

Social security (Streamlined participation requirements) Bill

Submission to Senate Education and Employment
Legislation Committee

9 June 2021

About ACOSS

The Australian Council of Social Service (ACOSS) is a national voice in support of people affected by poverty, disadvantage and inequality and the peak body for the community services and civil society sector.

ACOSS consists of a network of approximately 4000 organisations and individuals across Australia in metro, regional and remote areas.

Our vision is an end to poverty in all its forms; economies that are fair, sustainable and resilient; and communities that are just, peaceful and inclusive.

Summary

This Bill involves considerable redrafting of the primary legislation of the *Social Security Act 1991* and *Administration Act 1999* in relation to activity requirements and compliance for people who are unemployed.

ACOSS's views presented in this submission reflect our overall view that there has been insufficient time to consult on this Bill. The concerns we raise are based on a preliminary analysis of the Explanatory Memorandum, the text of the Bill and cross-referencing with the existing Acts. It is likely that changes beyond those recommended below will be needed.

The present system is harsh and unreasonable, and throws many people into financial hardship as well as causing severe mental distress. 'Mutual obligation' requirements are also unreasonable and counter-productive. Further, people cannot reasonably be expected to undertake such requirements on income support payments of \$44 a day. People are being set up to fail.

We are therefore deeply concerned to ensure that the harshest elements of the system are rectified, not entrenched or extended further.

Our recommendations set out below address the following key points:

1. The timeline for considering this legislation is far too short and should extend for at least two months.
2. Actions needed to ensure that people are not adversely affected:
 - 2.1 'Streamlining' law must not adversely impact people on unemployment payments (Schedule 1)
 - 2.2 Protections against adverse impacts from digital servicing and automated decision-making must be embedded in the legislation (Schedule 1)
 - 2.3 Requirements for people to enter into Job Plan before receiving the first income support payment should be rejected (Schedule 8)
 - 2.4 Requirements for people to undertake work-like activities without workplace protections should be removed, not expanded (Schedule 6)
3. Changes should be made to social security law to *improve* people's wellbeing and employment prospects:
 - 3.2 The legislation should remove harsh and unreasonable activity requirements and compliance systems
 - 3.3 Jobseeker and related payments should be increased
 - 3.4 The opportunity should be taken to put employment program funding on a sound legislative footing.

Discussion

1. The timeline for considering this legislation is far too short

There has not been enough time to digest the implications of the changes, or to explore/test them for unintended consequences. The Bill provides for consolidation and consistency across income support categories. The Explanatory Memorandum asserts that the Bill simply consolidates and streamlines existing rules, a goal we support in principle. Yet such wide-ranging legislation will inevitably have implications for people affected.

In the short time we have had to undertake analysis of the implications of the Bill, we have identified some serious concerns about the protection of conditions for some cohorts of job seekers.

Recommendation 1. We urge the Committee to recommend:

- 1.1 an extension of the reporting period of at least two months, to allow it to hear from people affected, community organisations, and social security experts;**
- 1.2 that the relevant Departments undertake public information sessions and consultation on all Schedules of the Bill.**

2. Actions needed to ensure that people are not adversely affected

2.1 'Streamlining' of activity requirements must not have adverse effects on people (Schedule 1)

The Explanatory Memorandum for the Bill lacks detail, and there has not been sufficient time to scrutinise it with a fine-tooth comb to ensure that existing protections have not been removed or weakened, and that there are no unintended consequences. It is vital that this Committee, the Parliament and stakeholders have adequate time to consider these issues carefully as they have major implications for the wellbeing of people on income support payments, including human rights implications.

In particular, we are concerned that Schedule 1 removes some protections for vulnerable people, and leaves time periods for exemptions from activity requirements for reasons such as domestic violence to the Secretary's discretion.

The streamlining of legislation in Schedule 1 may widen the Secretary's powers to determine the content of job plans, as published in guidelines or regulations rather than primary legislation. This is especially important because the

primary legislation offers limited guidance on what should and shouldn't be in a Jobs Plan, beyond the job search and suitable work provisions.

We propose that the Committee request a detailed side-by-side comparison between existing and proposed law to ensure that protections for people are not weakened by streamlining.

The Committee should assure itself that new Division 2A of the Administration Act, does not adversely interact with Division 2 of the Social Security Act. From our reading, the repeal of divisions of the Act in Schedule 1 removes important protections which are not replaced in Schedule 1.

For example, it is not clear that provisions of existing legislation that limit paid work and other activity requirements for principal carers to 15 hours a week.

- Item 77 repeals subdivisions B, BA and C of Division 1 Part 2.12 of the Act. (p.17 of the Bill)
- Item 21 repeals subdivisions 2, 3 and 3A of Part 2.10 (p.9 of the Bill).

Under those subdivisions, Sections 607 and 607A ensure that activities of more than 15 hours per week cannot be included in job plans for principal carer parents or people with partial capacity to work in receipt of *Jobseeker Payment*. In addition, Sections 501A and 501B of the Act spell out the requirement that activities of no more than 15 hours can be included in pathway plans for *Parenting Payment* recipients. The provisions are not replicated in new Division 2A of the Bill the Administration Act.

The Bill does not appear to replicate the existing limit of 15 hours a week on employment that principal carers and people with partial capacity are required to undertake as part of their Job Plans. Instead, the provisions in Division 2A provide for exemptions from meeting pathway plan requirements.

This example shows that without detailed side by side comparison of provisions in the existing and proposed legislation, it is not possible to fully assess whether people are adversely affected by the removal of legislative protections.

Recommendation 2. The Committee should ensure there are no adverse consequences of the Bill for people on income support by:

2.1 adopting the principle that streamlining and consolidation of legislation regarding activities and compliance for unemployment payments is only supported where it has no adverse implications for recipients of unemployment payments;

2.2 ensuring that the legislation does not lead to adverse changes to activity requirements or exemptions for people with barriers to employment including people with disability, principal carers of young children, and mature age workers.

2.3 recommending that the Bill be referred to the Parliamentary Joint Committee on Human Rights for consideration.

2.2 Protections against potential adverse impacts from automated decision-making should be embedded in the legislation (Schedule 1)

The Bill facilitates the introduction of 'digital employment services', especially in proposed sections 40B and C, in Part 1.4 of the Act (Schedule 1). This is a major change in employment services, which has far-reaching consequences. While the Bill allows people to opt out of digital servicing, risks for those affected include prescription of activities without human intervention, lack of information to exercise effective choices, algorithmic bias, expansion of automated payment suspensions, and privacy risks.

The government's plan to introduce 'digital employment services' for around half the population of people on unemployment payments is a transformational step in the use of digital technology in the provision of Commonwealth government services. This was recommended by the Expert Advisory Panel on Employment Services as a way to increase agency and choice and divert resources to invest in people who are disadvantaged in the labour market. At the same time, the use of machine learning in human services raises major risks for people, including invasion of privacy, denial of timely access to decision-makers and explanation of decisions, barriers to administrative review of decisions, and delays or reductions in payments.

This is well documented in a series of detailed reports on digital servicing and automated decision-making, including a recently-released report from the Australian Human Rights Commission, an earlier report from the Ombudsman on automated decision-making, and the Senate Inquiry into the 'Robodebt' debacle.¹ We must be careful to avoid stumbling into a 'digital dystopia'², and to ensure that the drive to create cost efficiencies does not trump regard for human welfare.³

An example of the current use of automated decision-making in employment services is the automation of payment suspensions where people do not meet activity requirements such as job searches and attending provider interviews. Payments are *automatically* suspended *unless* the person, or the provider, informs the system that they have complied with these requirements. Those decisions clearly have adverse consequences, and should be made by the Secretary or their delegate.

¹ Australian Human Rights Commission (2021), *Human Rights and Technology Final Report*. Sydney; Commonwealth Ombudsman (2007), *Automated Assistance in Administrative Decision Making Better Practice Guide*, February 2007

² Alston, P. (2019). *Report of the Special Rapporteur on Extreme Poverty and Human Rights*. https://www.ohchr.org/EN/newyork/layouts/15/WopiFrame.aspx?sourcedoc=/EN/newyork/Documents/GA74/A_74_48037.docx&action=default&DefaultItemOpen=1

³ Carney, T. (2019) *Robo-debt illegality: The seven veils of failed guarantees of the rule of law?* 10.1177/1037969X18815913

We have been concerned about these issues for some time. In 2019, ACOSS proposed to DESE that a set of 'digital services ethics' be developed specifically for employment services.

The Bill introduces legislative changes to facilitate the transition to digital employment services in the New Employment Services model (NESM). While some of these practices are already implemented (such as digital job plans), Schedule 1 appears to formalise them. In particular, compliance with digital job plans would have the same status as compliance with a job plan approved by a human delegate. In the past, the delegate was an employee of a contracted job service provider, or a departmental official as specified in the Social Security Administration Act.

In practice, job plans were often developed without detailed human review. Default requirements were included semi-automatically, as workers selected predetermined system codes depending on factors already assessed using the Job Seeker Classification Instrument or JSCI (such as being a single parent).

It appears that in future, 'digital services' will also use JSCI factors to identify appropriate job plan requirements, so that machine decisions play a double role, in assessing needs and job plan activity requirements. The resulting 'menu' of activity requirements would be used to implement the proposed Points Based Activation regime.

Whether or not the government plans to extend the use of automated decision-making in the NESM, the Bill appears to facilitate this. It is therefore vital that additional safeguards are legislated.

Recommendation 3: The Committee should recommend that provisions of the Bill facilitating digital decision-making should not be passed until the government commits to:

3.1 consult widely (including with people directly affected, relevant peak bodies and experts) to develop a legislated *code of digital ethics for employment services* including protections in the following areas:

- **privacy (including a ban on use of facial recognition and tracking technology),**
- **protection of personal information,**
- **assurances that people have access to information held on them and which decisions are automated,**
- **personal agency and choice (including in regard to Job Plans),**
- **timely access to decision-makers, reviews and appeals, and**
- **restrictions on automated decision-making where this has adverse consequences (including a ban on automated payment suspensions).**

3.5 establish a standing digital services advisory panel comprising people directly affected, relevant peak bodies and experts to monitor the impact of the use of information technology in

employment services, including automated decision-making, and publish advice to government to prevent and eliminate any harms arising from this.

2.3 Requirements for people to enter into Job Plans before receiving the first income support payment should be rejected (Schedule 8)

The committee should reject Schedule 8, which delays payment start dates for people using digital employment services. The Budget Papers estimate that around 144,000 claimants would have their first payments delayed as a result. This is unacceptable, especially at a time when many people affected by lockdowns need quick access to income support. Budget savings should not be sought at the expense of people at risk of poverty.

If implemented, these provisions would force people to enter into Job Plans hastily, and to agree with options presented to them, contrary to the Expert Advisory Panel's vision of a digital service that increases agency and choice.

In contrast to the view presented in the Explanatory Memorandum, ACOSS believes that this change treats people in digital services inequitably compared to those receiving face-to-face services. Since people's payments are delayed, which raises potential human rights issues.

Currently, clause 4A of Schedule 2 of the Administration Act sets out that payment of Jobseeker Payment or Youth Allowance for 'job-ready' job seekers commences from the day they attend an interview with their employment services provider (if that occurs within two business days of them being given notice of the requirement).

Schedule 8 would insert a new clause 4B in Schedule 2 of the Administration Act which provides that payment will not commence for people referred to online employment services until they have entered into an Employment Pathway Plan online, which the Explanatory Memorandum says will:

'Align start day provisions with those who are referred to a provider and subject to clause 4A.'

In our view Schedule 8 is not needed to correct an existing inequity, and in any event it would do so by *cutting* payments for one group instead of *increasing* them for the other.

Under existing legislation, start dates for existing claimants are back dated to the date of attendance at the initial appointment which must have been scheduled within two business days, not when the job plan is signed. When people don't comply with this requirement their payment can be suspended and not back dated.

Schedule 8 introduces new 'start-day' provisions for people using digital services which do not apply to people using face to face services. This is in an

environment where the usability of digital interfaces, and digital workflows between Services Australia and DESE systems have not been fully developed.

At the point of claim an applicant would not have much information about requirements or services available, so they would lack the information they need to 'negotiate a Job Plan'. Importantly, it appears that users of digital services would be denied the 48 hours 'think-time' available to those using face-to-face services, which gives them time to amend a Job Plan before it is finalised.

In our experience, existing payment claims and digital sign-up processes do not provide sufficient notification to claimants of the requirement to sign job plans. It is not clear the extent to which these processes have been tested with diverse cohorts of people such as culturally and linguistically diverse communities, Aboriginal and Torres Strait Islander people and older people.

The proposed deferral of the first income support payments until people using online services sign on to a Job Plan would needlessly cause financial hardship and pressure people to accept inappropriate automated plans. It raises a host of questions including:

- Could payments be delayed if people disagree with automated plans put to them and ask to negotiate a different plan through the call centre?
- Will people be aware of the remedies available to them when they are unable to promptly complete plans online (for example due to internet failure or system shutdown), to ensure they are back paid to the date of claim?
- How will people be notified they have 'failed' to complete their job plan and could this notification process lead to delays in the payment start date?
- How will the requirement to complete a job plan online be communicated to job seekers at the point of claim?

Recommendation 4. The Committee should recommend rejection of Schedule 8, which requires people to enter into Job Plan before receiving the first income support payment.

2.4 Requirements for people to undertake work-like activities without standard workplace protections should be removed, not expanded (Schedule 6)

The changes in Schedule 6 could lead to more people being required to undertake work-like activities (such as Work for the Dole) without standard workplace relations protections including minimum wages and workplace health and safety requirements, with less parliamentary scrutiny. The range of so-called 'programs of work' should not be expanded, whether by Legislative Instrument or administrative guidelines.

Schedule 6 allows for the continued exemption of 'programs of work' from workplace laws. It also *extends* this exemption to:

'an employment program; or activity (other than paid work) in accordance with a requirement, or an optional term, of an employment 14 pathway plan' (Part 1.4, paragraphs 40 (1) and (2)).

People on unemployment payments should not be required to work for their benefits, and work placements in employment programs should be subject to standard workplace relations protections including minimum wages and work health and safety laws. As we recommend below, existing programs that lack these protections, including Work for the Dole and Youth Jobs Path internships, should be discontinued.

Recommendation 5. The committee should recommend the removal any provisions of the Bill that may have the effect of increasing the range of employment programs exempted from workplace protections such as minimum wages or health and safety rules, such as:

- the words 'or in an employment program' and 'undertakes an activity (other than paid work) in accordance 13 with a requirement, or an optional term, of an employment 14 pathway plan' in Part 1.4, Paragraph 40.

3. Changes should be made to social security law to *improve* people's wellbeing and employment prospects

The above recommendations reduce the risk that the Bill would have adverse impacts on people affected. The following recommendations are designed to *improve* social security law so that the well-being and employment prospects of people on unemployment payments is improved.

3.1 The legislation should remove harsh activity requirements and compliance systems

The present system is harsh and unreasonable, and throws many people into financial hardship as well as causing severe mental distress:

- Between September 2020 and April 2021, there were 1,339,841 payment suspensions in the jobactive and ParentsNext.
- Psychological distress is already high among people who are unemployed and the constant threat that their only source of income could be taken away aggravates this, increasing the risk of suicides.⁴

⁴ <file:///X:/Policy/Employment/COVID%20recovery2020/butterworth-mental%20health%20and%20covid20.pdf>

- 'Mutual obligation' requirements are also unreasonable and counter-productive. When the standard requirement to apply for 20 jobs a month is reinstated in July employers will again be flooded with applications for positions that are not well-suited to the individual.

Job plan requirements for unemployed people must be designed fairly and with reference to best practice evidence on activities that are effective. The current system gives too much discretion to the Secretary to impose requirements that are onerous, harsh and do not produce tangible employment outcomes.

While the proposed legislation (along with related Legislative Instruments) specifies in some detail requirements regarding job search and acceptance of suitable work, the range of other activities people can be required to undertake is only vaguely described. This is a long-standing gap in social security law.

Paragraph (2) of proposed Section 40G in Subdivision A of the Act (in Schedule 1) goes some way to defining the range of activities that may be included in an employment pathway plan:

'Undertaking of other activities

(2) An employment pathway plan under this Subdivision in relation to 4 a person may contain requirements relating to one or more of the 5 following:

- (a) the person undertaking training or study;
- (b) the person undertaking voluntary work;
- (c) the person participating in an approved program of work for income support payment (subject to section 40J) or in an employment program;
- (d) the person attending an interview with a person engaged by an organisation that performs services for the 13 Commonwealth;
- (e) the person completing, updating or improving the person's résumé."

However, this is diluted by paragraph (5):

'No limit on requirements in plans 29

(5) Subsections (1) to (4) do not limit the requirements that an employment pathway plan may contain."

The broad scope of potential compulsory activities raises fundamental issues over the purpose of social security payments and what is fair for governments to expect recipients to do. The committee should ensure that the legislative scope of activity requirements is reasonable and limited to activities that improve people's employment prospects.

For example, we oppose behavioural requirements in the Social Security Act and program guidelines that could compel people to:

- obtain medical treatment including alcohol or drug treatment;

- change their appearance;
- change their principal place of residence;
- change the way in which they care for their children.

This Committee's review of the Bill is an opportunity to *improve* the system by removing harsh elements of the activity requirement and compliance system. The Committee should ensure that adequate safeguards apply so that participation requirements set by the Secretary in guidelines regarding participation plans are fair, reasonable, proportionate, and subject to parliamentary review.

Recommendation 6: The opportunity should be taken to remove harsh elements of the activity and compliance regime:

- 6.1 A new consultative mechanism should be introduced to advise on activity requirements for people on unemployment payments, with people affected, community organisations, and social security experts represented.**
- 6.2 The Social Security Act should include a definition of 'suitable activities' that limits any activity requirements extending beyond job search and accepting suitable employment to actions that are reasonable, relevant to individual circumstances and barriers to work, and demonstrably likely to improve people's employment prospects.**
- 6.3 The reduced activity requirements for principal carers, people with partial work capacity and mature age workers should be specified in the Social Security Act.**
- 6.4 'Social requirements' such as the care of children (for Parents Next participants) should be removed, including references (in section 40G Schedule 1) to children's health and education outcomes, as a condition for receiving income support.**
- 6.5 Requirements to undertake work-like activities without access to workplace protections and minimum wages, including Work for the Dole, should be removed.**

3.2 Jobseeker and related income support payments should be increased

The current rate of unemployment payments is far too low and harms people's mental health and well being. People need adequate income to facilitate day to day survival and undertake effective job search. People receiving unemployment payments cannot reasonably be expected to undertake job search requirements on income support payments of \$43 a day and this means they are being set up to fail.

Recommendation 7. Jobseeker, Youth Allowance and related payments should be increased to at least \$65 a day, and those payments should be indexed to wage movements as well as price movements.

3.3 The opportunity should be taken to put employment program funding on a sound legislative footing (Schedule 2)

Unlike most major community services programs, employment services funding lacks a dedicated legislative framework. To remove any doubt about the powers of the Commonwealth to fund these services, and ensure accountability to the Parliament, new legislation should be tabled specifically for this purpose. In the interim, the current Bill should be amended to ensure transparency by codifying arrangements for the Secretary to publish basic information on all employment programs.

Recommendation 8:

8.1 The government should commit to bring legislation to the Parliament specifically for the purpose of funding employment assistance programs

8.2 In the interim, the present Bill should be amended to require the Employment Secretary to publish the following information on at least an annual basis:

- **outlays on each program and sub-program;**
- **the number and profile of participants;**
- **the range of services provided;**
- **outcomes achieved;**
- **any program evaluation reports.**

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