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**Submission by the
Commonwealth Ombudsman**

**INQUIRY INTO THE SOCIAL
SECURITY LEGISLATION
AMENDMENT (JOB SEEKER
COMPLIANCE) BILL 2011**

**CONDUCTED BY THE HOUSE STANDING COMMITTEE
ON EDUCATION AND EMPLOYMENT**

Submission by Mr Allan Asher
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INTRODUCTION

On 23 March 2011, the Minister for Employment Participation and Childcare introduced the Social Security Legislation Amendment (Job Seeker Compliance) Bill 2011 (the Bill) into the House of Representatives.

The Bill implements part of the Government's 'Modernising Australia's Welfare System' policy statement¹ and amends the existing compliance system for job seekers, with an emphasis on the importance of attending employment related appointments and activities, and engaging with employment service providers.

On 24 March 2011 the Selection Committee asked the House Standing Committee to inquire into and report on the Bill. The Commonwealth Ombudsman welcomes the opportunity to contribute to this inquiry.

BACKGROUND

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.

While the primary function of the Ombudsman remains to receive and investigate complaints about government agencies, over the years the role has broadened to encompass the improvement of public administration. The independent examination of government administration through the investigation of individual complaints as well as broader, systemic issues, gives the Ombudsman a unique perspective.

This perspective is particularly important where more than one agency is involved in the administration and delivery of a program. In the case of job seeker programs, this office oversees the administrative actions of the Department of Education, Employment and Workplace Relations (DEEWR), in consequence of its policy and employment service provider responsibilities, Centrelink as the key decision-making agency, and the Department of Human Services (DHS) which is primarily responsible for the human services portfolio including Centrelink.

¹ Announced on 11 August 2010

RESPONSE TO THE BILL

The amendments proposed by this Bill concern decision making around job seeker compliance penalties. These amendments are relevant to the complaint-related work of this office and intersect with a range of reports we have released in the past and plan to release soon.

Notably, in 2007 this office published a report concerning the administration of non-payment penalties under an earlier compliance regime.² While the compliance system has undergone changes since then, the report identified instances in which the guidance provided to non-payment penalty decision makers differed from the legislation and, in turn, highlighted the administrative difficulties and complaints that can arise during the administration of these types of programs.³

More recently this office has published a report titled *Falling through the cracks*⁴, which examined the administration of the social security system with respect to people with mental illness. The report identified four areas requiring specific improvement: communication, training to improve the identification of customers who may have a mental illness, encouraging customers to disclose their conditions and situations, and more transparent recording of information about a customer's condition or barriers to service. The issues raised by that report are applicable to the administration of the amendments proposed by this Bill.

This office will shortly publish a report concerning the access to, and use of Indigenous language interpreters by Commonwealth agencies and their subcontracted service providers. That report considers information from a range of agencies, including Centrelink and DEEWR, and includes a case study about the practices of a Job Services Australia provider. A consistent message throughout that report is for the need for greater use of Indigenous language interpreters for service delivery to remote and regional Indigenous customers. This is particularly important at the point that Employment Pathway Plans (EPPs) are discussed and signed.

Although it is the case that this office currently receives few complaints about non-compliance penalties, we do receive complaints about employment service providers over whom we have jurisdiction by virtue of their contracts with a Commonwealth agency. The complaints cover issues ranging from concern the conduct of service provider staff in urban settings through to confusion about the roles of, and need to engage with, service providers in remote Indigenous communities. While the number of complaints is not particularly high, we advise caution about using the number of complaints as an indicator of success or failure in administration, particularly given vulnerable customers and Indigenous customers in remote communities are unlikely to complain through the usual mechanisms.

² *Application of penalties under Welfare to Work*, December 2007, report 16/2007 available at http://www.ombudsman.gov.au/files/investigation_2007_16.pdf

³ Other relevant reports include *Centrelink: the right of review – having choices, making choices*, report 4 of 2011 available at http://www.ombudsman.gov.au/files/centrelink_the_right_of_review_having_choices_making_choices.pdf and *Implementation of job capacity assessments for the purposes of the Welfare to Work initiatives: Examination of administration of current work capacity assessment mechanisms*, report 5 of 2008 available at http://www.ombudsman.gov.au/files/investigation_2009_02.pdf

⁴ September 2010, report 13/2010 available at http://www.ombudsman.gov.au/files/Falling-through-cracks_customers-with-mental-illness.pdf

Vulnerable job seekers

The Independent Review of the Job Seeker Compliance Framework (the Review) reported that 'about 20% of job seekers currently have a Vulnerability Indicator on their record'.⁵ This indicator is designed to alert Centrelink, DEEWR and employment service providers to a range of vulnerabilities that are relevant to a person's ability to meet participation requirements. The vulnerabilities include recent psychiatric problem or mental illness, an illness or injury requiring frequent treatment, drug or alcohol dependence, significant language or literacy problems and homelessness.

It is the view of this office that the number of job seekers who experience these vulnerabilities is likely to be higher as many job seekers affected by these issues remain unrecognised or unwilling to share their difficulties with agencies and providers. As our report into service provision for Centrelink customers with mental illnesses highlighted, Centrelink staff struggle with the challenge of properly identifying these customers so that services can be appropriately tailored to their needs. This will remain a challenge for all staff involved in the revised job seeker compliance system proposed by this Bill.

We note that the Minister's Second Reading speech states that 'job seekers who have been identified by Centrelink as vulnerable, such as those who are homeless or who have a mental illness, will not have their payments suspended in the first instance'.⁶ However, it is not immediately clear from the text of the amendments that this safeguard has been captured in the legislation itself. This is not a matter that should be left to policy.

Additionally, noting the Bill introduces a requirement to give prior notification of an inability to attend an appointment or participate in an activity, we are concerned that some vulnerable welfare recipients will not be well placed to provide information or evidence to satisfy Centrelink that they have a reasonable excuse for non-compliance, or that they should be excused from the requirement to provide prior notification on the basis of special circumstances. If these amendments remain in their current form then it will be imperative that Centrelink and DEEWR develop sensitive and flexible policies to underpin the decision making under these provisions.

Failure to provide flexible policy, supportive procedures and appropriate staff training will undermine the goals of this reform and vulnerable job seekers' attempts to negotiate the revised compliance framework and achieve employment outcomes. In view of these observations, it is suggested that:

Suggestion 1

The amendments should include provisions specifically designed to protect vulnerable job seekers from payment suspension unless it is a matter of last resort and there are sound reasons for considering that non-payment will result in better engagement by that job seeker. Such provisions should explicitly recognise that vulnerable job seekers constitute a broader category of people than those who have had a Vulnerability Indicator noted on their record.

⁵ Report of the Independent Review, September 2010, page 9, available at <http://www.deewr.gov.au/Employment/ComplianceReview/Pages/ComplianceReview.aspx>

⁶ Hansard, House of Representatives, 23 March 2011, page 9

Indigenous customers in remote and regional areas

This office conducts outreach to Indigenous people living in remote and regional communities in the Northern Territory. It has been our experience that residents of these communities are unlikely to complain about their experiences with government and have a strong preference for face-to-face communication.

The job seekers in these communities face particular challenges such as limited education, poor health, inadequate housing, competing cultural requirements and limited access to mainstream services. It has been our experience that many job seekers in these communities struggle with the complexity of the employment services. Notably, these job seekers must meet the challenge of navigating the relationship between Centrelink and employment service providers as well as:

- working with the changes brought about by Income Management (IM), including several categories of IM and exemption procedures
- changes to the Community Development and Employment Program (CDEP) which is often the only means of employment in a community although these are often thought not to constitute 'real jobs'
- concurrent CDEP streams in which one group of CDEP participants is subject to IM while others are not
- maintaining motivation in the face of limited job opportunities
- delays in the provision of training courses because training is not delivered until a certain number of participants can be secured or a training provider can attend communities
- the loss of job opportunities due to the extensive use of outside contractors, particularly during the implementation of Northern Territory Emergency Response (NTER) programs
- service provision which does not always take account of language needs and cultural protocols.

Additionally, we have received feedback that employment service providers are often unable to attend communities as expected, whether due to unexpected difficulties or community events. This is a significant issue if, under the proposed amendments, the ability for job seekers to actually attend interviews impacts upon the reinstatement of their payments. If so, this will need to be managed properly to ensure individuals are not adversely affected.

It is possible that the amended compliance program will impact upon CDEP. It is presently the case that a person who has been engaged in CDEP since before 1 July 2009 is not subject to IM and receives wages from their CDEP employer, which is often the local Shire. These people are known as continuing CDEP participants. As continuing CDEP participants also receive a CDEP Participation Supplement through Centrelink, they are also required to register and engage with employment service providers and sign EPPs. The need to register with Centrelink and employment service providers while receiving payment from a CDEP employer has caused considerable confusion in some remote communities.

Presently, if a continuing CDEP participant fails to engage with their employment service provider, and is exited from that employment service provider, their continuing CDEP participant status can be terminated. If the person subsequently returns to CDEP, often carrying out the same duties, they are placed on the new CDEP model under which they receive social support payments through Centrelink instead of wages and may be subject to IM. The difference in treatment between these two groups has been the subject of understandable confusion.

If the amendments proposed by the Bill further intersect with CDEP then it is likely that this confusion will be compounded. It is therefore imperative that these changes are communicated fully and clearly, utilising the services of Indigenous language interpreters where needed.

We make the following suggestion in respect of this issue:

Suggestion 2

The committee should seek information from the Department of Families, Housing, Community Services and Indigenous Affairs as to the likely impact of the amendments proposed by the Bill upon CDEP participants and the administration of CDEP.

Employment Pathway Plans

EPPs remain vital to the amended compliance regime proposed by this Bill. Drawing on complaints and feedback provided to this office, some job seekers fail to understand the significance of these agreements and others doubt their value when they offer little relevant training or targeted experience. In turn, poor or meaningless EPPs are likely to affect job seekers' motivation. The EPPs will only be effective if:

- they are the product of a proper discussion between the job seeker and the employment service provider
- the obligations contained within them as well as the consequences for non-compliance are properly explained to the job seeker
- interpreters are used to enhance this communication, particularly when servicing Indigenous job seekers in regional and remote communities
- the EPPs use clear, plain language
- the various roles of the agencies and providers involved in employment services are clearly explained to the job seeker
- complaint mechanisms are explained to the job seeker, including the ability to complain to DEEWR about the content of EPPs and, in turn, to this office.

In view of these concerns, we make the following suggestion:

Suggestion 3

It is apparent that the effectiveness of the job seeker compliance regime turns on the quality and effectiveness of the Employment Pathway Plans (EPPs) and job seekers' understanding of their obligations pursuant to those plans. In order to support the policy objective behind these amendments, it is suggested that DEEWR enhance the operational policy and guidelines which govern the process for developing, explaining and enforcing EPPs.

Notification

It is a basic principle of good public administration that a person will be given notice of any obligations they are required to meet and clear advice of any decisions that adversely affect them. The complaints and feedback provided to this office continue to reinforce the importance of providing effective notification in simple and easily understood language.

It will be crucial that the notices and EPPs issued to job seekers provide fair, accurate and accessible explanations of job seekers' obligations and the potential

consequences of non-compliance. These notices should be supported by clear oral explanations.

We welcome the amendments proposed by this Bill which provide that notices imposing mandatory requirements will provide warning of the consequences of failure to comply.

We note that Item 12 in the Bill removes the requirement to notify a job seeker of a reconnection requirement at least one day before the required event. The Explanatory Memorandum makes it clear that this is considered beneficial in remote areas, where a job seeker may only be in contact with Centrelink and their employment services provider every few weeks, thus it can be necessary to issue a reconnection requirement to attend an appointment on the same day as the appointment. However, this amendment may create difficulties for those people who cannot re-prioritise their lives at such short notice. Additionally, if this option is exercised inappropriately, it may be seen to be a penalty in itself and create a perception that notification is given at short notice so as to inconvenience job seekers. In short, this provision highlights the importance of balancing the need to maintain pressure on job seekers to maximise their opportunities against the risk of pointless or damaging demands to comply with inappropriate participation requirements.⁷

Suggestion 4

If the Bill is implemented in its present form, DEEWR should develop guidelines to guide decision-makers as to when it is appropriate to issue a reconnection requirement on the same day as the required event as well as the minimum period of notice it is reasonable to give in common circumstances.

Timing and duration of payment penalties

The Bill amends the timing of payment penalties so that payments can be deducted from the job seeker's payment for the fortnight in which the penalty is applied. While it is understood that this measure seeks to reinforce the connection between the non-compliance event and the penalty, it is possible that this may cause hardship to job seekers who will not have sufficient time to restructure their finances so as to manage the loss of payment. This is of particular concern if a job seeker disagrees with the decision to impose a penalty on the basis that the decision is legally flawed or unsupported by evidence, yet the penalty itself will already have commenced. Similarly, this amendment will bring about immediate hardship for job seekers who are unfairly affected by penalty decisions about which they were not given adequate warning or did not, or were not, able to understand the warning.

The Explanatory Memorandum states that if a job seeker fails to attend a rescheduled appointment without a reasonable excuse, 'they will incur a reconnection failure and lose payment for each day from the second missed appointment until they do attend a rescheduled appointment...there will be no back payment for this period' (emphasis added).⁸ The Second Reading Speech is to the same effect.⁹

⁷ This was noted in the Review, page 75.

⁸ Page 2

⁹ We note that Item 14 in Schedule 1 of the Bill inserts s 42SA which provides at s 42SA(2)(a) that the non-payment period ends at the end of the day before the day on which the person notifies the Secretary that the person *intends to comply* with the reconnection requirement. This appears to contradict the Second Reading Speech.

The Explanatory Memorandum and Second Reading Speech indicate that payment will only recommence when a rescheduled appointment is actually attended. If this is the case, it is of concern as some job seekers may not be able to secure appointments due to a lack of time slots in the provider's appointment schedule or due to the relative infrequency of service provider visits to remote or regional communities. Job seekers in this position should not be deprived of payment due to circumstances which are outside of their control.

Further, it is likely that a provision which delays reinstatement of payment until actual attendance at an appointment, as opposed to an agreement to attend, will have the greatest impact upon those job seekers who face additional barriers such as vulnerable job seekers experiencing illness, homelessness or drug dependency.

For the reasons explained above, we make the following suggestions:

Suggestion 5

Further to Suggestion 1 above, if the Bill is implemented in its present form, DEEWR should develop guidelines that require decision makers to first consider whether:

- a) the imposition of a non-payment penalty should be delayed so as to enable job seekers to adjust their finances in preparation for that penalty
- b) whether a job seeker is experiencing any indicators of vulnerability and, if so, take these into account in deciding when to impose a non-payment penalty.

Suggestion 6

Consideration should be given to amending the Bill so that, in cases where job seekers are delayed in attending appointments or activities because of the schedule of the employment services provider, their payments are reinstated as soon as they indicate an intention to comply with the reconnection requirement.

Record keeping

At this juncture it is important to reflect upon the centrality of record keeping in this compliance regime. Employment service providers must maintain accurate and contemporaneous records of their work and dealings with job seekers in order to provide an effective service. Similarly, Centrelink and DEEWR must maintain records of their dealings with service providers and job seekers. The accuracy of these records is central to the fair and efficient running of the compliance process itself. If the record keeping practices are not adequate, job seeker's will not be provided with the level of service and assistance they are entitled to receive, public service standards will not be met and the integrity of this employment program will be impaired.