WELFARE
RIGHTS
CENTRE INC
Advice, advocacy and free legal services
for people with Centrelink problems

8 April 2011

The Committee Secretary,
House of Representatives Standing Committee on
Education and Employment,
PO Box 6021,
Parliament House,
CANBERRA, ACT, 2600.

Dear Sir/Madam,

Re: Inquiry into *Social Security Legislation Amendment (Jobseeker Compliance) Bill* 2011

The Welfare Rights Centre Inc is a community legal service offering specialist advocacy in the areas of Social Security and Disability Discrimination law and policy. We are writing to express our concerns about the *Social Security Legislation Amendment (Jobseeker Compliance) Bill* 2011.

Summary of Issues –

We are concerned that the *Social Security Legislation Amendment (Jobseeker Compliance) Bill* 2011;

- proposes unreasonable changes to what excuses are considered 'reasonable';
- does not qualify 'special circumstances' well enough for effective decision making;
- creates a system that does not provide for a fair appeals process;
- should be more specific in its intention and less reliant on the discretion of the Executive and external contracted service providers;
- provides for a potentially arbitrary system of punishment dependant on chance and circumstance rather than merit or desert.

Details

Background

The justification for the Bill as provided in the media release and in the second reading speech in the House of Representatives states the Bill as introducing the Labor Party's "...*commitment to introduce tougher rules for job seekers*"[1] as made prior to the last

[1] *Modernising Australia's Welfare System* Jenny Macklin, Julia Gillard, Mark Arbib *posted Wednesday, 11 August 2010* http://www.alp.org.au/federal-government/news/modernising-australia-s-welfare-system/ viewed 4 April 2011 (copy on file with author)

election. *It is the "**Tougher rules for jobseekers …** For those jobseekers currently receiving welfare payments, the Gillard Labor Government will tighten up the rules to ensure they are making the most of opportunities to find work… [and]…impose tougher new rules for jobseekers who fail to meet their obligations with a job service provider."*[2]

The problem this Bill seeks to address is that apparently "*[t]he current attendance rate for employment services appointments is just 58 per cent. Of those who don't attend, approximately half have been recorded as having a valid reason for missing the appointment. The overall rate of non-attendance of 42 per cent needs to be reduced to improve engagement and job outcomes."*[3]

At the heart of the rhetoric around this Bill are a few contrary points.

- The Bill is about providing for greater inclusion by excluding payments to people of a certain kind.
- The Bill is about helping the majority of job seekers in their "genuine attempts to find work" by punishing the 42% of appointments that are missed.
- These 42% of appointment missed need to be reduced despite the claim that over half of them had a valid excuse.
- It seeks to re-engage people, to force them to help themselves by making them get services from employment service providers, while not actually addressing the cause of the disengagement in the first place.
- The Bill doesn't provide for penalties for people who have missed appointments or activities, only for those who do not re-engage with Centrelink. In this sense, a person could potentially miss every first appointment with a provider and not be penalised.

The statistics from the Department of Employment, Education and Workplace Relations for the quarter ending September 2010 provide some clarification as to the extent of the problems.

Of the 43,822 Connection Failures given for the quarter, 85.48% were given for failure to attend a Provider appointment. Of these, 16,807 were given to Jobseekers between the ages of 21-30 compared with 3858 for Jobseekers aged 41-54; 465 for Jobseekers over 55; 7,364 for Jobseekers aged 31-40 and 8,963 for Jobseekers aged under 21. Of the 43,822 Connection Failures given, 31,079 were to jobseekers on a Newstart Allowance and 10,341 were given to Jobseekers on Youth Allowance.[4]

63.03% of penalties awarded for Reconnection Failures or 'No Show, No Pay' were caused by a failure to attend an activity as specified in a Jobseeker's Employment Pathway Plan. Roughly half the number of Jobseekers on Youth Allowance received these penalties than those on Newstart Allowance.

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[2] *Modernising Australia's Welfare System* Jenny Macklin, Julia Gillard, Mark Arbib *posted Wednesday, 11 August 2010* http://www.alp.org.au/federal-government/news/modernising-australia-s-welfare-system/ viewed 4 April 2011 (copy on file with author)

[3] Hon Kate Ellis, Media Release - http://www.nesa.com.au/media/21583/mr_ellis_30.09.10review%20of%20job%20seeker%20compliance%20system%20tabled%20in%20parliament.pdf

[4] DEEWR *Job Seeker Compliance Data – September Quarter 2010* http://www.deewr.gov.au/Employment/ResearchStatistics/JobSeekerComplianceData/ComplianceData/Documents/PublicDataQuarter11011.pdf

Of the Connection Failures given, 20.44% were given to Jobseekers who identified as being Aboriginal or Torres Strait Islanders. This is roughly ten times more than the percentage of the general population of Australia who identify as Aboriginal or Torres Strait Islanders. Similarly 17.89% of Reconnection and 'No Show, No Pay' penalties were awarded to Aboriginal or Torres Strait Islanders.

Of the 340,795 jobseekers receiving Newstart or Youth Allowance, 128,186 or 37.6% are women; 212,609 or 62.34% are men. To be very lax, there are roughly twice as many men as there are women receiving these payments. The financial penalties given for specific reasons vary greatly between men and women and do not represent this statistic. When adjusted for the general population of jobseekers receiving Newstart or Youth Allowance;

- men receive almost double the penalties for failure to attend provider reconnection (24.31% compared to 7.22%). [5]
- men receive considerably more penalties for failure to attend an activity (46.89% compared to 16.14%)
- men received four times the amount of penalties for inappropriate conduct at an activity (78 compared with less than 20)
- men receive slightly more penalties for inappropriate presentation or conduct in an interview (0.47% compared to 0.19%).

These figures may present an argument that the awarding of penalties to Jobseekers is not evenly matched when divided into age; gender; race and payment type when compared with the general population of Jobseekers. While there may be a reasonable explanation for this, it is our contention that a system of decision making that presents these types of statistics should not be expanded further as the proposed Bill seeks to do.

Before an Employment Service Provider notifies Centrelink of the perceived need for a Connection Request, a Participation Report or other issue they have the ability to use discretion to find alternative outcomes: rescheduling an appointment; re-engaging with the Jobseeker or other means where they understand that the Jobseeker has a reasonable excuse.

Of the 1,136,353 appointments not attended in the September quarter, 20% were seen to have a valid reason by the Employment Service Provider; 14% were seen to have an invalid reason that created a Participation Report notified to Centrelink and 10% were seen as having an invalid reason, yet a Participation Report was not issued to Centrelink. Importantly, the revenue stream of the Employment Service Provider is quite dependant on interview attendance and placement. This presents a situation where the Employment Service Provider may have to choose between conflicting values in a decision, or at the very least, this system may present the appearance of such.

[5] DEEWR – Job Seeker Compliance Data September 2010 Quarter
http://www.deewr.gov.au/Employment/ResearchStatistics/JobSeekerComplianceData/ComplianceData/Documents/PublicDataQuarter11011.pdf

Of the 128,147 Participation Reports given to Centrelink by an Employment Service Provider, 57% were rejected by Centrelink on review. This may be taken as meaning the majority of the time, an Employment Service Provider lodging a Participation Report to Centrelink has done so inappropriately. Given that the proposed Bill seeks to increase the effect and severity of the punishments in this system, we believe that an unintended outcome of this system will be to unfairly and unjustly punish people without a legitimate reason. Many of these people will be from vulnerable or disempowered positions of which the proposed changes will add to their situation as well as disengaging them from the system: which will oppose the reasons for this Bill.

Of the reasons given for Centrelink rejecting the validity of a Participation Report, 69% were because the Jobseeker had a reasonable excuse. These reasons were made up of 26% who had a medical reason; 15% had another acceptable engagement/appointment; 7% had an acceptable personal crisis; 5% had conflicting responsibilities as a Carer; 5% had homelessness reasons; 4% had transport difficulties and 3% had an acceptable excuse due to cultural or language difficulties.

The remaining 31% were for procedural errors, made up of 16% in notifications requirement failure; 9% in submission failures and 6% concerned the nature of the request.

Reasonable Excuse and Special Circumstances

The Bill seeks to "tighten" the provisions available for a Jobseeker missing an appointment with a "reasonable excuse". The Bill does this by qualifying an excuse as reasonable only when the excuse is given prior to an appointment or activity. It is our understanding that in providing for this, the Bill does not "tighten" the meaning, it changes it beyond the point where the legal use of the word "reasonable" has semantic attachment.

This change is justified on the ground that, *"…[i]f a jobseeker has a reasonable excuse for non-attendance, such as being unwell, and the provider is informed prior to the appointment, then no penalty will apply. This is similar to when an employee takes responsibility for their own actions by calling their employer in the morning to advise if they are sick and unable to come to work that day*."

We would argue that one of the key facets of what is considered reasonable is that its flexibility and scope is not limited by when the reason is known.

On communicating with representatives from DEEWR about this concern, their understanding was that the term 'reasonable' in this context sought to introduce a legislative understanding of what is civil, polite or courteous behaviour from the jobseeker to the Employment Service Provider. It is our understanding that the term 'reasonable' does not provide for this in an unqualified legal context.

A legal understanding of the word 'reasonable' almost always phrases the term in the past tense. *Whether someone had a reasonable excuse for…* However the term is not dependant on objective knowledge at a given time. For example, as a defence to murder, reasonableness allows for many defences such as self-defence; provocation and accident, all of which ask "would a reasonable person, in the situation of the accused hold a warranted

belief that…" This question does not concern whether that person would have been able to provide that reasonable excuse ahead of time, nor should it.

The Bill does propose a partial, yet we believe impractical solution to this 'tightening' of the provisions for 'reasonable excuse' by allowing the Secretary the discretion in cases of 'Special Circumstance'. It states that if "*the Secretary is satisfied that there were special circumstances in which it was not reasonable to expect the person to give the notification*" then the requirement of prior notice may be waived.

It is our contention that the word 'special' is not appropriate in this sentence and ought to be removed so that the sentence reads if "…*the Secretary is satisfied that there were circumstances in which it was not reasonable to expect the person to give the notification*" then the requirement of prior notice may be waived.

We further recommend the that the Bill be amended to qualify and clarify exactly what these circumstances may be. This may be actioned by adding a subsection (3) to section 15 of the Bill as follows;

15 After section 42U

1)

…

3) For the purposes of this section, "*circumstances in which it was not reasonable to expect the person to give the notification"* may be, but are not limited to:
   a) a medical event that gave rise to a need to provide care or have care provided to or by the jobseeker;
   b) an unforeseeable event that would prevent a person, in the situation of the jobseeker from attending the interview or activity;
   c) a conflicting engagement that prevents the Jobseeker from attending;
   d) issues concerning homelessness or the threat of homelessness;
   e) issues concerning identified vulnerability indicators;
   f) a family incident;
   g) transport difficulties preventing the jobseeker from attending or
   h) cultural or language difficulties prevented the jobseeker from attending

4) The Secretary may make determinations with respect to what else may be considered "*circumstances in which it was not reasonable to expect the person to give the notification".*

This addition would aid good decision making and codify what appears to be current Centrelink policy and practice.

Appeals processes

We are concerned that the bargaining power of the Jobseeker who has a genuine dispute about whether or not they fulfilled their requirements in attending an interview or activity will be further depleted by the proposed Bill.

To illustrate this point with a real life situation:

A jobseeker who had issues with depression, alcoholism and substance abuse had attended an interview with an Employment Service Provider, after failing to qualify for a disability support pension. Many, if not all her conditions were caused by her and her nine year old son watching and hearing their partner/father burn to death in a caravan fire. She walked out of one interview with an Employment Service Provider after what she considered a grossly unacceptable comment was made regarding her situation. The Employment Service Provider reported this as a failure to attend and advised Centrelink. Centrelink duly contacted the jobseeker who reluctantly agreed to reschedule the appointment. At the second interview, the jobseeker did not feel that the Employment Pathway Plan was being appropriately negotiated, that she was being treated as a number that only provides revenue and felt that the Employment Service Provider was not in a situation to help her and politely, yet professionally told them this. The response of the Employment Service Provider was to advise Centrelink that the jobseeker had acted inappropriately in the interview.

The Bill as proposed would allow this situation to immediately remove the income support of a jobseeker regardless of whether or not they had a valid complaint about their treatment and the decision made against them. In short, it is placing more weight against the weaker party to a dispute without adequate services in our communities to support these jobseekers.

Given this situation, the current Bill would provide for further use of discretion in the Employment Service Provider and the Centrelink review officer. This would mean that the system would rely on the abilities of the people in it rather than providing for a system that had safeguards against this type of scenario happening.

We recommend that this situation can be avoided by clarifying the legislative intent to not penalise jobseekers who are acting in good faith. This safeguard ought to protect the vulnerability of the jobseeker and their claim is in good faith until proven otherwise. This could happen by the insertion of a further clarification about immediate suspension of payments that stated something like:

In the event that a Jobseeker lodges a request for review, appeal or complaint, their payment shall be restored until the outcome of this review, appeal or complaint.

Of note is also the cost and time involved in an appeal to the Social Security Appeals Tribunal and the Administrative Appeals Tribunal, and the fact that the most vulnerable traditionally do not use appeals and review processes.

Punishment – arbitrary

As someone loses their payment on a daily basis – the jobseeker loses 1/14th of their payment every day in which they do not reconnect with Centrelink and commit to another appointment, the nature and severity of a penalty involved appears quite arbitrary. Someone may be in a situation of great stress: illness in the family or a sudden and severe change of circumstances which place severe burdens on their time and attention; the jobseeker in this instance will lose payments until they realise that they need to contact Centrelink again.

If an appointment is missed on the first day of a pay cycle, this may amount to the loss of an entire fortnight's payment. If the same jobseeker missed an appointment on the day of, or the day before a payment is to be made, they would only lose one day's payment or 1/14th of their fortnightly income. This is further complicated by public holidays and weekends.

We would like to recommend that there is a standard penalty applied for jobseekers in this situation regardless of at what point their missed/forgotten appointment occurred on their pay cycle and that any such penalty not be in the form of loss of payment.

Use of Parliamentary Power

The Social Security Legislative framework in Australia is long and complex. Given the scope of its application, this is hardly surprising. This Bill provides Henry VIII clauses that outsource the decision making power that impacts on the lives of Australian Citizens, most of whom are in vulnerable situations, to the Executive (Secretary of the Department) and indirectly to private companies.

It is our contention that this usurps the role of parliament and is contrary to the separation of powers doctrine between the Legislative and the Executive arms of government as implied in the Australian Constitution.

It is our understanding that as the role of parliament is to enact government policy into law, in the current instance, this Bill does not do this. It merely allows for the Executive to do this at its discretion. It is our recommendation that this Bill be expanded to a legislative instrument that directly qualifies government policy in great detail and not leave the details at the discretion of the Executive and indirectly to private service contractors which, as has been discussed above, present great concerns about their involvement in this process.

Yours faithfully,

Welfare Rights Centre Inc (Queensland)