

Department of Employment

Submission to the Senate Community Affairs Legislation Committee inquiry into the Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014

Background

1. This Bill amends the *Social Security (Administration) Act 1999* to ensure that job seekers who deliberately fail to meet their participation requirements are held accountable for their actions.
2. The Bill provides that:
 - job seekers who incur an eight week non-payment penalty for **refusing or failing to accept an offer of suitable work** without a good reason will no longer be able to have the penalty waived under any circumstance. Instead they will be required to serve the eight week non-payment penalty in full; and that
 - job seekers who incur an eight week non-payment penalty for **persistently and wilfully failing to meet their participation requirements** will only be able to waive their eight week non-payment penalty once while in continuous receipt of an activity tested income support payment.
3. This Bill will not impact job seekers who cannot get work despite their best efforts. Rather, it targets those who have received but nevertheless refused an offer of suitable work without a reasonable excuse. The majority of job seekers will not be impacted by this Bill as they meet their participation requirements. During 2012-13, only 22 per cent of all activity tested job seekers had a participation failure applied by the Department of Human Services. Less than two per cent of job seekers incurred penalties for refusing work or persistent non-compliance.
4. This Bill aims to encourage greater compliance and engagement by the small proportion of job seekers who are not making genuine efforts to move off income support and are failing to take advantage of the wide range of benefits that work can provide to the individual. This includes not only the financial benefits of employment, but also social benefits through expanded networks, improvements to health and wellbeing that are closely associated with employment and the sense of inclusion in society that comes with being an active member of the workforce.

Current arrangements

5. Under the current job seeker compliance framework, an eight week non-payment penalty can be applied for:
 - refusing or failing to accept an offer of suitable work without a reasonable excuse; or
 - failing to meet a participation requirement without a reasonable excuse on at least three separate occasions in a six month period.

6. Before a penalty can be applied for the second of these reasons, the job seeker must first undergo a Comprehensive Compliance Assessment by a senior or specialist officer of the Department of Human Services. The purpose of this assessment is to ensure they have no undisclosed barriers to participation. Before a penalty can be applied, it must additionally be established that the job seeker's prior failures constitute wilful and persistent non-compliance. In 2012-13, 66 per cent of Comprehensive Compliance Assessments did not result in such a finding and therefore no penalty was applied.
7. If a job seeker incurs a penalty for either of the above reasons, they are able to have the penalty waived by agreeing to undertake a Compliance Activity. This is generally 25 hours per week of an activity such as Work for the Dole. However, if a job seeker is already undertaking an appropriate activity for a sufficient number of hours a week they can continue to do this and have their penalty waived and if no activity is available the penalty is waived anyway. If a job seeker is unable to undertake a Compliance Activity, for example because they now have significant caring responsibilities, or if undertaking the activity would aggravate an existing health condition, the penalty can be waived if it would place them in severe financial hardship.
8. In 2012-13, 68 per cent of eight week non-payment penalties applied for refusing work and 73 per cent of those applied for persistent non-compliance were waived. As there is currently no limit on the number of waivers a job seeker can access, this has resulted in eight week non-payment periods not being an effective deterrent to persistent non-compliance or refusing or failing to accept a job.

Policy rationale for the proposed changes

Penalties for refusing or failing to accept work

9. The Bill provides that job seekers who incur an eight week non-payment penalty for refusing or failing to accept an offer of suitable work without a reasonable excuse will no longer be able to have the penalty waived under any circumstance. Instead they will be required to serve the eight week non-payment penalty in full.
10. Job seekers in these circumstances are demonstrably employable as they have just been offered a suitable job by an employer. It is highly unlikely that they will have vulnerabilities or significant barriers to participation - or at least none that have just prevented them from being offered work. Nor will there be any good reason for them to have refused the work, as the Department of Human Services will have considered whether the work was appropriately remunerated, whether the job seeker was capable of doing the work and other such relevant matters before imposing the penalty. Rather, the job seeker has refused the job simply because they do not want to do it. It is therefore reasonable that such job seekers should incur a strong sanction and should not be able to return immediately to payment with little to no consequence, as they are able to do currently.

Penalties for persistently and wilfully failing to meet participation requirements

11. The Bill also means that job seekers who incur eight week non-payment penalties for persistently failing to meet their participation requirements will only be able to waive

their eight week non-payment penalty once while in continuous receipt of an activity tested income support payment.

12. Changing the waiver legislation to allow job seekers to waive only one penalty for persistent non-compliance while in receipt of activity tested income support is consistent with the original intention of the waiver provisions, which was to encourage non-compliant job seekers to show that they were genuine through re-engaging and undertaking a period of intensive activity. The more intensive level of activity required in order to waive the non-payment penalty was also designed to help change job seeker behaviour going forward so that the job seeker would consciously decide not to continue in persistently non-compliant behaviour in the future. Limiting the number of waivers a job seeker can have to one still gives them a chance to do this but removes the potential for job seekers to exploit the waiver provisions, thus providing a stronger disincentive to ongoing seriously persistent non-compliance.
13. This slightly different treatment in terms of waiver availability for eight week non-payment penalties incurred for persistent non-compliance, as opposed to those incurred for refusing work, is justified by the different nature of the failures involved. A penalty is generally applied for persistent non-compliance because the job seeker has a poor participation record, having repeatedly missed appointments with their provider or failed to attend activities without having a reasonable excuse. It is not unreasonable to give such job seekers one chance to show that they are serious about improving their behaviour through a period of more intensive participation. On the other hand, refusing a suitable offer of work is a more serious action that calls into question a person's genuineness as a job seeker. Not allowing the penalty to be waived in such circumstances sends a clear message that this is not acceptable.
14. In addition, while vulnerable job seekers are under-represented in terms of the proportion of penalties they incur for refusing work, they incur penalties for persistent non-compliance at a similar rate to the general population. This further supports the proposed approach of continuing to allow job seekers to waive such penalties the first time they incur them.

Safeguards

15. Job seekers will be informed in person of the new rules enacted by this Bill at routine contacts with employment services providers and with the Department of Human Services to ensure they understand the consequences of refusing suitable work and persistent non-compliance.

Reasonable excuse and unsuitable work provisions

16. Before applying any penalty, the Department of Human Services must establish that the job seeker did not have a reasonable excuse for their failure. In addition, before applying a penalty for refusing work, it must be established that the job was suitable for the job seeker. Work is considered unsuitable, and no penalty can be applied, if the work:
 - requires particular skills, experience or qualifications that the person does not have, and appropriate training will not be provided by the employer;

- might aggravate a pre-existing illness, disability or injury and medical evidence has been provided;
- involves health or safety risks and would contravene an occupational health and safety law;
- involves terms and conditions that are less generous than the applicable statutory conditions;
- involves commuting from home to work that would be unreasonably difficult (including, for principal carer parents, any time taken to access child care);
- would require a principal carer of a child or children to work during hours when appropriate care and supervision of the child/ren is not available;
- involves working more hours than a person's assessed capacity,
- involves enlistment in the Defence force or the Reserve forces,
- is the subject of industrial disputation;
- would require the person to change their residence; or
- in the Secretary's opinion, is unsuitable for any other reason (for example, on the basis of moral, cultural or religious grounds).

Legislative Instrument relating to reasonable excuse

17. On 1 July 2014, the Secretary of the Department of Employment made a new legislative instrument determining matters that decision makers must take into account when considering whether or not a job seeker had a reasonable excuse for any failure, including refusing suitable work. The previous instrument reflected a broad interpretation of the meaning of reasonable excuse, in that it effectively provided a list of things the decision maker should look for in order to find a reasonable excuse where one may not otherwise be apparent and frequently led to people avoiding penalties due to circumstances that may have had little impact on their capacity to meet the specific requirement that they had failed to meet.
18. The revised instrument recasts the Secretary's determination in such a way that it provides the decision maker with a tighter definition of reasonable excuse. This definition is intended to encourage the decision maker to find that a job seeker had a reasonable excuse for failing to comply with a participation requirement typically only in exceptional circumstances that were beyond the job seeker's control. While the instrument cannot limit the matters that can be taken into account in determining reasonable excuse, it does provide some guidance to decision makers.
19. It is important to note, however, that the revised instrument does not in any way undermine the above provisions relating to suitable work, as that is a separate test, or mean that a job seeker would be penalised unreasonably. For example, a job seeker would not be penalised for refusing a job that involved heavy lifting if they could show that their doctor had advised them that such work might aggravate an existing back injury.

Additional safeguards for vulnerable job seekers who refuse work

20. In 2012-13, job seekers with an identified vulnerability represented 16 per cent of the total activity tested job seeker population but incurred 13 per cent of the eight week penalties that were applied for refusing work. This means that they were slightly less likely to incur failures for refusing work than the general job seeker population. It is

important to note that, if a job seeker with an identified vulnerability refuses or fails to accept a suitable job, the Department of Human Services will consider the impact of the job seeker's vulnerability both in assessing the suitability of the work for the job seeker and in determining whether or not they had a reasonable excuse for refusing the work.

Additional safeguards for vulnerable job seekers who are persistently non-compliant

21. In 2012-13, job seekers with identified vulnerabilities incurred 16.7 per cent of the eight week penalties that were applied for persistent non-compliance, which means they incurred them at a similar rate to the general population. The safeguards in the system are designed to ensure that no penalty is applied for a failure that was directly attributable to a job seeker's vulnerability.
22. Where a job seeker has an identified vulnerability a Vulnerability Indicator is put on their IT record and is visible to Department of Human Services officers and employment services providers. A Vulnerability Indicator on a job seeker's record is not the same as an activity test exemption and is not intended to quarantine job seekers from compliance action where that is appropriate. Rather, Vulnerability Indicators are intended to alert providers and the Department of Human Services to the need to ensure that requirements are set at an appropriate and achievable level and to look carefully at the job seeker's circumstances when considering compliance action. So while job seekers with Vulnerability Indicators do incur persistent non-compliance failures at a similar rate to the general population, in every case their circumstances will have been scrutinised in relation to at least three previously substantiated failures and they will have undergone a Comprehensive Compliance Assessment - conducted by a senior officer or a specialist officer such as a Social Worker - designed specifically to identify previously undisclosed barriers to participation.

Other safeguards

23. All job seekers serving an eight week non-payment penalty are eligible for Stream 1 Limited Services with Job Services Australia providers during the penalty period, which can include assisting the job seeker to find work, helping to update or prepare a Résumé and providing an initial list of appropriate job vacancies.
24. All job seekers have the right to seek a review of any decision that is made under social security law. A job seeker who incurs a non-payment penalty will be able to seek an internal review of those decisions by the Department of Human Services. If not satisfied with the outcome of the internal review, the job seeker will be able to appeal to a Tribunal. While a job seeker's penalty is being reviewed, they will continue to receive their usual income support payment.

Supporting data

Evidence that waivable eight week penalties do not provide a sufficient deterrent to refusing work

25. Non-payment penalties for refusing work have existed in one form or another under social security law since 1945. The current eight week penalty was introduced in July 2006 and waiver provisions were introduced in July 2009. The introduction of waiver provisions has reduced the deterrent effect that such penalties were intended to create. In 2008-09, the year before their introduction, there were 644 serious failures for refusing or failing to accept suitable work. In 2012-13, there were 1,718 eight week penalties applied for refusing or failing to accept suitable work, of which 68 per cent were waived. This difference cannot be attributed to any comparable change in the size of the activity tested job seeker population or increase in the number of jobs being offered (as evidenced by the fact that the total job seeker population and vacancy rate changed very little between these years). The only available explanation for the trebling of the number of penalties is that they no longer provide an adequate deterrent to refusing work because job seekers are able to return to payment with virtually no consequence.

Evidence that waivable eight week penalties do not provide a sufficient deterrent to persistent non-compliance

26. In 2008-09, the year before waivers were introduced, there were 8,850 serious failures applied for persistent non-compliance, compared to 25,286 in 2012-13 of which 73 per cent were waived. Again, with little change in the caseload or the level of participation requirements between these two periods, the most probable explanation for the increase in penalty numbers is that they do not provide a sufficient deterrent to persistent non-compliance.

Evidence that vulnerable job seekers are not unduly affected by the measure

27. In 2012-13, job seekers with a Vulnerability Indicator on their record represented 16 per cent of the total activity tested job seeker population. During the same financial year, they incurred 13 per cent (223) of all of the penalties applied for refusing suitable employment and 16.7 per cent of all of the penalties applied for persistent non-compliance (4,238).

28. This data demonstrates that vulnerable job seekers are under-represented in the share of eight week penalties they incur for refusing a job and are therefore slightly less likely so be affected by the measure.

29. Vulnerable job seekers are marginally over-represented (by 0.7 per cent) in the share of eight week penalties they incur for persistent non-compliance.

30. In 2012-13 of the 18,488 waivers applied to persistent non-compliance failures, 3,076 (16.6 per cent) were granted to vulnerable job seekers. Of these 3,076 waivers:

- 2,091 (68 per cent) were a vulnerable job seeker's first waiver; and
- 985 (32 per cent) were a vulnerable job seeker's second or subsequent waiver.

31. For the general job seeker population, 69 per cent of waivers were first waivers and 31 per cent were second or subsequent waivers. This indicates that vulnerable job seekers waive penalties at similar rates to other job seekers and are no more likely to have multiple waivers. As the first waiver will remain available to all job seekers, only a relatively small percentage of all job seekers or vulnerable job seekers will be affected by the removal of second or subsequent waivers.

Evidence that other cohorts of job seekers are not unduly affected by the measure

32. Women, despite making up 49.7 per cent of the activity tested caseload in 2012-13, incurred only 23 per cent of the penalties that were applied for refusing work in that year and only 26 per cent of the penalties that were applied for persistent non-compliance.
33. The majority of penalties affected by this Bill are incurred by job seekers who are under 31 years of age (76.5 per cent) or male (74 per cent).

Human Rights Issues

34. The Joint Parliamentary Committee on Human Rights has also scrutinised this Bill and has sought further evidence on whether the measures in the Bill are aimed at achieving a legitimate objective; whether there is a rational connection between any limitation to human rights which would be made by the Bill and that objective; and whether the limitation is a reasonable and proportionate measure for achieving that objective and whether the measures in the Bill are compatible with the rights to equality and non-discrimination.
35. The Assistant Minister for Employment will be writing to the Human Rights Committee to address its specific concerns. However, it may also be useful also to touch on some of these concerns in this submission.
36. At the outset it is important to note that, while the International Covenant on Economic, Social and Cultural Rights guarantees the right to an adequate standard of living, including the right to income support, this does not mean that access to such income support should be unconditional.
37. The objective of the Bill is to encourage job seekers to take active steps to satisfy their participation requirements, and thereby increase their chances of moving off welfare payments, of becoming a productive participant in the work force and of experiencing the various benefits that such participation provides. Moving a jobseeker off income support payments into the workforce improves not only the jobseeker's standard of living, but national prosperity. It also helps to maintain the integrity and affordability of the social security system and to ensure that finite resources are equitably allocated to genuine job seekers.
38. As noted previously in this submission, job seekers who incur penalties for refusing suitable work are demonstrably employable and can be expected to find work rather than remain in receipt of income support at tax-payer expense. There is a need to ensure that such job seekers are properly deterred from refusing suitable work in future through the imposition of a meaningful penalty in the form of an eight week

non-payment period which is not subsequently waived. It follows that it would be inappropriate to permit the waiver of such a penalty.

39. There is also a need to properly deter job seekers from being persistently non-compliant with their obligations by not allowing penalties for such non-compliance to be repeatedly waived. Accordingly it would be inappropriate to allow repeated waivers to continue.