NATIONAL WELFARE RIGHTS NETWORK

17 October 2014

Senator Bridget McKenzie
Chair
Senate Education and Employment Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: eec.sen@aph.gov.au

Dear Senator McKenzie,

Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Bill 2014

The National Welfare Rights Network (NWRN) is the peak body for legal services specialising in social security, family assistance and employment assistance law and Centrelink administration. The Network includes 14 community legal centre members and three Aboriginal legal service associate members. There are member centres located in every State and Territory. Member Centres provide on the ground advice and casework services to vulnerable social security recipients, including in the area of social security compliance penalties.

For 30 years, our Member Centres have assisted clients affected by social security compliance decisions. Depending on the matter, this may include telephone advice, assistance liaising with National Participation Solutions Teams, assistance pursuing internal review and formal representation at the Social Security Appeals Tribunal and the Administrative Appeals Tribunal.

The NWRN is well placed to make submissions about the Bill and welcomes the opportunity to provide a submission to this Senate Inquiry.

Please find our submission attached for your consideration.

Yours sincerely

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NATIONAL
WELFARE RIGHTS
NETWORK

Submission to the

Senate Standing Committee on Education and Employment

on the

Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Bill 2014

Contents

1 Summary of recommendations

The NWRN recommends:

1. that restrictions on appeal to the Secretary and Social Security Appeals Tribunal be removed from the bill

2. that the bill be amended to ensure the inclusion of a first warning suspension with full back-pay for all compliance penalties (reconnection, no show no pay and non-attendance penalties)

3. that amendments be made to the start date for non-attendance penalties so that they commence from the date a person is actually notified of the non-attendance rather than the date of non-attendance

4. that an item be added to the bill to provide a legislative basis for the Government's intention that suspension will not apply where an appointment is not available within two days

5. that an item be added the bill which ensures (without limiting the Secretary's discretion not to suspend) that the discretion not to suspend will be exercised where a person:

    a. is in stream 3 or stream 4 (or new equivalent)
    b. has a reasonable excuse for non-attendance
    c. has a vulnerability flag

6. that measures that would end suspension once the person notifies that they will attend a rescheduled appointment be removed from the bill. Failing that, we recommend that an item be added to the bill to provide a legislative basis for the existing administrative practice which limits the snowballing of penalties by ceasing the application of penalties once a comprehensive compliance assessment is triggered

7. that an item be added to the bill to likewise prevent the snowballing of non-attendance penalties

8. that the bill be amended to clarify that where more than one penalty may apply, the more beneficial penalty should be imposed

9. that the measures relating to participation requirements for over 55s be removed.

2 Positive aspects of the bill

The National Welfare Rights Network recognises that this bill is more moderate and balanced than the compliance bills and instruments introduced to parliament earlier this year.

In our view the key to legislating a social security compliance system is to strike the right balance between supporting people to engage to the best of their ability and penalising them for failing to do so. A compliance system which is both reasonable and proportionate is most likely to strike this balance.

We support a compliance system with a graduated approach to penalties administered via transparent, open and accountable processes and decision-making.

We commend the Government for the following aspects of the bill:

- When introducing a new penalty the drafters have ensured that two critical safeguards which apply to other penalties will apply equally to this one; namely,:
    - the reasonable excuse provision, and
    - discretion for the Secretary not to apply the penalty
- The Government has ensured the Secretary has discretion to end suspension early
- There is clearly an intention that non-attendance penalties will be relatively small.
- It makes sense, in light of the proposed scheme, to enable employment service providers to make telephone appointments to ensure reconnection appointments occur as quickly as possible

However, we do have a number of significant concerns about the Bill.

3 Problems with the bill

3.1 Removal of appeal rights

The decision to suspend a person's payment for certain failures will no longer be reviewable by either the secretary (ie no review by an Authorised Review Officer) or the Social Security Appeals Tribunal. Specifically the following will be non-appellable decisions

- Suspension for non-participation in EPP activity,
- Suspension for non-attendance at appointment required by EPP
- Suspension for non-attendance at appointment required by s63(2) notice
- Decision to withhold whole of fortnightly payment

The Government's rationale is that people will find it easier to comply (and have the suspension lifted) than to seek review of the suspension decision. It contends that these appeal rights can therefore be removed with no apparent practical effect on the ground.

Our objections

We object to the restriction of appeal rights in relation to compliance suspension decisions. Administrative appeal rights are critical to ensure the ongoing integrity of the system and the confidence of the public at large as well as social security recipients.

Parliament should require a powerful justification before agreeing to the removal of appeal rights. We agree that few people, once their payments are restored, would pursue an appeal against a suspension. However, we do not think that this warrants removal of the right to appeal against the suspension.

Further, restricting appeal rights on the basis that few people would exercise the right to appeal, or that the impact on people would be small, ignores the general unfairness. It also ignores the potential disengagement and undermining of a person's relationship with DHS and employment services that can occur when a person cannot correct a decision, even if the financial loss was only temporary.

Recommendation #1: that restrictions on appeal to the Secretary and Social Security Appeals Tribunal be removed from the bill

3.2 Suspension and penalties

Currently a person will be immediately suspended for a:

- Failure to comply with reconnection or further reconnection requirement
- Failure to participate in an EPP required activity
- Failure to attend an EPP required appointment

This bill would add to that list the failure to attend an appointment required by s63(2) notice. We have no issue with this. It makes sense to apply the compliance suspension regime, rather than the general suspension in section 63, to activity requirements.

However, the difference now will be the penalty. Under current rules the suspension would:

- only apply to the days in the fortnight when the person failed to meet requirements
- end when the person agreed to attend a reconnection appointment
- have full back-pay when the suspension ends

Under the new bill suspension:

- may apply to the whole fortnightly instalment, irrespective of the number of "failure" days in the fortnight. That is, it will effectively withhold the whole fortnights pay, rather than withholding only the penalty amount.
- will not end until the person actually complies (ie attends the rescheduled appointment)
- from July 2015 back-pay may be reduced by the application of a new "non-attendance" penalty (ie the days from failure until actual attendance)

Non-attendance penalties will be a daily loss of payment from the day of the failure until the day before the reconnection requirement is met.

This is very similar to the reconnection failure penalty, which is daily loss of payment from the day of the failure to meet a reconnection requirement until the reconnection requirement is met.

Our objection

No evidence has been provided to indicate why these measures are required, or why current penalties are insufficient.

3.2.1 Removal of warning penalty

We object to the effective removal of the "warning" penalty that currently exists for missing appointments. Currently a person gets suspended with full back pay once they agree to a rescheduled appointment, and if they miss the rescheduled appointment, a reconnection failure penalty will apply. The reconnection penalty is essentially the same as a non-attendance penalty, except that the non-attendance penalty can apply to the very first appointment a person misses.

We think the warning penalty as it currently exists in s42SA (ie suspension with full back-pay) should be applied to any new penalty for missing appointments.

We note that there is an anomaly in the current system, in that the "no show no pay" penalty does not have a first warning like the current section 42SA suspension provision. There is a general need to harmonise the connection failure regime, no show no pay and new non-attendance regime to ensure that there is a first warning penalty in the form of suspension with full back-pay before any penalty which applies a permanent loss of payment is applied.

Recommendation #2: that the bill be amended to ensure the inclusion of a first warning suspension with full back-pay for all compliance penalties (reconnection, no show no pay and non-attendance penalties)

3.2.2 Start date for penalty

We also consider that the penalty should begin from when the person is notified of the failure, not from when the failure occurred. This will ensure that a person is not penalised for any delay or failure in the notification process. It is unfair to apply the penalty from the date of the failure, because it means that a person may lose several days of payment having only missed one appointment (possibly without realising).

Ensuring that the penalty applies only from the date of notification will further incentivise decision makers to notify the person at the first possible opportunity and will protect in situations where this does not occur.

At section 3.2.5 below we have provided examples of reasons why there may be problems with the notification and reconnection processes for Aboriginal people in remote communities.

> Recommendation #3: that amendments be made to the start date for non-attendance penalties so that they commence from the date a person is actually notified of the non-attendance rather than the date of non-attendance

3.2.3 Discretion to suspend whole payment

We question the need to suspend the person's whole payment as opposed suspending or withholding only the penalty amount. For a person living on the manifestly inadequate Newstart Allowance, a penalty equivalent of one or two day's pay can have a significant impact on the person's ability to meet expenses for that week. There has been no evidence provided to show that a higher penalty is needed.

There is no legislated limit on the number of days the new penalty may accrue. This is also the case currently for reconnection failures. We understand that Government policy intends to keep these penalty periods short, via a policy not to suspend if a reconnection appointment cannot be made within two days.

We think this two day limit is sound policy, but that such a safeguard should be included in the legislation. This is important so that parliamentary scrutiny would apply to any proposal to remove it. We note, in particular, the higher impact any departure from this policy would have on Indigenous people in remote and regional communities where providers do not have a permanent physical presence in the local communities and problems with access to telephones mean that the likelihood of rescheduling appointments within two days is low.

The bill should specifically include the two day limit and set out other circumstances in which the discretion to end the suspension early will apply, including where the person has a reasonable excuse for the non-attendance, without limiting other circumstances in which the discretion may be applied.

The bill should ensure that full suspension does not apply to people in the new equivalent of current stream 3 and stream 4 jobseekers or people with vulnerability.

> Recommendation #4: that an item be added to the bill to provide a legislative basis for the Government's intention that suspension will not apply where an appointment is not available within two days
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> Recommendation #5: that an item be added the bill which ensures (without limiting the Secretary's discretion not to suspend) that the discretion not to suspend will be exercised where a person
>
> a. is in stream 3 or stream 4 (or new equivalent)
> b. has a reasonable excuse for non-attendance
> c. has a vulnerability flag

3.2.4 Potential for snowballing of penalties

In practice at the moment, three days in a row of non-attendance, or three missed appointments triggers a Complex Compliance Assessment (CCA). In the current system there are administrative safeguards for no show no pay and reconnection failures that limit the number of days that a person is penalised:

- suspension ends as soon as the person indicates that they will do a replacement activity/appointment (presently legislated, but proposed to be removed by this bill); and
- three consecutive failures trigger a comprehensive compliance assessment, at which point the penalties stop being incurred (an administrative safeguard, presumably based on the Secretary's discretion not to apply a penalty)

These measures stop penalties from accruing at a rapid rate ("snowballing") pending rescheduling of appointments or the scheduling of a CCA. Stopping penalties once a CCA is triggered prevents the accumulation of penalties for all the days between the failure(s) and the comprehensive compliance assessment taking place.

It is not entirely clear how this new system will play out in practice. We are worried about people for whom there is an inadvertent delay in contacting and reconnecting. We are particularly worried about Aboriginal people in remote areas, for whom remoteness and other factors can complicate the reconnection process (see 3.2.5 below for a detailed list of such factors). Parliament should seek clear information about for how many days no show no pay, reconnection or non-attendance failures will accrue in practice and assurance that the penalties will stop accruing once the comprehensive compliance assessment is triggered. Ideally the administrative safeguard would be drafted into the legislation.

There may be situations where a non-attendance penalty could apply at the same time as a reconnection or no show no pay penalty. Given that the non-attendance penalty is not a

penalty included in s42M (Serious Failure for Persistent non-compliance) the more beneficial decision might be to apply the non-attendance penalty. There is no clarity in the legislation which would apply add unwarranted and further complexity.

By way of comment, we think it necessary to ensure that people are offered the first available appointment (eg, if there is a telephone appointment the same or next day, the Government should ensure that they cannot be made to wait for a face to face appointment at the end of the second day).

> Recommendation #6: that measures that would end suspension once the person notifies that they will attend a rescheduled appointment be removed from the bill. Failing that, we recommend that an item be added to the bill to provide a legislative basis for the existing administrative practice which limits the snowballing of penalties by ceasing the application of penalties once a comprehensive compliance assessment is triggered
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> Recommendation #7: that an item be added to the bill to likewise prevent the snowballing of non-attendance penalties
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> Recommendation #8: that the bill be amended to clarify that where more than one penalty may apply, the more beneficial penalty should be imposed

3.2.5 Aboriginal communities

Aboriginal job seekers are subject to financial penalties to a much greater extent than non-Indigenous job seekers. Despite totalling 10% of job seekers in 2012 to 2013 , Aboriginal job seekers accounted for 28% of all financial penalties imposed, 30% of smaller financial penalties imposed, and 34% of serious failures for 'serious non - compliance' imposed. [1]

The following is feedback we recently received from our affiliate member caseworkers in the Northern Territory on factors impacting on ability to 'reconnect' in Indigenous communities. We note that RJCP are the employment services providers in these communities and that the responsibility for making reconnection appointments has been transferred to employment services providers:

> *"There are a number of factors which impact on Aboriginal people living in remote areas being able to connect with the Department of Human Services or their Remote Jobs and Communities Program providers, which need to be taken into consideration in the drafting of the Bill.*
>
> - *RJCP providers do not have permanent presence in the community, meaning that it is unlikely that appointments can be made within 2 days.*

[1] Senate Standing Committee on Education and Employment, Questions on Notice, Additional Estimates 2012 - 13, Department of Employment Question No. EM0186_14.

- *There is very limited access to communication facilities in remote communities in the Northern Territory. For example, there are no public phones in Milingimbi. If a person does not have mobile phone credit or loses their phone, there may be no way to contact DHS or their RJCP provider.*

- *Centrelink offices do not exist in the majority of remote communities; limited DHS services are provided by agents not employed by DHS. Generally people would not be assisted to contact their RJCP provider, as the phones are hot linked to DHS only. There is a high degree of replacement phones – people change phone numbers regularly.*

- *Mail insecurity is rife – there is no personal mail delivery in remote communities in the Northern Territory, meaning that people routinely do not receive letters or notices from Centrelink delivered to their homes; mail is held by the local council office and Centrelink mail is routinely discarded.*

- *Temporary mobility of Indigenous people in remote parts of the Northern Territory is frequent and widespread for reasons like accessing services, medical treatment, visiting family and discharging cultural obligations. "*

- *The ability to return to the place of residence is impacted by the quality and passability of roads – many roads become impassable during the wet season and people can get stuck at outstations for months at a time.*

This feedback illustrates the need for inclusion of the safeguards and the limited amendments we have recommended for the bill. We would particularly emphasise those amendments which recommend a first warning suspension, a revised start date based on when a person is actually notified of non-attendance and providing a legislative basis for not suspending if an appointment cannot be made within two days.

3.3 Changes for over 55s

The Bill removes the ability of certain people on Newstart Allowance, Special Benefit or Parenting Payment who are 55 or over from satisfying the activity test via 30 hours of approved voluntary or paid work (or a combination of these). The Minister will be able to declare a class of persons within this group to whom this will apply. The explanatory memorandum says the present intention is that this would be jobseekers 55-59 receiving assistance from Job Services Australia.

The 2013 Australian Law Reform Commission (ALRC) inquiry, *Access All Ages*, which inquired into Commonwealth Laws that were barriers to mature age participation recommended against changing the current rules for over 55s.[2] In its discussion paper, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), 127–129 the ALRC stated observed:

[2] http://www.alrc.gov.au/publications/7-social-security/newstart-allowance-and-mature-age-job-seekers at 7.69

> *5.59 In 2009, the Participation Review Taskforce considered the different activity test rules for job seekers aged 55 years and over. It recommended that, in the medium term, mature age job seekers should have the same participation requirements as other job seekers.[101] However, the Taskforce recommended that this change should be preceded by actions to combat negative attitudes towards older workers.[102]*

The ALRC concluded:

> *5.63 The ALRC considers that there should be no further tightening of the current activity test for job seekers aged 55 years and over. The test as it currently operates serves to provide a concession for the barriers to work faced by persons in this age group. Given that job seekers may voluntarily continue to engage with their employment services provider, the current activity test requirements do not appear to be acting as a barrier to mature age participation.*
>
> *5.64 In addition, the concessional activity test recognises the value of volunteering, not only as a potential pathway to paid employment, but also as a form of productive work in its own right.[111] [3]*

The NWRN is not aware of any evidence that the negative attitudes towards older workers have improved to the point where it is appropriate to remove this provision for jobseekers over 55.

There is little evidence to support the assertion that the Newstart Allowance is being used as a vehicle for early retirement. However, there is a wealth of evidence on the difficulties faced by older people trying to find employment a large increase in the numbers of older people that are receiving the Newstart Allowance.

Three in 10 people on the Newstart Allowance are aged over 50. Higher rates of disability among older people, combined with age discrimination are some of the main issues facing mature age job seekers. There were nearly 130,000 unemployed people aged in the age bracket 55-65 in March 2014. Of these, almost half, 64,092 (49 per cent) are aged under 60 and are likely to be negatively impacted by any changes restricting access to the existing arrangements for job seekers over 55.[4]

Currently, there are 63,048 older people who are undertaking approved full-time voluntary work or a combination of voluntary and part-time work. Unemployed mature aged women were over-represented, and made up three-quarters (48,893 or 77%) of those accessing these flexible activity requirements. There were just 14,156 males who received a payment while meeting their activity requirements under these provisions[5].

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[3] http://www.alrc.gov.au/publications/5-social-security/newstart-allowance-and-mature-age-job-seekers

[4] Source: Senate Community Affairs Committee Answers to Questions on Notice, Social Services Portfolio, 2014-15 Budget Estimates Hearings, Question No: 495

[5] Department of Social Services, *Labour Market and Related Payments: a monthly profile*, Table 2, p. 5.

The difficulties finding work due to age discrimination is a major problem in Australia. Sixty-eight per cent of all age discrimination complaints to the Human Rights Commission are about employment.[6] This is backed by the recent Australian Bureau of Statistics' *Job Search Experience* series which found "being considered too old" was the main obstacle to finding job, and was nominated by 31% of those aged over 45.[7]

Recommendation #9: that the measures relating to participation requirements for over 55s be removed.

[6] Wilson, C. *Unemployment among older Australians a national disaster, age discrimination commissioner says*, ABC Radio, 3 November 2013.

[7] Australian Bureau of Statistics, *Job Search Experience, Australia, 2013,* 4 February 2014. Cat. No. 6222.0