

Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014

Portfolio: Employment

Introduced: House of Representatives 4 June 2014

Purpose

1.304 The Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014 (the bill) seeks to amend the Social Security (Administration) Act 1999 to provide that:

- jobseekers who incur an eight-week non-payment penalty for refusing suitable work will no longer be able to have the penalty waived; and
- jobseekers who persistently fail to comply with participation obligations will only be able to have the penalty waived once while in receipt of an activity tested income support payment.

Committee view on compatibility

Right to social security

1.305 The right to social security is guaranteed by article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This right recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.

1.306 Access to social security is required when a person has no other income and has insufficient means to support themselves and their dependents. Enjoyment of the right requires that sustainable social support schemes are:

- available to people in need;
- adequate to support an adequate standard of living and health care;
- accessible (providing universal coverage without discrimination and qualifying and withdrawal conditions that are lawful, reasonable, proportionate and transparent); and
- affordable (where contributions are required).

1.307 Under article 2(1) of ICESCR, Australia has certain obligations in relation to the right to social security. These include:

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and

- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

1.308 Specific purposes and circumstances recognised as engaging a person's right to social security include health care and sickness; old age; unemployment and workplace injury; family and child support; paid maternity leave; and disability support.

1.309 Under article 4 of the ICESCR, economic, social and cultural rights may be subject only to such limitations as are determined by law and compatible with the nature of those rights, and solely for the purpose of promoting the general welfare in a democratic society. Such limitations must be proportionate to the achievement of a legitimate objective, and must be the least restrictive alternative where several types of limitations are available.

Right to an adequate standard of living

1.310 The right to an adequate standard is guaranteed by article 11(1) of the ICESCR, and requires States parties to take steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia.

1.311 The obligations of article 2(1) of the ICESCR also apply in relation to the right to an adequate standard of living, as described above in relation to the right to social security.

Removal or limitation of the ability to waive the non-payment penalty for refusal of suitable work, or for persistent non-compliance

1.312 Currently, the *Social Security (Administration) Act 1999* provides that jobseekers who receive an activity-tested income support payment 'participation payment' (that is, the Newstart allowance and, in some cases, youth allowance, parenting payment or special benefit) may have an eight-week non-payment penalty imposed if they refuse suitable employment, or for repeated failures to comply with their activity-test obligations.

1.313 The bill would remove the ability for the eight-week non-payment penalty to be waived for refusing suitable employment. In relation to jobseekers who persistently fail to comply with participation obligations, the penalty will only be able to be waived once for each period of continuous receipt of a participation payment.

1.314 The committee notes that the measures may limit these rights because their effect may be to reduce the ability of jobseekers subject to the eight-week penalty to enjoy an adequate standard of living. In this regard, the statement of compatibility notes that the measures potentially limit the rights to social security and to an adequate standard of living, and concludes:

To the extent that the Bill may limit the right to social security and the right to an adequate standard of living, there is a reasonable justification...¹

1.315 The statement of compatibility effectively identifies the 'reasonable justification' or objective of the measures as being to 'provide stronger deterrents to persistent non-compliance' of jobseekers to satisfy participation requirements.²

1.316 However, the committee notes that, while the statement of compatibility provides data regarding the number and amount of penalties applied, and the percentage of cases in which a waiver has been applied, the assessment does not establish that the removal or limitation of the waiver will, of itself, provide a deterrent against non-compliance with jobseekers' obligations.³ In particular, the figures provided on the proportion of waivers granted are not accompanied by an analysis to show that these were inappropriate, excessive or misused. It is therefore unclear how limiting the availability of a waiver on the ground of a jobseeker's severe financial hardship, or because a jobseeker agrees to undertake more intensive activities, such as Work for the Dole, would achieve the stated objective of the measures.

1.317 Based on the information and analysis provided the committee does not consider that the statement of compatibility adequately demonstrates that the proposed amendments are needed for the purpose of meeting a pressing and substantial concern, that there is a rational connection between the measure and the identified objective and that the measure is a reasonable and proportionate one for the achievement of that objective.

1.318 The committee notes that to demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective. The Attorney-General's Department's guidance on the preparation of statements of compatibility states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'.⁴ To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

1 Explanatory memorandum (EM), p. 12.

2 EM, p. 12.

3 EM, p. 13.

4 See Attorney-General's Department, Template 2: Statement of compatibility for a bill or legislative instrument that raises human rights issues at <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx> [accessed 8 July 2014].

1.319 Further, the committee considers that the characterisation of the bill as promoting the right to work by providing 'a stronger incentive to accept an offer of suitable work'⁵, is not an accurate assessment of the limitation on human rights proposed by the measure. For example, the statement does not adequately address the punitive aspects of the bill and how these might outweigh the asserted indirect promotion of the right to work. Reference to more remote impacts on other human rights, fails to effectively analyse the human rights implications required by human rights law.

1.320 The committee therefore seeks the advice of the Assistant Minister for Employment as to whether the removal or limitation of the ability to have the non-payment penalty waived is compatible with the right to social security, and particularly:

- **whether the proposed changes are aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the limitation and that objective; and**
- **whether the limitation is reasonable and proportionate measure for the achievement of that objective.**

Right to equality and non-discrimination

1.321 The rights to equality and non-discrimination are guaranteed by articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR). These are fundamental human rights that are essential to the protection and respect of all human rights. They provide that everyone is entitled to enjoy their rights without discrimination of any kind, and that all people are equal before the law and entitled without discrimination to the equal and non-discriminatory protection of the law.

1.322 For human rights purposes 'discrimination' is impermissible differential treatment among persons or groups that results in a person or a group being treated less favourably than others, based on one of the prohibited grounds for discrimination.⁶

1.323 Discrimination may be either direct or indirect. Indirect discrimination may occur when a requirement or condition is neutral on its face but has a disproportionate or unintended negative impact on particular groups. Articles 2, 3, 4 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) further describes the content of these rights, describing the

5 EM, p. 11.

6 The prohibited grounds are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation.

specific elements that States parties are required to take into account to ensure the rights to equality for women.

Removal or limitation of the ability to waive the non-payment penalty for refusal of suitable work, or for persistent non-compliance

1.324 The committee considers that the bill could potentially have a disproportionate or unintended negative impact on particular groups, and may therefore engage and limit the rights to equality and non-discrimination. For example, women are generally more likely to be welfare recipients and to have a range of caring responsibilities that intersect with the right to social security.

1.325 However, the statement of compatibility does not provide any assessment of the compatibility of the bill with the rights to equality and non-discrimination.

1.326 The committee's usual expectation where a limitation on a right is proposed is that the statement of compatibility provides an assessment of whether the limitation is reasonable, necessary, and proportionate to achieving a legitimate objective.

1.327 The committee notes that group-specific information, such as analysis or modelling based on gender-disaggregated data, is particularly relevant to the human rights assessment of this measure.

1.328 The committee therefore seeks the advice of the Assistant Minister for Employment as to whether the removal or limitation of the ability to have the non-payment penalty waived is compatible with the rights to equality and non-discrimination.