Australian Council of Social Service

Submission to the Senate Education Employment and Workplace Relations Committee

Social Security Legislation Amendment (Employment Services Reform) Bill 2008

ACOSS, October 2008

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ACOSS acknowledges the need for a system of reasonable activity requirements and compliance arrangements to keep unemployed Australians engaged with the labour market and employment and training programs.

The present system of compliance arrangements and penalties does not achieve this objective and creates a great deal of financial hardship. It places too much emphasis on punishment for breaches of activity requirements and too little emphasis on re-engagement of job seekers. In particular, the maximum penalty of eight weeks' loss of income support deprives people of the income needed to meet activity requirements (which are suspended during this period). It also causes considerable hardship since few unemployed income support recipients have significant savings. In 2007-08, 32,000 people lost income support for 8 weeks as a result of these arrangements. Of these people, approximately two thirds had breached activity requirements on three occasions in the previous 12 months and approximately one third had left their previous employment for reasons that were not considered appropriate or were dismissed for misconduct.

In 2006-07, over 215,000 breaches of activity requirements were reported, around half of which led to participation failures being determined by Centrelink. A major reason for the large number of participation reports is that the system is not responsive to individual circumstances. Until recent administrative changes, employment service providers were in effect required to submit participation reports in all cases where requirements were breached (for example where a job seeker did not attend a Job Network appointment), regardless of the provider's judgement as to whether this was warranted. Centrelink subsequently rejected a high proportion of these reports on the grounds that insufficient evidence was provided to warrant breaching the job seeker, or that they had a reasonable excuse. This is a waste of resources that should be devoted to helping people obtain employment.

The appropriateness of imposing large numbers of penalties on unemployed people at a time when unemployment is likely to rise substantially and job seekers will find it more difficult to secure vacancies, is also questionable.

1. Key provisions that implement the new policy approach to compliance

Our primary concern with the present compliance system is the 8 week penalty, which ACOSS regards as excessive. Regrettably, the Bill does not reduce this penalty.

However, we welcome the Government's intention to reduce the incidence of 8 week penalties, to increase the discretion available to providers as to whether or not to raise a participation failure, and to shift the focus of the compliance system from punishment after the event towards prevention and engagement. This change of emphasis is well summarised in the Government's recent Request for Tender for Employment Services, and in the Objects clause of the Bill which states that:

> *The object of this Division is to encourage people to participate in employment and engage with employment services. It is also the object of this division to secure compliance with the a person's obligations and requirements in relation to participation requirements, and to ensure that those who do not comply are re-engaged with employment services as quickly as possible'*[1]

ACOSS welcomes and broadly supports the following provisions of the Bill which implement this shift in the focus and administration of the compliance system including:

- The Secretary's discretion to take individual circumstances into account by not determining that a person has committed a 'serious failure', whether or not they have a 'reasonable excuse' (S42M). This replaces the automatic 'three strike' rule.

- The ability of job seekers to undertake a 'serious failure requirement' (for example, to participate in unpaid work experience) in lieu of 8 weeks' loss of income support (S42Q).

[1] See S42B.

- The associated financial hardship test under which individuals who lack the capacity to undertake such a requirement may be excused from doing so (S42Q).

It is important that these measures be legislated as they should reduce the incidence of 8 week penalties and improve engagement of these job seekers with employment services and the labour market.

However, three serious weaknesses in the Bill should be addressed to ensure that the new policy agenda is effectively and consistently implemented. First, the Bill does not implement the new policy approach consistently and some elements of the Bill appear to run counter to it. Second, the new system of '*no show no pay'* penalties is too broad in scope and there are insufficient checks and balances to prevent unnecessary penalties and hardship. Third, the Bill is silent on important elements of the package of compliance system reforms announced by the Government.

2. Inconsistencies between the Bill and the new policy approach

The Bill does not implement the new policy approach consistently and some elements of the Bill appear to run counter to it. There are basic inconsistencies between the proposed rules for 'connection failures' and 'no show no pay failures' and those for 'serious failures'. Further, new applicants who are subject to the 'voluntary unemployment' provisions are dealt with very differently to existing social security recipients with 'serious failures'. The process by which Employment Pathway Plans (and the activity requirements which the compliance system enforces) are developed also runs counter to the policy emphasis on active engagement with job seekers.

- Unlike the 'serious failure' provisions, the Bill does not appear to give the Secretary (and by implication Centrelink and employment service providers) a clear discretion whether to impose a participation failure in the event of an alleged 'connection failure' or 'no show no pay failure', except where the job seeker has a 'reasonable excuse'. In the clauses dealing with 'no show no pay failures' and 'connection failures' the Bill commences with the words: 'the Secretary must determine that a person commits a failure' whereas the 'serious failure' provisions commence with the words: 'the Secretary may determine' (S42C(1), S42E(1) and S42H(1)).

If so, this lack of discretion could generate large numbers of 'no show no pay' penalties in cases where the employment service provider or Centrelink believe the failure would be best dealt with by a warning, for example in cases of 'first time breaches' where the job seeker was not fully aware of the rules or where the provider considers the job seeker is likely to comply in future.

- Unlike the 'serious failure' provisions, the Bill does not make it clear that in these cases ('no show no pay' and 'connection' failures) the Secretary should only take account of actions that are 'intentional, reckless or negligent'. (S42C(1), S42E(1) and S42H(1))

- Unlike job seekers subject to the 'serious failure' provisions, those who have left a job without a suitable reason cannot reduce the 8 week penalty by engaging in a 'serious failure requirement'. This is because a new 8 week 'unemployment non-payment period' applies to these cases instead of the 'serious failure' provisions (Subdivision E). A legislative instrument will allow the Secretary to apply the hardship test to certain categories of these job seekers (see S42S), but this is likely to be much narrower in scope than the hardship test applied in cases of 'serious failure'. This should at the least include principal carers, for example.

  Around one third of 8 week penalties currently arise from 'serious failures' relating to a person's previous employment. Many of these job seekers are unaware of the penalty at the time they lost or left their jobs, and many would be unable, due to a lack of savings, to meet activity requirements over this period. Their proposed treatment is inconsistent with the policy emphasis on active engagement rather than automatic application of penalties.

- The requirement to prepare 'job seeker diaries', which add to compliance costs without assisting job seekers to search for work more efficiently, is retained (S42E(g)).

- The Bill makes no reference to a process of negotiation between the Secretary and the job seeker of the new 'Employment Pathway Plans' that replace the current 'activity agreements'. Instead, the Secretary has a general discretion to insert requirements considered suitable, with which the person must comply. (Schedule 2).

This is inconsistent with the policy focus on active engagement and choice for job seekers. Further, it is not clear whether the existing legislative instrument limiting the Secretary's discretion in this regard (for example not to require a person to seek medical treatment) would remain in force if the Bill is passed.

3. Some risks with the proposed 'no show no pay' regime

The new system of '*no show no pay'* penalties is very broad in scope and there are insufficient checks and balances to avoid unnecessary penalties and hardship, especially penalties that extend beyond the loss of a few days' payments from a single instalment (for example where a person has failed to attend an activity for more than a few days at a time).

In theory, 'no show no pay' is a tool for employment service providers and Centrelink to quickly re-engage job seekers who do not fully participate in work experience and training activities. The effect of the 'no show no pay' regime on the actions of job seekers has not been tested. Given that 'no show no pay' arrangements emphasise an almost immediate loss of payment over attempts to re-engage the job seeker, their impact on compliance may be muted. If, on the other hand, providers could require a person to undertake the days of activity they missed in lieu of financial penalty, this may have more impact on future participation.

There is a danger that if 'no show no pay' is rigidly applied payments will be reduced in large numbers of cases for minor infringements, and that a complex web of rules will be developed to determine whether 'no show no pay' failures apply in individual cases, and the nature of the evidence required to establish a 'reasonable excuse'. Given the complexity of the proposed arrangements (for example, the distinction between 'connection' and 'no show no pay' failures) many job seekers could face payment reductions before they fully understand the rules, especially in the case of 'first time' participation failures.

A further risk for job seekers is that 'no show no pay' penalties could be extensive in cases where the failure to participate in an activity extends over more than a few days in a single payment cycle (fortnight).

To avoid these pitfalls, it is critical that employment service providers and Centrelink have a

clear discretion whether to impose a ‘no show no pay’ failure, and that adequate protections exist against the imposition of large penalties on job seekers likely to experience hardship. The following problems need to be addressed:

- The scope of ‘no show no pay’ failures in the Bill is too broad, extending beyond the initial policy intention to ensure full participation in work experience and training activities. For example, it could be read to extend to a failure to apply for the required minimum number of jobs each fortnight even though this is explicitly dealt with in the ‘reconnection failure’ provisions.

  The proposed distinction in the Explanatory Memorandum between failures to undertake ‘activities’ (subject to the ‘no show no pay’ provisions) and ‘appointments’ (subject to the ‘connection failure’ provisions) suggests that the ‘no show no pay’ provisions may be much broader in scope than ‘connection failures’, and may operate as the default compliance system. (S42C(1)). Given that ‘no show no pay’ arrangements rely on immediate penalties rather than re-engagement first, this could increase the number of financial penalties applied in future.

- As indicated above, unlike the ‘serious failure’ provisions, the Bill does not appear to give the Secretary (and by implication employment service providers and Centrelink) a clear discretion to take individual circumstances and consequences into account when determining a ‘no show no pay’ failure, except where the job seeker has a ‘reasonable excuse’. The relevant clause uses the word ‘must’ rather than ‘may’. (S42C(1))

- Similarly, unlike the ‘serious failure’ provisions, the Bill does not clarify that the Secretary should only take account of actions that are ‘intentional, reckless or negligent’. (S42C(1))

- Unlike the serious failure provisions, there is no provision in the Bill for job seekers to engage in a ‘serious failure requirement’ activity in lieu of a ‘no show no pay’ financial penalty. This is especially important where the job seeker stands to lose a substantial part of a fortnightly payment instalment.

  For example, a parent could lose three or four days’ payment under the ‘no show no

pay' provisions if they fail to attend a part time training course without a reasonable excuse. A job seeker required to participate in work experience could lose six days' payment from a single instalment if they fail to attend for two weeks.

In theory, where a job seeker agrees to 'work off' the missed days of activity, providers could avoid submitting a participation report in the first instance, but this is less likely to occur in cases of extended 'no shows' especially when the provider cannot initially contact the job seeker, and as noted above the provider may not have this discretion in any event.

- The Bill leaves open the possibility that 'no show no pay' penalties may be deducted from the next payment following the participation failure, which leaves Centrelink too little time to properly assess the circumstances, and the job seeker too little time to adjust to a loss of payments. This would have a particularly unfair impact on a person whose 'no show no pay' failure is determined within a few days of the end of a payment cycle. This critical issue is to be dealt with in a legislative instrument. (S42C(5))

- The policy intention to limit 'no show no pay' penalties to core income support payments rather than supplements is not clearly achieved since only rent assistance, pharmaceutical allowance, and youth disability supplement are specifically excluded in the Bill. This issue is to be dealt with in the same legislative instrument. (S42T(5))

- A related concern is that in the new Employment Services arrangements there is no limit on the period that a job seeker may be required to participate in unpaid work experience programs such as Work for the Dole. Prior to 2006, this was generally limited to six months in any given year. More extensive periods of unpaid work experience are likely to trigger extensive 'no show no pay' penalties as they are likely to be perceived by job seekers as unreasonable and are unlikely to lead to paid employment outcomes. (Schedule 2)

  In the United States participation in work experience is subject to the provisions of the Fair Labour Standards Act, including hourly wage levels. In Australia unpaid work experience for a private company is currently limited to 8 weeks to avoid

exploitation. Until 2006, when 'full time' Work for the Dole for nine months was introduced as a form of penalty, participation in Work for the Dole was limited to 6 months.

The only references in the Bill to these forms of unpaid work experience are clauses that explicitly exclude Work for the Dole participants from the scope of industrial relations legislation. (Division 2)

4. Omission of important provisions

The Bill is silent on key elements of the package of compliance system reforms announced by the Government, where the detail is of critical importance. A number of these provisions are to be dealt with in legislative instruments but to our knowledge these have not been tabled at this stage. Key omissions from the Bill include:

- The minimum number of participation failures that would constitute a 'serious failure', thereby triggering a comprehensive compliance assessment and a possible 8 week penalty is not specified. In the Request for Tender for Employment Services, this threshold is specified as three missed appointments or interviews or three failures to attend an activity (up to six days in all) in a six month period. Instead of specifying this, the Bill provides that a legislative instrument should define a 'persistent' failure for this purpose. (S42M)

  This is obviously a critical threshold, and a vital part of the Governments reforms to the compliance system, because once a job seeker commits a certain number of participation failures both a comprehensive compliance assessment and a potential 8 week penalty are triggered. While it would be sensible in some cases to conduct a comprehensive compliance assessment before these thresholds are reached, the 8 week penalties should not be triggered at that stage.

- The comprehensive compliance assessment process itself (including the key factors that should be taken into account) is not specifically mentioned in the Bill though there is a brief reference in the Explanatory Memorandum (S42M).

- The policy intention that, in counting the number of participation failures to determine

whether a ‘serious failure’ has occurred, the clock will be ‘wound back to zero’ following a comprehensive compliance assessment, is not specified.

If this is not addressed, it opens up the possibility that a job seeker could be financially penalised twice for the same participation failure.

Legislative instruments are also proposed to define ‘reasonable excuse’ (S42U), and to specify activity requirements for ‘Stream 4’ job seekers who generally have major social barriers to employment (Schedule 3). Since these definitions are also critical to protect vulnerable job seekers, it is important that these are examined carefully, and desirable that these provisions are subject to amendment. For example, it is important that caring responsibilities are taken into consideration when deciding whether the person has a ‘reasonable excuse’.

5. Implementation and monitoring

As the new rules are very complex, especially the proposed division of participation failures into ‘connection failures’, ‘no show no pay’ failures and ‘serious failures’, it is important that job seekers and employment service providers are well prepared for the introduction of the new system from July 2009. A comprehensive information campaign expressed in simple language will be critical.

It is also very important that the Government closely monitor the effects of the new system on the number of breaches imposed, and the financial circumstances and compliance of job seekers. The legislation should be reviewed after implementation to assess whether or not the new system substantially reduces participation failures and financial hardship, and improves compliance with requirements. In the interim, it is important that detailed and timely data is publicly available on participation reports, participation failures, and penalties.

6. Suggested amendments

We outline a series of possible amendments below to address the concerns raised in this submission.

No Show No Pay provisions

1. Amend S42C(1) to specify that the Secretary 'may' rather than 'must' determine a 'no show no pay' failure and to make it clear that the Secretary should only take account of actions that are 'intentional, reckless or negligent'.

2. Amend S42C(1) and S42E(2) to more clearly define the scope of 'no show no pay' failures and to specify that the 'connection failure' provisions are the default arrangement for dealing with participation failures.

3. Amend S42C(5) or S42T to specify that any penalty may not be deducted until at least the payment instalment *after* the first payment that is made following notification to the person of a 'no show no pay' failure.

4. Amend S42D to allow a person to undertake an activity similar to a 'serious failure requirement' (as outlined in S42P and S42Q) in lieu of 'no show no pay' penalties for participation failures that occur on more than two days within the same payment cycle (fortnight), and to apply a similar hardship test where the person is unable to meet this requirement.

5. Amend S42T to make it clear that only core income support payments and not supplements such as Mobility Allowance and Pensioner Education Supplement, are affected by the proposed penalties.

Serious failures

6. The contents of Subdivision E - 'Unemployment resulting from a voluntary act or misconduct' should be incorporated into Subdivision D – 'Serious failures', so that the 'serious failure requirement' provisions in S42P and S42Q would also apply in these circumstances. This means that these participation failures would continue to be dealt with as 'serious failures', rather than precluding these unemployed people from entitlements to

income support as proposed.

7. Amend S42M to specify that the minimum threshold for a ‘persistent’ failure that can trigger a ‘serious failure period’ (8 week no-payment penalty) is that outlined in the Request for Tender for Employment Services; that is, three missed appointments or interviews or failures to attend an activity (six days in all) in a six month period. Comprehensive compliance assessments could be conducted before this threshold is reached, but in those cases the ‘serious failure period’ would not apply.

8. Amend S42M to set out procedures for the conduct of comprehensive compliance assessments, including a requirement to notify and personally interview the person, and incorporating the policy intention (outlined in the Request for Tender for Employment Services) that these assessments would ascertain why the person has failed to meet requirements and identify any barriers to participation along with appropriate alternative service options.

9. Amend S42M to specify that once a comprehensive compliance assessment is concluded, previous participation failures will no longer be counted in determining whether or not a future participation failure is ‘persistent’.

Connection and reconnection failures

10. Amend S42E(1) and S42H(1) to specify that the Secretary ‘may’ rather than ‘must’ determine a connection or reconnection failure respectively, and to make it clear that the Secretary should only take account of actions that are ‘intentional, reckless or negligent’.

11. Amend S42H(5) or S42T to specify that any penalty may not be deducted until at least the payment instalment *after* the first payment that is made following notification to the person of a ‘no show no pay’ failure.

General

12. In S42E, delete paragraph (g) regarding job seeker diaries.

13. Amend Division 2 to specify that the Secretary should, where practicable, offer a person a choice of options to include in their Employment Pathway Plan and seek to reach

agreement with the person over its contents.

14. Amend Division 2 to limit the duration of an ‘approved program of work for income support payment’ to no more than 6 months in any 12 month cycle, and unpaid work experience in the for-profit sector to no more than 8 weeks at a time.

15. The Bill should provide for a review of the new compliance arrangements within 12 months of their introduction, to assess its effectiveness in improving compliance, reducing financial hardship, and reducing compliance costs for job seekers, providers and Government. The review should be informed by comprehensive data on trends in participation reports, failures and penalties, and feedback from job seekers, providers, Centrelink and other stakeholders.