

Labor Senators' Dissenting Report

1.1 Unemployment is unacceptably high in many remote parts of the country and for certain groups, including in particular Aboriginal and Torres Strait Islander peoples.

1.2 Labor understands that remote jobseekers face unique challenges when looking for work.

1.3 Labor believes that more can and should be done to support these jobseekers into employment.

1.4 Labor believes the current arrangements can be improved to ensure a more effective and timely compliance framework that meets the needs of providers, communities and jobseekers.

1.5 Most importantly, Labor believes the system can be improved to give remote jobseekers the best chance of finding and keeping work.

1.6 However, the Labor members of the Committee have significant concerns about whether this Bill will achieve these aims.

1.7 Despite requests, the Government has been unable to address these concerns.

1.8 As a consequence, the Labor Senators do not agree with the recommendation of the majority.

Lack of consultation with communities and providers

2.1 Labor Senators are concerned that CDP providers, communities and jobseekers have been given little to no opportunity to provide meaningful input into the design and implementation of the scheme proposed in the Bill.

2.2 The majority report of the Committee notes the concerns of many stakeholders about the short timeframe for communities, CDP providers and other interested parties to provide feedback on the proposed reforms.

2.3 The Tiwi Islands Training and Employment Board is owned and managed by the Tiwi Traditional Owners and provides the Community Development Program on the Tiwi Islands. In its submission it stated:

The tabling of the Bill in December was the first time we were made aware of the significant changes that are contained in the Bill. To our knowledge, there has been no consultation with communities in our region about these proposals... The introduction of the Bill immediately before the holiday break and the very short time available to prepare submissions and have them duly authorized does not in any way constitute any proper or bona fide consultation.¹

2.4 Evidence from Mr. Ben Burton, from Winun Ngari Aboriginal Corporation, confirmed that despite many conversations with the Minister for Indigenous Affairs

1 *Submission 4*, p.1.

and the Department of the Prime Minister and Cabinet (PM&C), they had not seen details of the Bill.

What we have seen predominantly is what is being promoted through the department, which is the five or six dot points regarding the biggest changes.²

2.5 While the majority report recognises these concerns, it accepts without question the evidence of PM&C that the Department is confident that adequate consultation has taken place, despite overwhelming evidence to the contrary.

2.6 PM&C's own submission says that "initial consultations" on the Bill took place at a meeting in Cairns on 16-17 February 2016 – the same week as the Committee's only public hearing, and some months after the Bill had already been introduced into Parliament.

2.7 Labor Senators acknowledge and accept the evidence from PM&C that meetings have taken place with CDP Providers on four occasions beginning in March 2015.

2.8 Labor Senators note some of these meeting were held prior to the implementation of the first stage of the new CDP scheme.

2.9 The supplementary submission from Jobs Australia confirmed that the meeting in Cairns held on the 16-17 February 2016 was the first to include 'consultation' on the agenda and was the only meeting of the four referenced in the PM&C submission at which the Bill was discussed.³

2.10 Labor Senators concur with the assessment of Tangentyere Council that:

If the Government wishes to make changes of the magnitude proposed in the Bill, it is of the utmost importance that the people and communities affected are properly engaged in the change process, something which has not occurred.⁴

Breadth of Ministerial discretion

3.1 Labor Senators hold grave concerns about the breadth of Ministerial discretion provided for in the Bill.

3.2 As outlined in the majority report, the Bill seeks to divest a broad range of powers, which currently sit with the Parliament, to the Minister for Indigenous Affairs.

3.3 The inquiry has revealed that core aspects of the new CDP arrangements are simply not in the Bill. Rather, key details are left to the discretion of the Minister.

2 *Proof Committee Hansard*, 19 February 2016, p.4

3 *Submission 11 (supplementary)*, p.10.

4 *Submission 10*, p.2.

3.4 Notably, the Bill does not limit the range of matters the Minister may determine.⁵

3.5 Almost every submission to the Committee detailed serious concerns with such broad ministerial discretion.

3.6 Dr Kirrily Jordon, Research Fellow with the Centre for Aboriginal Economic Policy Research at Australian National University, noted:

This Bill would give the Minister very wide scope to determine the social security rules for all social security recipients in the declared regions, and to vary those rules at any time. The list of matters that could be dealt with in a determination is very broad... Moreover, this list is non-exhaustive, meaning that while existing protections are swept aside it is not at all clear how the new arrangements would work in practice nor whether there would be sufficient protections against inappropriate obligations and penalties.⁶

3.7 The Northern Land Council argued that the Bill would provide the Minister with “unfettered power”.⁷

Lack of justification for broad ministerial powers

3.8 Labor understands that the Government’s rationale for these provisions is the need to address poor employment outcomes and disproportionately high rates of compliance breaches in remote regions.⁸

3.9 The Explanatory Memorandum and the Minister’s Second Reading speech argued that the current framework is failing in remote regions and a flexible approach is needed to enable simpler payment and compliance arrangements to be introduced.⁹

3.10 However, the Bill does not seek to address specific compliance issues. Rather, it gives the Minister discretionary power over the design and implementation of an entirely new social security arrangement for remote jobseekers.

3.11 Proposals to significantly alter the current distribution of responsibilities with regards to social security arrangements are not supported by evidence gathered by the Committee.

3.12 Ms Lisa Fowkes, a Research Scholar attached to the ‘Implementing the RJCP’ project at Australian National University, noted in her submission that two of the substantive measures the Minister indicated would be introduced via legislative instrument are already addressed elsewhere:

The issue of immediacy of penalties will likely be addressed through a Bill currently before the Parliament (Social Security Legislation Amendment

5 Social Security Legislation Amendment (Community Development Program) Bill 2015, section 1061ZAAZA(2).

6 *Submission 5*, p.5.

7 *Submission 18*, p.4.

8 Explanatory Memorandum, p. 3.

9 Explanatory Memorandum, p. 3.

(Further Strengthening Job Seeker Compliance) Bill 2015). Weekly payments are already possible under the existing social security legislation.¹⁰

3.13 Labor Senators note that the Senate Standing Committee for the Scrutiny of Bills has sought further information from the Minister regarding an evaluation of the appropriateness of using delegated legislation to give effect to the central elements of the scheme.

3.14 The Labor members of this Committee note with concern that the majority report gives no consideration to whether such a broad ministerial discretion is appropriate or justified to achieve the stated aims of the Bill.

3.15 The Explanatory Memorandum states the primary reason for providing core elements of the scheme in legislative instruments rather than the primary legislation is to:

...allow the Minister to consult with communities and the Parliament to determine participation requirements and compliance arrangements and to make amendments to meet the changing needs of communities.¹¹

3.16 Despite this, as the National Congress of Australia's First Peoples noted in its submission:

Besides assurances in the [Explanatory Memorandum] that the Minister will consult with communities and CDP providers before implementing the new CDP regulations, based on the arrangements in the proposed legislation, there is no formal requirement for consultation.¹²

3.17 Labor understands the need for flexible arrangements tailored to the particular circumstances and needs of remote communities.

3.18 However, the matters to be determined by the Minister through legislative instrument are of great practical importance to the people and providers affected by them.

3.19 Labor Senators are not convinced of the need to vest the power to determine such a broad range of matters in the Minister for Indigenous Affairs in order to achieve the intent of the Bill.

Parliamentary scrutiny

4.1 Labor Senators are concerned by the evidence presented to the Committee regarding the lack of parliamentary scrutiny of the Bill.

4.2 In its submission, PM&C acknowledged that the only parliamentary scrutiny over the core elements of the CDP scheme is disallowance of the legislative instrument.

10 *Submission 1*, p.9.

11 Explanatory Memorandum, p. 3.

12 *Submission 28*, p.6.

4.3 Echoing concerns expressed in many of the other submissions, Jobs Australia argued:

Providing welfare payments to people in need of support is a core responsibility of the Federal Government, and to delegate this much authority over social security law to one Minister would be a fundamental abrogation of the Parliament's responsibility to hold the Government to account – a responsibility that is particularly important when individuals' human rights are affected.¹³

4.4 The National Congress of Australia's First Peoples strongly refuted the Government's claims that disallowance afforded adequate parliamentary scrutiny of the measures provided in legislative instruments.

Including the core measures within the Bill affords Parliament the opportunity to analyse and scrutinise the contents of proposed legislation before it votes whether or not to pass that bill into law. It is a fundamental tenant of the Westminster system of government that the Executive be held to account by the Parliament. The core function of Parliament is severely limited when the only recourse to check the power of a Minister is to disallow a regulation.¹⁴

4.5 It is both disappointing and perturbing that while the majority report acknowledges these serious concerns, the Committee has accepted without question the evidence from PM&C that disallowance constitutes adequate parliamentary scrutiny.

4.6 The Committee accepted this evidence on the word of the Government, as the Committee was not presented with the detail or a draft of the proposed regulations.

4.7 The willingness of the Committee to accept this evidence on its face, even without the detail of the relevant regulations or the process by which they will be determined or varied, is astounding.

4.8 Labor Senators concur with the view of the Central Land Council, that "leaving critical aspects of the new measures to be dealt with by regulation is inappropriate."¹⁵

Importance of access to social security safety net and safeguards

5.1 Labor believes that access to the social security safety net is an important right of all Australians, consistent with Australia's international obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR).

5.2 As the Australian Council of Social Services noted in its submission, the Bill seeks to remove remote income support recipients from the existing social security arrangements, thereby removing them from the safeguards and protections built into the existing social security law.

13 *Submission 11*, p.9.

14 *Submission 28*, p.13.

15 *Submission 25*, p.9.

In effect, many protections built into the Social Security Act would no longer apply to people in remote areas. This may include, for example, the ability to take underlying issues into account in determining whether to impose a sanction for non-compliance, for example, domestic violence, as provided for by the Comprehensive Compliance Assessment' process.¹⁶

5.3 We would be very concerned by any rules that do not ensure that job seekers in remote regions have equal access to the same rights and protections offered to other Australians under social security law.

5.4 The Bill in its current form does not provide that accepted standards of protection for jobseekers in existing social security laws will be maintained.

5.5 Labor Senators are concerned by the lack of detail available about the process of review available to remote income support payment recipients.

5.6 The Explanatory Memorandum suggests that the Minister intends to make CDP providers the decision makers in the first instance, replacing Department of Human Services (DHS) officials under existing arrangements.¹⁷

5.7 It further indicates that internal review will be conducted by PM&C, and not DHS.

5.8 Labor Senators disagree that PM&C is the appropriate agency to conduct review of social security decisions, particularly in light of the lack of a clear process and detail about how expertise, accountability and consistency will be maintained.

Transfer of responsibilities to CDP providers

6.1 The Explanatory Memorandum suggests that CDP providers, rather than DHS, will be responsible for compliance decisions as well as making income support payments to job seekers in remote regions.¹⁸

6.2 This is not detailed in the Bill; but rather, is expressed in the Explanatory Memorandum and the Minister's Second Reading Speech as a central element of regulations to be introduced at the discretion of the Minister as provided in the Bill.

6.3 Labor Senators understand the Government's rationale for this transfer of responsibility is that it will strengthen jobseeker compliance.

6.4 In its submission, PM&C explains that the more immediate relationship between payments and attendance will reduce compliance breaches and penalties incurred by jobseekers.

6.5 PM&C guarantees that "the reforms will not increase complexity for providers and jobseekers."¹⁹

16 *Submission 22*, p.2.

17 Explanatory Memorandum, p.7.

18 Explanatory Memorandum, p.7.

19 *Submission 9*, p.2.

6.6 However, much of the evidence presented to the Committee does not support this claim.

6.7 Australian National University Research Fellow, Lisa Fowkes, argued that CDP providers taking over payments will not reduce red tape; but rather, would create new issues.

One of the principal reasons for this is that, while providers are capable of employing people and administering wages to employees, the administration of the social security safety net requires more rules, more reporting and more specialized attention to complex needs. Most providers would prefer to be much less involved in social security administration and much more involved in finding and creating employment than they currently are.²⁰

6.8 This was supported by evidence from Mr. Michael Berto, CEO of Roper Gulf Regional Council:

The current CDP programme has already increased our compliance and administrative staff by 50%. This has been caused by the complicated processes introduced, the inadequacy of the IT systems that were not completed until the end of December 2015 at PM&C, and the lack of reporting feedback...If the current programme is not ready how can you introduce new changes and expect great results.²¹

6.9 The appropriateness of CDP providers making compliance decisions and social security payments was questioned in many of the submissions to the Committee.

6.10 Ironbark Aboriginal Corporation pointed out that:

Additionally, the structure of payments – ie, paid only on attendance and/ or compliance action for invalid non-attendance, means the changes will in effect put providers in charge of determining their own payment levels, based on how they treat non-attendance or lack of engagement from participants.²²

6.11 Lisa Fowkes argued that this creates a direct conflict between CDP providers' financial interests in applying penalties and their obligations to avoid harm to vulnerable job seekers through reducing their income.²³

6.12 The Australian Council of Trade Unions noted that:

Under the current system the role of a CDP provider is to assist job seekers in employment activities and report non-compliance. It is the function of DHS, who has no financial or other incentive to administer penalties, through a system of checks and balances.²⁴

20 *Submission 1*, p.12.

21 *Submission 13*, p.2.

22 *Submission 27*, p.2.

23 *Submission 1*, p.11.

24 *Submission 7*, p.11.

6.13 The Tiwi Islands Training and Employment Board and Tangentyere Council expressed concerns about the effect of the transfer of responsibility and conflict of interest on the safety of their locally employed staff members.

6.14 The effect of the Bill is to provide the Minister with broad discretion over the functions and responsibilities of CDP providers, so that the Minister may give effect to measures that would require providers to adopt responsibility for compliance decisions and social security payments.

6.15 This issue was not considered in the majority report despite being clearly identified by Government as being one of the central features of future regulations.

6.16 Labor supports devolution to local decision making where appropriate.

6.17 Labor Senators acknowledge and accept the evidence from a number of providers that the current arrangements with DHS are not working as well as they should.

6.18 However, Labor Senators have serious concerns about ministerial discretion to effect such a change, particularly where this may divert providers from their core functions of providing quality activities and helping jobseekers into employment.

6.19 There has been no evidence provided from the Government to assess whether some of these aims could be achieved through existing social security legislation.

Taper rates

7.1 Labor welcomes increases to the taper thresholds for remote job seekers.

7.2 However, the precise arrangements for a new taper rate are not found in the Bill itself. Rather, the Explanatory Memorandum makes it clear that the Government intends to raise the threshold at which rates start to taper to \$650 per week.

7.3 Labor Senators again express concern that details of a central element of the new CDP scheme are absent from the primary legislation.

7.4 The Explanatory Memorandum gives cause for concern at the effect of the stringent arrangements that could underpin the threshold increase.

7.5 The Explanatory Memorandum and the Minister's Second Reading Speech suggest that social security payments will be deducted for every hour of their 'Work for the Dole' (WFTD) activity not completed, even where the reason for non-attendance is paid work.²⁵

7.6 Professor Jon Altman from the Alfred Deakin Institute for Citizenship at Deakin University explained that the former Community Development and Employment Program (CDEP) referenced by the Minister was premised on the payment of award rates for hours worked.

For the [CDEP] participant the base payment was a safety net from which additional work could be undertaken on a flexible basis as determined by

25 Explanatory Memorandum, p.9.

seasonal factors, ceremonial commitment, family responsibilities or personal health status.²⁶

7.7 Professor Altman went on to say that:

The new proposal will suit those who want to work 25 hours per week for the dole (at about \$10 per hour) and then work additional hours at award rates. But it will not suit those who only want to work part time or those who want to work at award rates – for them there will be a trade-off that constitutes a new form of poverty trap.²⁷

7.8 According to the Tiwi Islands Training and Employment Board:

In most cases however, a person will do paid work instead of WFTD, not in addition to it. Jobseekers would be worse off than under existing arrangements that allow hours of paid work to be counted towards their 25 hours WFTD requirements. The benefits of increased threshold for taper are undermined by the activity arrangements that underpin them.²⁸

7.9 ANU Research Fellow Lisa Fowkes explained the difference between current arrangements and those outlined in the Explanatory Memorandum:

In order to retain their full benefits and avoid a penalty, they would have to work their full WFTD hours and do any additional employment hours on top of this. By contrast, under the existing guidelines, if the person has moved on to a part time rate of income support, the overall WFTD hours requirement would reduce.²⁹

7.10 The evidence presented to the Committee suggests that the proposed taper rates would improve the earning capacity for some people, but reduce income for many others in remote communities.

Human rights compatibility and indirect discrimination

8.1 Labor Senators acknowledge the concerns expressed in many of the submissions that the Bill is not compatible with Australia's human rights obligations under international law.

8.2 In assessing the Bill's compatibility under the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Parliamentary Joint Committee on Human Rights (PJCHR) found in its initial assessment of the Bill that the new obligations and penalty arrangements would limit CDP participants' rights to social security under Article 9 of the ICESCR.

8.3 The PJCHR further found the Bill disproportionately affects Aboriginal and Torres Strait Islander peoples.

26 *Submission 8*, p.15.

27 *Submission 8*, p.15

28 *Submission 4*, p.5.

29 *Submission 1*, p.14.

8.4 Labor Senators share the PJCHR's concerns that the regulations are not yet published.

8.5 Labor notes that the PJCHR has sought advice from the Minister and is yet to make a final assessment of:

- whether the limitations the Bill places on the right to social security are reasonable and proportionate to the achievement of the Bill's objective; and
- whether the disproportionate impacts on Aboriginal and Torres Strait Islander peoples are justified under international human rights law.

Conclusion

9.1 Labor Senators are concerned that the recommendation put forward in the majority report stands in direct contrast to the evidence gathered by the Committee.

9.2 If enacted, the Bill would provide the Minister for Indigenous Affairs with a wide-ranging discretion to design and implement new social security arrangements for approximately 37,000 remote jobseekers, of which 84 per cent are Aboriginal and Torres Strait Islander people.

9.3 Labor believes that it is essential that the processes for developing and implementing change are appropriate for purpose, subject to robust scrutiny and developed in genuine consultation with those affected by the change.

9.4 In the opinion of Labor members of the Committee, it is very rare indeed to see a majority report that recommends the passing of a Bill that contains so much criticism of the Bill itself.

9.5 Labor remains willing to work in good faith with the Government to improve employment outcomes for remote jobseekers.

Recommendation 1

That the Bill be opposed in its current form.

Senator Jenny McAllister
Deputy Chair

Senator Nova Peris

Senator Claire Moore