations and Ordinances, Eighty-third Report* April 1988, Parliamentary Paper No. 377 of 1988, p. 131, para. 8.1.

174 ibid., p. 131.

175 ibid., p. ix.

176 Mr M. Orpwood QC, *Trends in Subordinate Legislation*, Paper given at the Parliamentary Counsel's Committee, Conference on Legislative Drafting, Canberra, 17 July 1992, p. 4.

177 ibid., p. 6.

3.8.5 There are no established guidelines as to when disallowable instruments should be used in preference to regulations. Both disallowable instruments and regulations are subject to disallowance provisions under Part XI and Part XII of the AI Act respectively. Regulations are generally the form of delegated legislation used for matters, such as the establishment of a particular scheme. Use of regulations may avoid the disallowance power associated with disallowable instruments, although regulations themselves can also be disallowed. Disallowable instruments are appropriate where certain details cannot be settled in advance and such instruments may be a necessity in some circumstances. Examples of disallowable instruments may include lists or approved forms. Regulations generally deal with more substantive issues than disallowable instruments.

3.8.6 An inherent disadvantage of all secondary legislation is that the large amount of this type of legislation makes it difficult for Parliament to scrutinise the various instruments thoroughly.[178]

B. The effect of the Legislative Instruments Bill 1994

3.8.7 It is important in this context to have an understanding of the provisions of the Legislative Instruments Bill as the Bill has had an impact on the Employment Services Bill. It is arguable that had it not been anticipated that the Legislative Instruments Bill would come into force at the same time as the Employment Services Bill, the content of a large number of those instruments may have been included in instruments that were not subject to a tabling requirement and consequently, they would not have been subject to parliamentary scrutiny.

3.8.8 The Legislative Instruments Bill 1994 was introduced and read a second time in the Senate on 30 June 1994. It was referred to the Senate Standing Committee on Regulations and Ordinances on 25 August 1994 and that Committee will report on 10 October 1994.

3.8.9 The Bill defines a legislative instrument for the purposes of the Act. It introduces consultation procedures for delegated legislation in certain circumstances and provides for parliamentary scrutiny of all forms of delegated legislation. The Bill also establishes the Federal Register of Legislative Instruments ('the Register'). Unregistered instruments will not be enforceable. Registration will ensure that disallowable instruments are readily accessible to people through an electronic register available in a number of outlets, such as Australian Government Publishing Service shops. Regulations will also become cheaper to purchase, as it will be possible to browse through the register and select and print individual regulations, instead of buying an entire volume.

3.8.10 Subclause 4(1) details the criteria that must be fulfilled for a legislative instrument to exist. Those criteria are that the instrument:

178 But see 3.8.9 below for proposed changes which will be relevant to scrutiny of secondary legislation.

(a) is in writing;

(b) is, or was, made in the exercise of a power delegated by the Parliament;

(c) determines the law or alters the content of the law, rather than stating how the applies in a particular case;

(d) directly or indirectly imposes an obligation, creates a right, or varies or removes an obligation or right; and

(e) is binding in its application.

3.8.11 Under subclause 4(2)(d) of the Legislative Instruments Bill, a legislative instrument is expressed to include a disallowable instrument. Consultation must occur in relation to all legislative instruments made on or after 1 January 1996, except those listed in subclause 19(1). Consultation involves seeking submissions. The circumstances in which submissions are not required include where the instrument is not likely to directly or indirectly affect business, the instrument is required for reasons of urgency, the instrument will implement a Government policy whose details have already been the subject of significant public consultation, notice of the content of the instrument would enable individuals to gain an advantage over other persons without that notice or the public interest requires that consultation not take place.

3.8.12 Schedule 2 of the Bill lists the enabling legislation that provides for legislative instruments directly affecting business. Consideration will need to be given as to whether the Employment Services Bill, once enacted, should be included in that schedule. It is arguable that instruments relating to employment services are likely to directly affect business. In response, it could be suggested that consultation in relation to the instruments is not required because, in the terms of subclause 19(1)(a)(iv) of the Legislative Instruments Bill, the instruments will implement a Government policy whose details have already been the subject of significant public consultation (that is, the White Paper). However, the issue remains as to whether there was public consultation on the content of the proposed instruments or whether consultation focused broadly on the case management scheme rather than on the mechanics of the scheme and the content of the individual instruments.

Recommendation 17

The Committee recommends that the Government consider whether the Employment Services Bill, once enacted, should be included in Schedule 2 to the Legislative Instruments Bill.

3.8.13 Assuming the disallowable instruments in the Employment Services Bill do fall within the scope of Schedule 2, they still may not be subject to consultation. The

commencement date for case management is 1 January 1995 but consultation does not become mandatory until 1 January 1996. Consequently, the instruments in the Employment Services Bill will be drafted without the benefit of public consultation provided in the Legislative Instruments Bill.

3.8.14 The Legislative Instruments Bill reduces the time frame for the lodgment of instruments. Once an instrument is required, it must be tabled in Parliament within six days (as opposed to the fifteen day period currently allowed for tabling). The length of time for parliamentary scrutiny of the instrument remains fifteen days. Under clause 48 of the Bill, a legislative instrument or a provision of a legislative instrument can be disallowed by either House within 15 sitting days after a copy of the instrument was laid before that House. It will also be possible for the houses to resolve to defer consideration of a motion of disallowance for a maximum of six months.

3.8.15 The number of disallowable instruments in the Employment Services Bill and whether the content of those instruments would be better placed in the proposed legislation will be addressed in the following paragraphs. However, despite the large number of instruments in the Employment Services Bill, it appears the content may be more accessible to the general public via the Register than would have been the case had the Legislative Instruments Bill not been introduced.

C. The issues

3.8.16 There are two main issues arising from a consideration of the disallowable instruments in the Employment Services Bill. First, there has been discussion on the desirability of leaving a large amount of detail for inclusion in the disallowable instruments rather than the bill itself. The second issue concerns the possibility of the proposed instruments being amendable rather than disallowable.

(a) Content of instruments

3.8.17 Criticisms relating to the large number of proposed disallowable instruments, and the resulting lack of detail in the Bill itself, were expressed during the hearings. The Committee does not consider that the mere number of disallowable instruments is, in itself, a ground for criticism. In addition the Committee notes that the Senate Standing Committee for the Scrutiny of Bills did not comment on the number of disallowable instruments in the Bill or whether all of them were appropriate.[179]

3.8.18 The Committee acknowledges the comment made in a submission that the amount of material to be included in disallowable instruments makes it difficult 'for comprehensive comment' on the Bill.[180] That submission states that given it is

179 See *Alert Digest 12/94.*

180 AYPAC, *Submissions*, p. S136.

anticipated the case management scheme will be operative by 1 January 1995, it is disappointing the bill only provides scant detail.[181]

3.8.19 The rationale for including such a large number of disallowable instruments in the Employment Services Bill is that it allows:

(a) ESRA and the Minister the power to act quickly and effectively to ensure proper protection of the long term unemployed from exploitation by the unscrupulous; and

(b) parliamentary scrutiny of the arrangements relating to the operation of contracted case management.[182]

3.8.20 The Explanatory Memorandum states that determinations have been used in some instances because it is impossible at this stage to envisage all the relevant criteria.[183] It was suggested that the use of a ministerial determination will allow further criteria to be specified as the case management system develops and experience is gained with its operation.[184] The submission of the Australian Council of Social Service (ACOSS) accepts that rationale and recognises that there may need to be a number of changes as the system is developed and in response to the changing needs of long term or disadvantaged unemployed people.[185]

3.8.21 DEET's supplementary submission defended the number of disallowable instruments by stating that 'it allows for the detailed operational aspects of the system to be developed in consultation with key players and for the ready ability to change in the light of experience'.[186] Mr David Thompson, Chief Executive Officer of the National Skillshare Association Ltd, took a similar line. He stated that, given it will take some time to formulate the details of the scheme, the number of disallowable instruments is not inappropriate.[187]

3.8.22 ACOSS submitted that the instruments would be crucial in determining the effectiveness and likely success of the case management system. ACOSS pointed to the possibility that if substantial concerns were raised by any of the instruments, the introduction of the new scheme may be delayed.[188] To avoid any delay, ACOSS suggested that the instruments should be released for public and parliamentary scrutiny at the same time as the bill.[189] Other witnesses and submissions agreed

181 ibid., p. S136.

182 Employment Services Bill, Explanatory Memorandum, p. 11.

183 ibid., p. 19.

184 ibid., p. 20.

185 ACOSS, *Submissions*, p. S29.

186 DEET, *Submissions*, p. S72.

187 Mr D Thompson, *Transcript*, p. 56.

188 ibid., p. S29.

189 ibid., p. S29.

that the instruments should have been available to the Parliament at the same time as the Bill.[190]

3.8.23 The Committee was informed that the relevant Minister is 'very relaxed' about giving commitments to publish the draft disallowable instruments some weeks before they are made and to consult the Opposition and the minor parties in the Senate prior to the instruments being made.[191] The Committee was also informed that it is anticipated the disallowable instruments will be drafted by late October.[192] If the draft instruments are distributed at that time, Parliament will have an opportunity to consider the contents of the draft instruments before the Bills complete their passage through the Parliament.

3.8.24 The Committee understands that many details have been left to the disallowable instruments to provide flexibility and to allow changes to be made quickly if problems come to light once the scheme begins. The Committee accepts this but believes that matters of substance should be in the primary legislation rather than in disallowable instruments.

Recommendation 18

The Committee recommends that in general, substantive matters should be included in primary legislation so that the content of the scheme is clear. The inclusion of such matters in disallowable instruments should be the exception rather than the rule.

3.8.25 Further, the Committee believes that in the case of the Employment Services Bill as much of the detail as possible should be included in primary legislation once the scheme has evolved and there is more certainty about matters to be included in some of the disallowable instruments. This is particularly the case where the rights of individuals are directly affected.

Recommendation 19

The Committee recommends that the contents of the disallowable instruments should be reviewed at the end of 12 months in order to determine whether amendments should be introduced to include more detail in the primary legislation.

190 Mr A. Farrar, *Transcript*, p. 64, AYPAC, *Submissions*, p. S136.

191 Mr T. Brennan, *Transcript*, p. 114.

192 Mr T. Brennan, *Transcript*, p. 36.

3.8.26 The Committee notes that it would have been beneficial if the instruments (in the form of exposure drafts) had been available to the Committee for consideration at the same time the Bill was considered. The Committee now suggests that the Government release drafts of the disallowable instruments before the Bills have passed through the Parliament.

Recommendation 20

The Committee recommends that drafts of the disallowable instruments arising from the Employment Services Bill be circulated before the passage of the Bill through the Parliament is completed.

(b) Amendable instruments

3.8.27 The second issue relates to the desirability of the instruments being made amendable. The Minister is agreeable to having the instruments made amendable by either House of Parliament, provided that the mechanism for amending does not risk any significant delay in the commencement of the case management system.[193] Instruments made under the Employment Services Bill would come into effect at the time they were made and continue in effect until amended or disallowed.[194]

3.8.28 There is little material dealing with amendable and partially disallowable instruments. There are some amendable instruments in place, although such instruments are not common. The argument against Parliament amending an instrument is that the enactment of an instrument is an executive action and, according to the separation of powers doctrine, the legislature should not be able to amend the instrument.

3.8.29 Informal discussions have revealed that amendable instruments are subject to a tabling requirement and capable of resolution by either House. An amendable instrument is created by subsections 39BA(4), (6) and (7) of the *National Health Act 1953*. The main difference between amendable and disallowable instruments is that amendable instruments can be amended on the floor of the House. The Committee has considered the option of amendable instruments. Enquiries have revealed that such instruments are unusual and the Committee does not think that the operation of the Bill will benefit from converting the disallowable instruments to amendable instruments.

3.8.30 As previously mentioned, the Legislative Instruments Bill allows the House to defer consideration of a motion of disallowance for up to six months. This provision replaces the previous method of Ministers giving undertakings that

193 DEET, *Submissions*, p. S72.

194 ibid., p. S72.

problems with instruments will be remedied. The provision allowing consideration of a motion of disallowance to be deferred is not akin to an amendable instrument because the instrument cannot be amended on the floor of the House. When consideration of a motion of disallowance is deferred, the rule-maker (and not the Parliament) amends the instrument.

D. Analysis of disallowable instruments

3.8.31 The proposed disallowable instruments, and the content of each instrument, are discussed below.

(a) Subclause 21(3)

3.8.32 The effect of subclause 21(3) is that the Minister may make a written determination about participants in the case management system. The Explanatory Memorandum indicates that the proposed criteria of eligibility for case management includes long term unemployed persons, persons at risk of becoming long-term unemployed, persons eligible to receive the youth training allowance[195] and persons in receipt of Jobsearch or Newstart.

3.8.33 The Bill, as introduced, would have ended participation in case management at the point a person ceased to be registered with the CES. It was suggested that the amendments (allowing for the making of a disallowable instrument addressing when a person is a participant in case management) overcome that rigidity and expand the capacity to include persons receiving unemployment benefits.[196]

3.8.34 The Government amendments to clause 21 differentiate between general and special determinations about participants. It appears that subclause 21(3) may need to be amended to reflect the addition of subclause 21(1A) in the Government amendments.

3.8.35 In justifying the use of a disallowable instrument to describe the participants in the scheme, Mr David Thompson suggested that if the White Paper initiatives work in the way envisaged, the Government may need to change its targets to assist different types of people.[197] The nature of unemployment and varying impact in different regions may result in different types of people being eligible for assistance.[198] However, the determination of participants in case management is central to the legislative scheme and it is desirable that potential participants be able to ascertain with some certainty whether they fall within the specified

195 Explanatory Memorandum, p. 17.

196 Mr T. Brennan, *Transcript*, p. 118.

197 Mr D Thompson, *Transcript*, pp. 58–59.

198 ibid., p. 59.

categories of participants. The need for certainty can be met to some extent by an early circulation of the draft disallowable instrument.

3.8.36 The Committee accepts the justification for using a disallowable instrument to specify the participants in the scheme. Notwithstanding the fact that the determination of participants is a key issue, it is understood that the instrument may need to be amended quickly to cater for sudden fluctuations in unemployment.

(b) Subclause 22(5)

3.8.37 The effect of subclause 22(5) is that the Minister may make a written determination as to the event or circumstance that constitutes a terminating event and causes the person to cease to be a participant in the case management system. The Explanatory Memorandum states that:

> As the Act is setting up a new system of case management, it is impossible at this stage to identify the full range of situations where case management should come to an end.[199]

3.8.38 During the hearings, the Committee was informed that there are four 'key outcomes' that would be the focus of case management. Those outcomes are full-time employment, part-time employment with some other activity (for example, work experience), placement in full-time education or training (but not a training program) and work opportunities (such as Nettforce traineeships[200] or the Job Compact program). Examples of terminating events, listed in the explanatory memorandum, include where a person has spent three months in unsubsidised employment or where a person has spent 18 months being case managed.

3.8.39 The Committee recognises the need for flexibility and it accepts it is appropriate that the terminating events be included in a disallowable instrument at the outset. However, the Committee believes these matters should eventually be included in the legislation as the determination of terminating events will directly affect the rights of individuals. It suggests that the matter should be reviewed in 12 months to see whether the terminating events, that cause a person to cease to be a participant in the case management scheme can be determined with some degree of certainty. This detail could then be included in the legislation.

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199 p. 17.

200 Ms J. Kirner, *Transcript*, p. 9.

Recommendation 21

The Committee recommends that the disallowable instrument in clause 22 be reviewed in 12 months to see whether the terminating events, that cause a person to cease to be a participant in the case management scheme, could be included in the legislation.

(c) Subclause 25(6)

3.8.40 The effect of subclause 25(6) is that the Minister may make a written determination as to the matters, other than those listed in proposed subsection 25(5), that the CES must take into account in making a decision to refer a person to a case manager.

3.8.41 It is arguable that a comprehensive list of matters, to be specified in the Minister's determination, could be included in the proposed legislation. Factors that may be important in deciding to refer a person to a case manager include the person's education and training background, the person's employment history, the person's previous participation in labour market programs, the needs of particular clients (for example, sole parents or those with disabilities), the specialisation of particular case managers and the geographic location of the unemployed person. The committee believes these matters could be placed in the legislation so the matters the CES takes into account in its decision are clear on the face of the legislation. However, the Committee does not want the commencement date of the case management scheme to be delayed. With that in mind, it is recommended that the content of the disallowable instrument be reviewed in 12 months to assess whether it could be included in the legislation.

Recommendation 22

The Committee recommends that the disallowable instrument in clause 25 be reviewed in 12 months to see whether the relevant matters the CES must take into account, in making a decision to refer a person to a case manager, could be included in the legislation.

(d) Subclause 26B(5)

3.8.42 The effect of subclause 26B(5) is that the Minister may make a written determination as to the matters, other than those listed in proposed subsection 26B(4), that the CES must take into account in making a decision to refer a person to a new case manager where the CES decides not to interview the person. For the

reasons outlined above, the Committee believes the matters could be included in the legislation but it does not wish to delay the operation of the scheme.

Recommendation 23

The Committee recommends that the disallowable instrument in clause 26B be reviewed in 12 months to see whether the relevant matters the CES must take into account – in making a decision to refer a person to a new case manager where the CES has decided not to interview the person – could be included in the legislation.

(e) Subclause 26C(6)

3.8.43 The effect of subclause 26C(6) is that the Minister may make a written determination as to the matters, other than those listed in proposed subsection 26C(5), that the CES must take into account in making a decision to refer a person to a new case manager where the CES decides to interview the person. Similar factors to those listed at paragraph 3.8.41 are relevant.

Recommendation 24

The Committee recommends that the disallowable instrument in clause 26C be reviewed in 12 months to see whether the relevant matters the CES must take into account – in making a decision to refer a person to a new case manager where the CES decides to interview the person – could be included in the legislation.

(f) Subclause 30(4)

3.8.44 The effect of subclause 30(4) is that ESRA may make written determinations concerning those services that are considered to be case management services and those services that are outside the scope of the scheme. Case management services are defined broadly in subclause 30(1) as assisting a participant in the case management system to find employment.

3.8.45 The explanatory memorandum states that the disallowable instrument will allow ESRA to define what is involved in the provision of case management services in the light of experience gained in developing such services.[201] Mr Thompson agreed that a disallowable instrument may be appropriate in these circumstances as

201 Explanatory Memorandum, p. 21.

case management could not be defined at present because it is not known how it will operate.[202]

3.8.46 However, the services that case management will include is a central issue to the operation of the scheme. It is arguable that, from the outset, those involved (both participants and case managers) should be aware of the type of services it is anticipated the scheme will provide. During the public hearings Michael White, of DPIA, suggested that an outline of case management was needed.[203] His supplementary submission states that:

> Case Management is primarily about the management of a range of processes that combine together to produce an outcome that is the desired outcome of all parties to the process. For Case Management to be effective, there needs to be clearly defined roles and responsibilities of all parties with little or no overlap.[204]

3.8.47 Mr White suggests that notions of shared responsibility, facilitation and flexibility are integral notions of a case management scheme, yet they are absent from the DEET model.[205] Mr White also states that case management is a multi-faceted process requiring great flexibility, and it would be difficult, if not impossible, to legislate for this flexibility.[206]

3.8.48 In DEET's supplementary submission, the anticipated functions of a case manager were outlined. Those functions include:

(a) identification and assessment of each job seeker's employment aspirations, capacities, needs and barriers to employment;

(b) negotiating with the job seeker a jointly agreed return to work plan designed to take advantage of the job seeker's strengths and overcome the job seeker's employment barriers;

(c) submission of the case management activity agreement to the CES;

(d) the provision of active and regular assistance to each job seeker to fulfil the requirements of the activity agreement;

(e) monitoring and reporting to the CES of apparent breaches of the activity agreement;

(f) job placement assistance and post-placement assistance and support;

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202 Mr D. Thompson, *Transcript*, p. 58.

203 Mr M. White, *Transcript*, p. 98.

204 DPI(A), *Submissions*, p. S145.

205 ibid., p. S145.

206 ibid., p. S146.

(g) maintaining records in the manner prescribed by ESRA; and

(h) reporting to ESRA as required.[207]

3.8.49 Given that the scheme is in its infancy, the Committee accepts that case management services should be described in an instrument at the beginning of the scheme's operation. The Committee recognises that flexibility is a key issue in any definition of case management services. However, as the services case management includes are central to the scheme, the Committee favours the inclusion of a description of case management services in the legislation once the scheme has been in operation for 12 months.

Recommendation 25

The Committee recommends that the provision for a disallowable instrument in subclause 30(4) should be reviewed in 12 months, to determine whether a definition of case management services should be included in the legislation.

(g) Subclause 32(13)

3.8.50 The effect of clause 32(13) is that the Minister may make written determinations concerning those persons who become eligible for the Job Compact at a specific time and any event or circumstance that constitutes a terminating event, causing a person to cease to be eligible for the Job Compact.

3.8.51 In relation to a determination of the persons that are eligible for the Job Compact, the argument outlined at paragraph 3.8.35 may be relevant, that is, the Government may need to change its targets depending on variations in the labour market. The Committee accepts that using a disallowable instrument to list those eligible for the Job Compact is justified.

3.8.52 No submissions or evidence were received on events that cause ineligibility for the Job Compact under subclause 32(12). As discussed at paragraph 3.8.37, terminating events may be capable of being determined with some certainty after 12 months and consideration should be given then as to whether the events could be included in the legislation.

207 DEET, *Submissions*, pp. S72–73.

Recommendation 26

The Committee recommends that the relevant disallowable instrument in clause 32 be reviewed in 12 months to see whether the events which cause a person to cease to be eligible for the Job Compact could be included in the legislation.

(h) Subclause 39(7)

3.8.53 The effect of subclause 39(7) is that the ESRA board must make an instrument that details the accreditation scheme for case managers. The Committee was informed that ESRA was 'almost in a position' to present the disallowable instrument detailing the accreditation system to the Minister.[208] The requirements of case managers to be included in the instrument dealing with accreditation, were discussed. Those requirements include a competency requirement, which may refer to a demonstrated track record in case management and appropriate qualifications (for example, previous involvement in case management).[209] Financial stability must also be demonstrated, as must reasonable premises with facilities that allow privacy for interviews.[210] Potential case managers must also demonstrate preparedness to conform to occupational health and safety standards and equal opportunity requirements.[211] The final requirement is that the case manager must have the ability to store documents appropriately, as required by the Employment Services Bill and the *Privacy Act 1988.*

3.8.54 While it appears that the broad details of the accreditation scheme have been considered, the Committee does not feel it appropriate that the requirements for accreditation be included in the proposed legislation. A number of issues concerning the practicalities of accreditation will need to be developed after the case management scheme begins.

3.8.55 The need for ensuring the same accreditation system applies to both contracted case managers and case managers working under the auspices of EAA was commented upon by a number of witnesses.[212] The Committee does not share the concerns of these witnesses, noting that the EAA (as part of the public sector) will have the characteristics detailed in 3.8.53 from the commencement of its operation.

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208 Ms J. Kirner, *Transcript*, p. 4.

209 ibid., p. 5.

210 ibid., p. 6.

211 ibid., p. 6.

212 Mrs S. Taylor, *Transcript*, p. 106.

(i) Subclause 50(3)

3.8.56 The effect of subclause 50(3) is that the ESRA Board must make a written instrument that declares codes of practice relating to the provision of case management services. The codes of practice envisaged at present relate to service ethics and standards, advertising, standards of premises and facilities and financial and resource management.[213] The Committee notes that the fact a person is accredited does not automatically mean ESRA will engage that person as a contracted case manager.[214]

3.8.57 The Committee agrees that those codes of practice are best placed in disallowable instruments. That approach will readily facilitate amendment of the codes as issues come to light.

(j) Subclauses 51(3) and 52(3)

3.8.58 The effect of clause 51(3) is that the Minister may give written directions to the National Director of the CES concerning the assistance the CES will give to case managers. The DEET supplementary submission states that provision will be made within this instrument for the CES to allow case managers to display material advertising their services within CES offices.[215]

3.8.59 The effect of clause 52(3) is that the Minister may make a written instrument that formulates a scheme for the provision of information technology assistance to case managers.

3.8.60 It was suggested, during the hearings, that subclauses 51(3) and 52(3) are crucial areas for the effective operation of the system and one of the most urgent areas requiring detail.[216] It was also stated that contracted case managers must have the same access to information concerning job vacancies as EAA case managers and an information system would need to be developed to facilitate that access.[217] Mr Farrar also pointed out that clause 52 makes provision for a fee-for-service model to be imposed in relation to information technology services.[218] He suggested that, '[t]here is some danger that . . . this could impose a cost burden which in effect is simply cost shifting from DEET to the new competitive case managers, and that kind of cost shifting may rule out potential providers.'[219]

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213 Ms J. Kirner, *Transcript*, p. 7.

214 DEET, *Submissions*, p. S81.

215 *Submissions*, p. S75.

216 Mr A. Farrar, *Transcript*, p. 70.

217 Ms J. Kirner, *Transcript*, p. 5.

218 Mr A Farrar, *Transcript*, pp. 70–71.

219 ibid., p. 71.

3.8.61 It is evident that issues concerning equality of access to information and information technology are crucial if the case management scheme is to operate competitively and fairly. It is understood that DEET is currently examining information technology redevelopment in the context of the services it provides. The equality of access issues raised by the case management scheme could be usefully considered in that project.

3.8.62 Instruments detailing the provision of assistance and information technology to case managers may take a considerable amount of time to formulate. For that reason, the Committee considers that those matters are best placed within secondary legislation rather than the principal Act.

Recommendation 27

The Committee recommends that the Government carefully consider issues of equality of access to information on job vacancies for contracted case managers and the provision of information technology services to those case managers.

(k) Subclause 53(7)

3.8.63 The effect of subclause 53(7) is that the ESRA Board may make a written determination that certain documents are case management documents and it may make a written instrument that formulates rules about the destruction of such documents or the provision or return of such documents to the CES. The Government amendments require that the ESRA Board must consult the Privacy Commissioner before either instrument is made and that the rules must not be inconsistent with the *Privacy Act 1988*.

3.8.64 The determination of case management documents and the rules relating to such documents are central concerns in ensuring that the privacy of participants in the case management scheme is preserved. It is the Committee's view that every effort should be made to ensure that the rules concerning the storage of case management documents are determined before the scheme comes into operation. However, the Committee does not wish the implementation of the scheme to be delayed for this reason. Once the case management scheme has been operative for 12 months, consideration should be given to including a definition of case management documents and the case management document rules in the legislation.

Recommendation 28

The Committee recommends that the disallowable instruments in clause 53 be reviewed in 12 months to determine whether a definition of case management documents and the case management document rules could be incorporated in the legislation.

(l) Subclause 54(3)

3.8.65 The effect of subclause 54(3) is that the ESRA Board may make a written determination creating duties of non-disclosure for the purposes of applying section 70 of the *Crimes Act 1914* to case managers. A case manager who performs services for, or on behalf of, a public authority under the Commonwealth is a Commonwealth officer.[220] Section 70 prohibits a Commonwealth officer from disclosing information which came to his or her knowledge, or into his or her possession, by virtue of him or her being a Commonwealth officer and which it is his or her duty not to disclose.

3.8.66 The duty of non-disclosure is created by regulation 35 of the *Public Service Regulations*. Regulation 35 states that no information or official papers concerning public business or any matter of which an officer or employee has knowledge of officially shall be disclosed, either directly or indirectly. An 'officer' is defined in the *Public Service Act 1922* as a person appointed or transferred to the Public Service. That definition would not include a case manager. Consequently, there is a need for duties of non-disclosure to be created for case managers. The Committee accepts that a disallowable instrument is necessary in this context to bring case managers within the ambit of section 70 of the Crimes Act.

220 See the definition of 'Commonwealth officer' in subsection 3(1)(c) of the *Crimes Act 1914*.

4 Conclusions and list of recommendations

4.1 Conclusions

4.1.1 The Committee found that there is strong support for this legislation, and for the case management approach to the delivery of employment services that it introduces.

4.1.2 The evidence highlighted the close relationship between some of the programs within the employment portfolio and the social security portfolio. This creates an obvious need for close correlation between the legislative support structures provided by each of the social security and the employment, education and training portfolios.

4.1.3 The Committee is satisfied that the Bill provides protection for sensitive personal information, and recognises that some persons in the private sector will need to adjust to working with an increased awareness of the need to set and follow procedures. As a result of this Bill persons in the private sector will be introduced to rights and obligations under administrative law, notably those arising from the FOI Act, the Ombudsman Act and the Privacy Act.

4.1.4 The necessary amendments should be made as soon as possible. The Committee is aware that the Government's program is to have this element of the employment policy in place for commencement on 1 January 1995. The Committee agrees that assisting unemployed persons to gain productive and satisfying work is of great importance.

4.1.5 The Committee recognises that this legislation attempts to provide the structure for an innovative approach to the delivery of employment services in Australia, and welcomes this first step towards the development of a competitive environment for the supply of employment services.

4.2 Consolidated list of recommendations

4.2.1 For the convenience of readers, the Committee's recommendations are consolidated below.

Recommendation 1

The Committee recommends that the Bills be passed by the House after the acceptance of this report. (p.8)

Recommendation 2

The Committee recommends that the definition of case management services in the Bill be adjusted to reflect more accurately the case manager's responsibility to assist job seekers both to find and to maintain secure employment. (p.11)

Recommendation 3

The Committee recommends that special attention should be given to the needs of people with disabilities and other disadvantaged groups, such as sole parents, in the formulation of the disallowable instrument specified in clause 21(3) of the Employment Services Bill. (p.13)

Recommendation 4

The Committee recommends that ESRA and DEET examine closely the payment for outcomes, particularly payment for placement into subsidised employment, to ensure that Commonwealth funds are being expended appropriately and that the Commonwealth is not paying twice for an individual placement to be arranged. (p.15)

Recommendation 5

The Committee recommends that ESRA's measurement of outcomes take into consideration:

(a) the difficulty of obtaining outcomes in rural and remote areas; and

(b) the need to maintain services in these areas, regardless of their cost-effectiveness. (p.16)

Recommendation 6

The Committee recommends that the Employment Services Bill be amended to include more information on the purpose of the Area Consultative Committees and an indication of their composition. (p.18)

Recommendation 7

The Committee recommends that the government give detailed consideration to the introduction of a statutory framework for DEET's labour market programs. (p.19)

Recommendation 8

The Committee recommends that case managers should not be able to refuse clients and that case loads should involve a mix of clients, where possible, unless the case manager is a 'specialist' under clause 44(1) of the Bill. (p.23)

Recommendation 9

The Committee recommends that ESRA monitor closely the development of specialist case managers to ensure that all job seekers are adequately catered for, particularly those groups where cultural considerations may need special attention. (p.25)

Recommendation 10

The Committee recommends that labour market program funds should not be used as an incentive for minimising job seeker access to labour market programs. (p.27)

Recommendation 11

The Committee recommends that it is essential that sufficient notice be given before income support payments are deferred due to breach of obligations. (p.33)

Recommendation 12

The Committee recommends that the accreditation scheme created by clause 39 of the Employment Services Bill include a determination of an appropriate ratio of participants to case managers and that this ratio be used to determine an upper limit to referrals and participants for any individual case management organisation.

The Committee also recommends that ESRA monitor its ability to control contracted case managers and report any problems in this area to the Minister. (p.38)

Recommendation 13

The Committee recommends that the application of the codes of practice be included in the accreditation scheme and that DEET investigate the possibility of removing from the Employment Services Bill the potential for the codes of practice to be advisory only. (p.39)

Recommendation 14

The Committee recommends that the legislation should be amended to provide for the Commonwealth Ombudsman to be able to advise ESRA directly about complaints where they will be relevant to ESRA's functions.

The natural justice safeguards under the *Ombudsman Act 1976* which apply to reports to ministers and the government should apply to such reports to ESRA. (p.47)

Recommendation 15

The Committee recommends that ESRA, in consultation with the Attorney-General, the Commonwealth Ombudsman, the Privacy Commissioner and other appropriate organisations, develop and implement an education and training strategy for case managers to ensure that they are aware of their legal obligations when delivering case management services. (p.49)

Recommendation 16

The Committee recommends that resources be made available for:

(a) the extension of the administrative law package to the activities of case managers; and

(b) conducting an intensive education and training strategy for case managers. (p.51)

Recommendation 17

The Committee recommends that the Government consider whether the Employment Services Bill, once enacted, should be included in Schedule 2 to the Legislative Instruments Bill. (p.54)

Recommendation 18

The Committee recommends that in general, substantive matters should be included in primary legislation so that the content of the scheme is clear. The inclusion of such matters in disallowable instruments should be the exception rather than the rule. (p.57)

Recommendation 19

The Committee recommends that the contents of the disallowable instruments should be reviewed at the end of 12 months in order to determine whether amendments should be introduced to include more detail in the primary legislation. (p.57)

Recommendation 20

The Committee recommends that drafts of the disallowable instruments arising from the Employment Services Bill be circulated before the passage of the Bill through the Parliament is completed. (p.58)

Recommendation 21

The Committee recommends that the disallowable instrument in clause 22 be reviewed in 12 months to see whether the terminating events, that cause a person to cease to be a participant in the case management scheme, could be included in the legislation. (p.61)

Recommendation 22

The Committee recommends that the disallowable instrument in clause 25 be reviewed in 12 months to see whether the relevant matters the CES must take into account, in making a decision to refer a person to a case manager, could be included in the legislation. (p.61)

Recommendation 23

The Committee recommends that the disallowable instrument in clause 26B be reviewed in 12 months to see whether the relevant the CES must take into account – in making a decision to refer a person to a new case manager where the CES has decided not to interview the person – could be included in the legislation. (p.62)

Recommendation 24

The Committee recommends that the disallowable instrument in clause 26C be reviewed in 12 months to see whether the relevant matters the CES must take into account – in making a decision to refer a person to a new case manager where the CES decides to interview the person – could be included in the legislation. (p.62)

Recommendation 25

The Committee recommends that the provision for a disallowable instrument in subclause 30(4) should be reviewed in 12 months, to determine whether a definition of case management services should be included in the legislation. (p.64)

Recommendation 26

The Committee recommends that the relevant disallowable instrument in clause 32 be reviewed in 12 months to see whether the events which cause a person to cease to be eligible for the Job Compact could be included in the legislation. (p.65)

Recommendation 27

The Committee recommends that the Government carefully consider issues of equality of access to information on job vacancies for contracted case managers and the provision of information technology services to those case managers. (p.67)

Recommendation 28

The Committee recommends that the disallowable instruments in clause 53 be reviewed in 12 months to determine whether a definition of case management documents and the case management document rules could be incorporated in the legislation. (p.68)

Daryl Melham MP
Chair

Appendix 1

Details of public hearings

Canberra, 31 August 1994

Interim Employment Services Regulatory Authority
Ms Joan Kirner
Chairperson

Mr David Eldridge
Board member

Department of Employment, Education and Training
Mr Nick van Weelden
Assistant Secretary
White Paper Implementation Branch

Commonwealth Ombudsman Office
Ms Philippa Smith
Commonwealth Ombudsman

Ms Mary Perrett
Acting Deputy Ombudsman

Department of Employment, Education and Training
Mr Ian Campbell
First Assistant Secretary
Employment Programs Delivery Division

Mr Thomas Brennan
Assistant Secretary
Legal Branch
Performance and Review Division

Human Rights and Equal Opportunity Commission
Mr John Morison
Acting Head
Privacy Branch

Canberra, 1 September 1994

National SkillShare Association Ltd
Mr David Thompson
Chief Executive Officer

Australian Council of Social Service
Mr Adam Farrar
Policy Manager
Future of Work Program

Attorney-General's Department
Ms Madeline Campbell
Principal Counsel
Administrative Law Unit
Civil Law Division

Mr Philip Jamieson
Principal Counsel
International Civil and Privacy Branch
Civil Law Division

Ms Kathy Leigh
Senior Government Counsel
International Civil and Privacy Branch
Civil Law Division

Mr Richard Morgan
Senior Government Counsel
Family and Administrative Law Branch
Civil Law Division

Brotherhood of St Laurence
Mr Ian Brain
Director
Central Highlands Region

Department of Employment, Education and Training
Mr Thomas Brennan
Assistant Secretary
Legal Branch
Performance and Review Division

Mr Mark Molloy
Senior Legal Adviser
Legal Branch
Performance and Review Division

Disabled People's International (Australia) Ltd
Mr Michael White
Executive Director

Australian Council for the Rehabilitation of the Disabled
Ms Susan Taylor
Deputy Executive Director

Aboriginal and Torres Strait Islander Commission
Mr James Ramsay
Assistant General Manager
Economic Development Policy Branch

Mr Jeffrey Yong
Manager
Employment and Training Policy

Appendix 2

List of submissions

Submission No.	Individual/Organisation	Date of Submission	Page
1	Mr John Rome Project Co-ordinator Welfare Rights Centre	30 August 1994	S 1
2	Mr Ian Campbell First Assistant Secretary Employment Programs Delivery Division Department of Employment, Education & Training	31 August 1994	S 12
3	Mr John Morison Acting Head Privacy Branch Human Rights & Equal Opportunity Commission	31 August 1994	S 24
4	Mr Adam Farrar Policy Manager Future of Work Program Australian Council of Social Service	1 September 1994	S 28
5	Mr Michael White Executive Director Disabled Peoples' International (Australia) Ltd	1 September 1994	S 35
6	Mr C J Louttit President ACT Chamber of Commerce and Industry Ltd	1 September 1994	S 44
7	Mrs Susan Taylor Deputy Executive Director ACROD	6 September 1994	S 49
8	Ms Philippa Smith Commonwealth Ombudsman	7 September 1994	S 53
9	Mr Stephen Langman Welfare Rights and Legal Centre	7 September 1994	S 58
10	Mr Bob Laine Director Work Resources Centre	7 September 1994	S 62

Submission No.	Individual/Organisation	Date of Submission	Page
11	Mr Peter J. Hill	7 September 1994	S 65
12	Mr Tom Brennan Assistant Secretary Legal Branch Department of Employment, Education & Training **(Supplementary Submission to No.2)**	9 September 1994	S 68
13	Mr Geoffrey Dabb First Assistant Secretary Criminal Law Division Attorney-General's Department	8 September 1994	S 128
14	Dr Susan Kenny President Administrative Review Council **Exhibit 3**	12 September 1994	S 132
15	Mr Julian Pocock Australian Youth Policy and Action Coalition	12 September 1994	S 135
16	Ms Betty Hounslow Director Australian Council of Social Service **(Supplementary Submission to No.4)**	13 September 1994	S 138
17	Mr Michael Raper Director Welfare Rights Centre **(Supplementary Submission to No.1)**	13 September 1994	S 140
18	Mr Michael White Executive Director Disabled Peoples' International (Australia) Ltd **(Supplementary Submission to No.5)**	7 September 1994	S 146
19	Mr Michael Raper Director Welfare Rights Centre **(Supplementary Submission to No.17)**	14 September 1994	S 147

Submission No.	Individual/Organisation	Date of Submission	Page
20	Mr Michael Raper Director Welfare Rights Centre **(Supplementary Submission to No.19)**	14 September 1994	S 148
21	Mr H N Johnston Deputy Secretary Programs Department of Social Security	20 September 1994	150

Appendix 3

List of exhibits

Exhibit number	Exhibit
1	List of disallowable instruments - presented by the Committee
2	Submission to the Committee on Employment Opportunities - presented by National Skillshare Association Ltd.
3	Terms of reference - Review of Freedom of Information Legislation - presented by Administrative Review Council

Appendix 4

List of members of the interim ESRA Board

Mrs Joan Kirner (Chair)

Ms Norah Breekveldt, Toyota Australia

Mr David Eldridge, Salvation Army

Ms Marion Gaynor, Australian Council of Trade Unions

Mr Philip Holt, NSW Chamber of Manufactures

Ms Lorraine Martin, Lorraine Martin Business College

Appendix 5

List of disallowable instruments

clause	
21(3)	Determination, by the Minister, under subclause (1) concerning who will become participants in the case management system.
22(5)	Determination, by the Minister, under subclause (2) as to when a person ceases to become a participant in the case management system and what constitutes a terminating event.
25(6)	Determination under subclause (5) concerning matters to be taken into account by the CES in making a decision to refer a person to a case manager.
26B(5)	Determination, by the Minister, under subclause (4)(a) concerning matters to be taken into account by the CES in making a second or subsequent referral to a case manager.
26C(6)	Determination, by the Minister, under subclause (5)(a) about matters to be taken into account if CES decides to refer a person to a new case manager.
30(4)	Written determination, by ESRA, under subclauses (2) and (3) on what constitutes the provision of case management services and what are not considered to be the provision of case management services.
32(13)	Determination, by the Minister, under subclause (10) or (12) concerning eligibility for the Job Compact and a terminating event that ceases eligibility.
39(7)	Instrument under subclause (1) concerning formulation by the ESRA Board of an accreditation scheme.
50(3)	Instrument under subclause (1) declaring codes of practice relating to the provision of case management services, to be developed by ESRA.
51(3)	Instrument under subclause (1) by the Minister giving directions to the National Director of the CES about the provision of assistance by the CES to case managers.
52(3)	Instrument, by the Minister, under subclause (1) formulating a scheme for the production of information technology assistance by the Department to case managers.

53(7)	Instrument, by ESRA, under subclauses (2) and (3) specifying documents that are case management documents and rules concerning their creation, handling, copying, amendment, return to the CES, destruction and retention of documents.
54(3)	Determination, by ESRA under subclause (1), creating duties of non-disclosure for the purposes of s.70 of the Crimes Act 1914 to case managers.