



Submission by the
Commonwealth Ombudsman

**THE EMPLOYMENT SERVICES
REFORM REVIEW**

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INTRODUCTION AND SUMMARY

On 25 September 2008, the Senate referred the provisions of the Social Security Legislation Amendment (Employment Services Reform) Bill 2008 (the bill) to the Senate Standing Committee on Education, Employment and Workplace Relations for report by 24 November 2008. The Committee has invited submissions on the bill by 31 October 2008.

The bill will establish a framework for a new compliance system that will make job seekers more accountable for their efforts to find and keep a job. The new framework will apply to persons in receipt of newstart allowance, parenting payment (for those subject to participation requirements), youth allowance (for those who are not full-time students or new apprentices) and special benefit (for nominated visa holders). Currently, the social security law contains different compliance provisions for these four payments and these will be consolidated by the bill.

The bill provides that all substantive measures are to commence on 1 July 2009.

BACKGROUND

The office of Commonwealth Ombudsman is established by the *Ombudsman Act 1976* to investigate administrative actions by Commonwealth agencies. The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

The Ombudsman's office received about 40,000 approaches and complaints in 2007-08. As well as cases generated by complaints, the Ombudsman's office conducts investigations on an 'own motion' basis into wider systemic issues in public administration. The office has extensive investigation powers, but prefers to investigate with less formality and greater efficiency where possible.

Given the nature of the Ombudsman's role, the comments and observations in this submission relate to the issues the office has identified through the complaints it has received. These observations might usefully inform the Committee's considerations of the proposed legislation.

COMMENTS ON PROPOSED AMENDMENTS

In December 2007 the Commonwealth Ombudsman released a report titled *Application of penalties under Welfare to Work*. The underlying investigation identified that the job compliance policies under Welfare to Work were not being applied in accordance with the legislation and was difficult to administer as intended. Customer payments were being stopped before a legitimate decision had been made in accordance with the legislation. This meant the people affected by such actions were denied access to procedural fairness and safety net features such as an independent review of the decision or access to *Financial Case Management*.

The report noted that one particular area of the legislation that was difficult to administer and required clarification was the 'commencement date of non-payment periods'. It also noted high levels of confusion among administrators of the program, particularly Centrelink staff and Job Network Providers about the ongoing participation obligations of people who had incurred 'participation failures'. Affected people were not properly informed, and even more confused about what they were required to do, which in some instances contributed to a non-payment period being imposed that could have otherwise been avoided.

We have examined the bill in the context of the issues identified in our report and complaints we have investigated. We have noted that the proposed changes have introduced levels of administrative discretion that could address the issues identified by the report. We note that this will depend on the policy guidelines as well as how the discretion is applied.

We support the underpinning principles of the reforms which allow more scope for decision-makers to take into account that some people are unable to consistently comply with inflexible activity requirements. The new approach gives people the opportunity to rectify a mistake without worsening their already difficult economic position. It is important that such people are not left without income for their housing, fares, medications, food and everyday financial commitments for eight weeks.

We note however, the need for the new processes to be transparent and clearly conveyed to people to enable them to understand their obligations and take up the options available to them.

We have identified the following three specific issues that we also consider relevant in the context of this inquiry:

- the inability of people with undiagnosed or unstabilised mental illnesses to respond appropriately to participation obligations
- the inability of people affected by an eight-week non-payment period to access their superannuation on the basis of 'severe financial hardship'
- the need to ensure the availability of programs, such as the Personal Support Program for people who need intensive levels of support.

Undiagnosed mental illness

An issue that has surfaced in many of the complaints to the Ombudsman Office is the problem of undiagnosed mental illness, often with no self awareness, among people on activity-based payments. Such people are often unable to comply with their activity agreements, or acquire sustainable work without high levels of support.

The undiagnosed, untreated illness excludes such people from qualifying for disability support pension. Due to the variable nature of how and when such illnesses present, they can be mistaken for bad or abusive behaviour and can be difficult to diagnose, even by qualified professionals.

These people typically also have difficult relationships both with their Job Network Provider and Centrelink. They absorb a high level of administrative resources when assisted with income support payments.

Although we note the proposed reforms will allow decision-makers more flexibility to accommodate the needs of these people, we consider it important that their special needs are recognised and met. For example, under the proposed reforms, this group would be disadvantaged if an assessor did not identify that the person was having a mental health episode, and therefore use the discretion allowed in s 42Q(1)(b) of the bill to end a non-payment period on the basis that the person does not have the capacity to undertake any 'serious failure requirement'.

In such circumstances it is also probable that they will not understand or be inclined to agree to a *serious failure requirement* while their condition remains unstable. The most likely result will be that people in these circumstances will be over-represented amongst those who serve lengthy periods of non-payment.

Early release of superannuation

The Australian Prudential Regulatory Authority (APRA) provides guidance to superannuation funds regarding when it is appropriate to allow people to obtain an early release of superannuation funds. One of the grounds on which a person may seek such a release is 'severe financial hardship'.

The Superannuation Industry (Supervision) Regulations 1994 (the Regulations) set out, at regulation 6.01(5), that:

5. For the purposes of Schedule 1, a person is taken to be in severe financial hardship if:
 - a) the trustee of a superannuation entity is satisfied:
 - I. based on written evidence provided by at least one Commonwealth department or agency responsible for administering a class of Commonwealth income support payments, that:
 - a. the person has received Commonwealth income support payments for a continuous period of 26 weeks; and
 - b. the person was in receipt of payments of that kind on the date of the written evidence; and
 - II. that the person is unable to meet reasonable and immediate family living expenses

As a 'Commonwealth department or agency responsible for administering a class of Commonwealth income support payments' Centrelink is often requested to provide a statement to the effect that a person has 'received Commonwealth income support payments for a continuous period of 26 weeks'. A problem with such requests arises where a person has been subject to a period of non-payment during the 26 weeks immediately before they apply for an early release of their superannuation.

We note that s 42X of the bill allows payments to people subject to a 'no show no pay or reconnection failure' to remain 'payable', even if the rate is reduced to nil as a result of deducting a penalty amount. In effect, this section protects this group of people from having the continuity of their payment broken.

However people subject to a 'serious failure' or 'unemployment non-payment' period under the bill would have the continuity of their income support broken. In such circumstances, they would be unable to meet the criteria to establish they were in 'severe financial hardship' as required by the Regulations, regardless of whether their payment was 'not payable' for one day or eight weeks.

Although this also applies to people who are subject to a non-payment period under the current guidelines, they appear to have 'fallen through the cracks' for the purposes of the Regulations. Indeed, these people are often in an even more dire situation than those who are able to meet the criteria, because they have received no payment from any source during the non-payment period.

We are concerned that there appears to be a legislative anomaly with the operation of the Regulations. It seems to further disadvantage those people who are subject to a period of non-payment, irrespective of whether or not the person 'begins to comply with a serious failure requirement'. This in turn appears to be in conflict with the underlying principles of the proposed reforms, and we consider warrants further consideration.

Integration of stand-alone programs into new employment services

We note in the Second Reading of the Bill that:

The bill also removes references to stand-alone programs such as the Personal Support Program, that will be integrated into and delivered by the new employment services. Jobseekers will retain the benefits currently available.

Based on several complaints we have investigated, the unavailability of places on programs such as Personal Support (PS) has caused protracted difficulties for Centrelink assessors and Job Network Providers, regardless of who delivers these new employment services. For example, some complainants who have been assessed as requiring a PS program have waited for more than 18 months to access the program.

As these specialised programs are important for people with special needs, including people with mental health issues, we would caution against any action that might compromise their longer term availability. We therefore suggest that this review recommends that administrative arrangements are put in place to monitor and ensure the availability of these programs.