



Social Security Legislation Amendment (Employment Services Reform) Bill 2008

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Social Security Legislation Amendment (Employment Services Reform) Bill 2008

Date introduced: 24 September 2008

House: House of Representatives

Portfolio: Education, Employment and Workplace Relations

Commencement: **Sections 1 to 3 in Schedule 1** from Royal assent. The residual provisions from 1 July 2009.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To provide for changes to social security legislation to provide a new compliance regime for the application of penalties for persons required to look for and accept employment. The new compliance regime is timed to commence from 1 July 2009, being the same time the proposed reforms to Australian Employment Services are also scheduled to commence.¹

Background

Committee consideration

The Bill has been referred to Senate Education, Employment and Workplace Relations Committee for inquiry and report by 24 November 2008. Details of the inquiry are at the Committee's webpage.²

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1. The Hon. Brendan O'Connor, MP, Minister for Employment Participation, A better pathway to employment for job seekers with new employment services, *Media Release*, Canberra, 1 August 2008, <http://mediacentre.dewr.gov.au/mediacentre/OConnor/Releases/Abetterpathwaytoemploymentforjobseekerswithnewemploymentservices.htm>, accessed October 2008.
 2. See generally the Committee's webpage at: http://www.aph.gov.au/Senate/committee/eet_ctte/index.htm, accessed October 2008.

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Introduction

Unlike virtually all comparable overseas income support payments for the unemployed, the unemployment benefit payment in Australia has always had look for and accept work requirements. Partially, this is a feature of overseas unemployment payments being unemployment insurance contributed to by the individual when working, rather than income support provided out of general revenue, as applies here. The rigour that has been applied in Australia for the unemployment benefit has been the threat and actuality of payment being cancelled.

From 1947, the social security legislation did stipulate the period of non-payment where payment was cancelled with the initial period being between 2 to 12 weeks. In more recent years there have been additions made to legislation to set out in more detail what the activity test and work search requirements are and also their associated penalties. For example, the *Social Security Legislation Amendment (Work for the Dole) Act 1997*³ set out in detail that an unemployed jobseeker is required to attend a Work for the Dole (WftD) program and the penalties that could apply, where the jobseeker failed to comply with their WftD requirements.

For a long time, much of the detail we see now in social security legislation about what is an activity test failure or an administrative failure was not contained in legislation. The rigour applied had its basis in the words in current section 601 of the *Social Security Act 1991* (SSA), that is unemployed jobseekers are required to look for and accept work - see below.

601 Activity test

601.(1) Subject to subsections (1A) and (5), a person satisfies the activity test in respect of a period if the person satisfies the Secretary that, throughout the period, the person is:

(a) actively seeking; and

(b) willing to undertake;

paid work in Australia, other than paid work that is unsuitable to be undertaken by the person.⁴

Where a jobseeker failed to attended a job interview, failed to attend a training program, failed to accept a reasonable job offer, the Secretary could not be satisfied that the person

3. Chris Field, *Social Security Legislation Amendment (Work for the Dole) Bill 1997*, *Bills Digest No. 136 1996-97*, Parliamentary Library, Canberra, 7 May 1997, <http://www.aph.gov.au/library/pubs/bd/1996-97/97bd136.htm#Contact>, accessed October 2008.

4. Section 601 of the *Social Security Act 1991*.

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was ‘actively seeking and willing to undertake suitable paid work’. The person therefore did not qualify for payment and payment could be cancelled.

Breaching penalties for unemployment benefit over time

Set out below is a chronology of the major unemployed jobseeker compliance initiatives and changes that have occurred since 1945, when the then unemployment benefit was introduced.

1945-1979

The *Unemployment and Sickness Benefits Act 1944* introduced the unemployment benefit from July 1945. The *Social Services Consolidation Act 1947* saw the introduction of the *Social Security Act 1947*. From 1945, the unemployment benefit has always maintained an expectation that the recipient would be required to look for and accept paid work, that is, the “*work test*”. From 1945 to 1979, the imposition and duration of penalties (that is, cancellation of payment or a non-payment period) for failure of the “*work test*” were at the discretion of the delegate. Under the *Social Security Act 1947*, if an unemployed jobseeker:

- left work voluntarily,
- was dismissed from employment for misconduct,
- refused, without sufficient reason, to accept a suitable job offer,
- ceased to be registered with the Commonwealth Employment Service, or
- was not taking reasonable steps to obtain employment.

Then the unemployment benefit was not payable for a period of between 2 and 12 weeks.

1979

The non-payment period was defined as not less than 6 weeks and not more than 12 weeks.

1984

The 6-week minimum non-payment period was removed. To not pay a jobseeker for 6 weeks is a very considerable decision, so to set the minimum non-payment period at 6 weeks tended to discourage the application of a non-payment penalty, except in the most extreme cases. This especially applied in the 1980s when the primary jobseeker partner (usually the male) in a partnered situation received both his unemployment benefit and the payment amount for the partner (combined partnered rate of unemployment benefit). It was not until September 1990 that a partner of an unemployment benefit claimant had to

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qualify for an income support payment in their own right and was paid their own payment (at the partnered rate).

1986

The minimum non-payment period was re-set to 2 weeks. Additional reasons for breaching were added in 1987, 1989 and 1990.

1989

Following on from recommendations made by the Social Security Review,⁵ the 'work' test was replaced with an 'activity' test, which was to be satisfied by training or part-time work as well as searching for suitable paid work. This was viewed as a shift from a social security system designed to maintain the incomes of those out of work to a system primarily designed to encourage people into work.

1994

In conjunction with the then Working Nation Initiative, legislation for the first time made distinctions between 'administrative' and 'activity' test breaches, with harsher penalties for the latter.⁶ An administrative breach referred to failing to comply with some procedure or administrative requirement such as a failure to return a review form or a failure to attend an interview at Centrelink. An activity test breach referred to failing to accept a reasonable job offer or attend a job interview with a prospective employer etc.

From July, non-payment periods due to breaches of the activity test were changed, so they related to the length of time that a person had been unemployed. Non-payment periods for administrative breaches remained unchanged. For those unemployed for less than 12 months, the penalty for the first activity test breach was a 2 week non-payment of income support, with subsequent breaches being 6 weeks each. The initial non-payment period was raised from 2 weeks to 4 weeks for those unemployed for 12 to 18 months and to 6 weeks for those unemployed for over 18 months. A non-payment period could not commence until the person had been notified and had received two instalments of Jobsearch Allowance (JSA)⁷ or Newstart Allowance (NSA)⁸ after that notification.

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5. Bettina Cass, *Social Security Review, Issues Paper No. 4 Income Support for the Unemployed in Australia: Towards a More Active System*, Canberra, 1988, p. 283.
 6. Chris Field, *Social Security (Budget and White Paper) Amendment Bill 1994, Bills Digest No. 37 1994-95*, Parliamentary Library Canberra, 31 August 1994.
 7. Jobsearch Allowance was then the unemployment benefit for the first 12 months of receipt. Once payment had been received for 12 months or more, the payment was then called Newstart Allowance (NSA).
 8. Newstart Allowance is now provided to unemployed jobseekers aged 21 or more and under age pension age and is commonly referred to as the unemployment benefit. In 1994

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1997

The following actions were added to the category of activity test breaches:

- failing to attend an interview with an employer or job placement provider,
- failing to declare earnings from employment, and
- failing to complete a labour market program, or being dismissed from a program for misconduct.

Penalty provisions for administrative breaches were simplified. Instead of losing payment for 2 weeks, those incurring a penalty could be given a payment reduced by 16 per cent for 13 weeks if they preferred.

From July, penalties for the first two activity test breaches in a two-year period were also imposed through reduced payment periods. The first breach reduced payment by 18 per cent for 26 weeks while the second breach reduced payment by 24 per cent for 26 weeks. Third and subsequent breaches incurred an 8 week period of non-payment.

Prior to the changes introduced with the passing of the *Social Security Legislation Amendment (Activity Test Penalty Periods) Act 1997*,⁹ many actions did not result in an activity test breach, but rather an overpayment resulting, in most cases, in debt recovery and perhaps prosecution action (rarely). This partially explains the reason for the increased incidence of breaches after these changes as some actions attracted breach action that did not previously have a breach applied. Actions that fit into this category were:

- failure to notify of a change in circumstances,
- failure to keep appointment with field assessor,
- failure to reply to contact request, or
- failure to notify of change in study load.

In the past, these actions may have resulted in a change of rate or even a cancellation of payment but they were not recorded as a breach.

Where payment was cancelled, the claimant would be usually asked to re-apply and prove that they satisfied the activity test. However, a payment reduction period would not normally have been applied.

unemployed jobseekers on income Jobsearch Allowance were paid Newstart Allowance when their period on payment exceeded 12 months.

9. Chris Field, *Social Security Legislation Amendment (Activity Test Penalty Periods) Bill 1997*, *Bills Digest No. 150 1996-97*, Parliamentary Library, Canberra, 12 June 1997. <http://www.aph.gov.au/library/pubs/bd/1996-97/97bd150.htm#Contact>, accessed October 2008.

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The following table explains how activity test penalties were applied:

If	Then
it is the first activity test breach within a 2 year period	the customer's basic rate of payment is reduced by 18% for a period of 26 weeks.
it is a second activity test breach within a 2 year period	the customer's basic rate of payment is reduced by 24% for a period of 26 weeks.
it is a third or subsequent activity test breach within a 2 year period	a non-payment period will apply for 8 weeks.

The feature of these breach penalties was the 6 month payment reduction periods. It was felt that a payment reduction period might be easier and more flexible to apply than the previous minimum of a 2 week non-payment period.

1998

From May, the then new Job Network employment assistance arrangements replaced most of the previous government's Working Nation employment assistance programs. Job Network members were obliged to advise Centrelink if they are aware of any conduct that would constitute a breach of a jobseeker's activity test obligations.

2001

Concerns from welfare groups about the rise in the number of breaches led to procedural changes such as consultations with social workers or occupational psychologists before a third breach was imposed.

2002

Failure to attend an interview with Centrelink without good reason was reclassified as an administrative breach rather than an activity test breach. There was also a broadening of the breach waiver provisions to include starting an approved rehabilitation or training course.

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2006

New compliance and breach rules were introduced under the Welfare to Work initiatives that commenced from 1 July 2006.¹⁰

A jobseeker who commits a first or second participation failure is contacted and is given an opportunity to avoid any penalty by meeting the requirement they initially failed to meet. If they have not done so by their fortnightly lodgement day they are then interviewed when they lodge their form and advised that, although they will be paid the next day, their next payment will be contingent upon their re-engagement. If, after this warning, they again fail to re-engage, their payment for the coming pay period will commence only from the day they do re-engage. Jobseekers not already on fortnightly lodgement for the pay period are reverted to fortnightly lodgement and issued with an application for payment form to ensure that they are interviewed prior to their next fortnightly pay period.

If, after being warned, the jobseeker does re-engage, they incur no loss of payment. However, even where the jobseeker incurs no financial penalty following a participation failure because they re-engage as requested, the failure is noted on their record for the purpose of counting breaches. For a third breach in a 12 month period, an 8 week non-payment penalty is applied.

10. Dale Daniels and Peter Yeend, Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Bill 2005, *Bills Digest No. 70 2005-06*, Parliamentary Library, Canberra, 6 December 2005.
<http://www.aph.gov.au/library/pubs/bd/2005-06/06bd070.htm>. accessed October 2008.

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Application of breaches under Welfare to Work arrangements

How many 8 week non-payment period breaches have been applied

Table 1: 8 week non-payment period penalties¹¹

Quarter	3 rd or subsequent participation failures	Serious failures	Total
Sept 06	551 (28.4%)	1,391 (71.6%)	1,942
Dec 06	1,849 (46.4%)	2,135 (53.6%)	3,984
Mar 07	3,081 (51.4%)	2,908 (48.6%)	5,989
Jun 07	4,218 (57.8%)	3,084 (42.2%)	7,302
Sept 07	5,823 (58.4%)	4,114 (41.6%)	9,937
Dec 07	4,799 (53.5%)	4,179 (46.5%)	8,978

Notes:

3rd or subsequent participation failures refers to 8 week non-payment period penalties automatically applied when a jobseeker has had 3 breaches in a 12 month period (3 strikes and you're out).

Serious failures refers to a one-off breach like refusal of a reasonable job offer, or being voluntarily unemployed without a reasonable reason.

Application of automatic 8 week non-payment period penalties

In the 12 month period from September 2006 to September 2007 a total of 29 154 8 week non-payment period penalties applied. Initially, the number of 8 week non-payment period breaches imposed for the third or subsequent failures (3 strikes and you're out) was far less than those imposed for serious breaches. Jobseekers who incurred an activity test penalty in the 12 month period up to 1 July 2006 (when the Welfare to Work initiatives commenced) did have breaches counted towards the count of 3 breaches in a 12 month period. So, it took some time for jobseekers to accumulate 3 breaches in a 12 month period, and then have an 8 week non-payment period penalty automatically imposed.

11. Department of Education, Employment and Workplace Relations, *Jobseeker Compliance Data*, Quarterly reports on participation failures and serious failures by job seekers in receipt of social security payments.
<http://www.workplace.gov.au/workplace/Publications/ResearchStats/Participation+and+compliance+data/>, accessed October 2008.

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The Minister said in the second reading speech when presenting the Bill that in 2006–07 there were around 16 000 8 week non-payment period penalties applied and in 2007–08 around 32 000 applied.¹² Given there were about 550 650 unemployed jobseekers on Newstart Allowance (NSA)¹³ and Youth Allowance Other (YA Other)¹⁴ in July 2006, ranging down to 497 753 jobseekers on the same payments in September 2007, this number of 8 week non-payment penalties is about 5.5 per cent of all jobseekers on NSA and YA Other (at one point in time) in the period.¹⁵ While there may be an average of about 525,000 jobseekers on NSA and YA Other in this period, there are a lot more grants of NSA and YA Other in the period, as there are many jobseekers who claim and are paid for short periods (1 to 3 months) and many jobseekers who claim and are paid multiple times over a period. So, a point-in-time count of jobseekers on a payment actually understates the total number of jobseekers who gained assistance from NSA and YA Other and were therefore exposed to the breach and penalty regime.

The Minister made the point in his second reading speech, that the changes presented in this Bill are necessary as it is the government's view that the current compliance regime applies 8 week non-payment period penalties when it should not and some other approach would be more productive.

The key reason that these changes are necessary is that the current compliance system has resulted in thousands of counterproductive, non-discretionary and irreversible eight-week non-payment penalties. For the duration of these eight-week non-payment penalties there is no requirement for a job seeker to look for work or to have contact with either their employment service provider or Centrelink.¹⁶

Certainly, the number of 8 week non-payment period penalties for third or subsequent participation failures now consistently exceeds the number for serious breach failures.

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12. The Hon. Brendan O'Connor, MP, Minister for Employment Participation, 'Second reading speech', Social Security Legislation Amendment (Employment Services Reform) Bill 2008, House of Representatives, *Debates*, 24 September 2008, pp. 8-11.
 13. Newstart Allowance is provided to unemployed jobseekers aged 21 or more, op. cit.
 14. Youth Allowance (Other) is provided to unemployed jobseekers aged 16 to 20.
 15. Department of Education, Employment and Workplace Relations, *Labour Market and Related Payments – monthly profiles, July 2006 to September 2007*, <http://www.workplace.gov.au/workplace/Publications/LabourMarketAnalysis/LabourMarketandRelatedPaymentsMonthlyProfile>, accessed October 2008.
 16. The Hon. Brendan O'Connor, MP, Minister for Employment Participation, 'Second reading speech', p. 8, op. cit.

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Main reasons for participation failures

Table 2: Participation failures¹⁷

Quarter	Failed to attend interview with Job Network provider	Failed to comply with activity agreement	Total participation failures
Sept 06	15,984 (40.7%)	8,167 (20.1%)	39,288
Dec 06	20,978 (44.2%)	9,764 (20.6%)	47,473
Mar 07	24,573 (46%)	11,139 (20.8%)	53,454
Jun 07	27,697 (48.3%)	12,166 (21.2%)	57,403
Sept 07	32,005 (53.9%)	11,720 (19.8%)	59,365
Dec 07	32,519 (57.2%)	11,063 (19.5%)	56,835

Notes:

The two participation failure reasons in the table are consistently the two main participation failure reasons. All the other listed participation failure reasons each consistently make up less than 10% of all participation failures.

The % figures refer to the number of that type of participation failure as a % of total participation failures.

These participation failure reasons mainly centre on the jobseeker not complying with a process required of them. These processes can range across failure to attend an interview with a Job Network provider, failure to attend a training course and/or unsatisfactory attendance at a Work for the Dole (WftD) project. Three participation failures in a 12 month period can result in an 8 week non-payment period penalty.¹⁸

17. Department of Education, Employment and Workplace Relations, *Jobseeker Compliance Data*, op. cit.

18. Section 629 of the *Social Security Act 1991*.

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Main reasons for serious participation failures

Table 3: Serious failures¹⁹

Quarter	Voluntarily unemployed – left without good reason	Dismissed from employment due to misconduct	Total serious failures
Sept 06	833 (59.2%)	376 (26.7%)	1,407
Dec 06	1,191 (55.2%)	551 (25.5%)	2,157
Mar 07	1,743 (59.9%)	661 (22.7%)	2,908
Jun 07	1,676 (54.4%)	741 (24%)	3,084
Sept 07	2,115 (51.4%)	915 (22.2%)	4,114
Dec 07	2,347 (56.2%)	914 (21.9%)	4,179

Notes:

These are the serious failures that resulted in an 8 week non-payment period. They are separate from the participation failures that can, if there are 3 in a 12 month period, also result in an 8 week non-payment period.

The two serious failure reasons in the table are consistently the two main reasons for serious failures. All the other listed serious failure reasons each consistently make up less than 10% of all serious failures.

The % figure refers to the number of that type of serious failure as a % of total serious failures.

The total number of serious participation failures make up a small part of the total 32 000 8 week non-payment failures imposed in 2007–08.²⁰ Most of the 8 week non-payment period penalties are applied for third or subsequent participation failures in a 12 month period – see Table 1 above.

19. *ibid.*

20. The Hon. Brendan O'Connor, MP, Minister for Employment Participation, 'Second reading speech', *op. cit.*

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Will the proposed new breach regime presented in this Bill see any changes in the number of 8 week non-payment periods imposed?

Will the proposed new breach regime presented in this Bill see any changes in the number of 8 week non-payment periods imposed? The short answer to this question is both yes and no.

Yes

The current ‘3 strikes and you’re out’ regime that applies an 8 week non-payment period penalty for 3 participation failures in a 12 month period allows no discretion as to whether the 8 week non-payment penalty is applied. Under the current provisions in the SSA, for the third breach in 12 months, the 8 week non-payment period is applied as a matter of legislation, so delegates have not had to apply any discretion or decision making as to whether the penalty is applied.²¹ The essential change presented in this Bill is to allow some discretion and flexibility in the application of the 8 week non-payment period. The discretion and flexibility is to centre around:

- reasonable excuse,
- financial hardship, and
- compliance with a serious breach requirement.

The actual detail and guidelines as to how and in what circumstances this discretion is to be exercised is largely not set out in this Bill, rather it is to be set out in Legislative Instruments to be written by the Secretary or the Minister. Legislative Instruments are generally disallowable by the parliament under the *Legislative Instruments Act 2003* (LIA),²² unless the Principal Act otherwise provides.

The discretion to not apply an 8 week non-payment period for a serious participation failure where the jobseeker has a reasonable excuse currently applies²³ but the financial hardship and compliance with a serious breach requirement provisions do not currently apply. Under the proposed provisions, not only is there to be the discretion to not impose a 8 week non-payment period, but there will also be the discretion to not apply the full 8 weeks of non-payment, but a shorter period; also at the discretion of the delegate.

21. Section 629, *op. cit.*

22. Moira Coombs, *Acts Interpretation Amendment (Legislative Instruments) Bill 2005*, *Bills Digest No. 11 2005-05*, Parliamentary Library, Canberra, 8 August 2005.
<http://www.aph.gov.au/library/pubs/bd/2005-06/06bd011.htm>, accessed October 2008.

23. 624(2) Despite subsection (1), a failure of a kind referred to in that subsection is not a newstart participation failure if the person satisfies the Secretary that the person had a reasonable excuse for the failure.

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As can be seen from Table 1 above, the application of the non-discretionary '3 strikes and you're out' non-payment periods make up the majority of all 8 week non-payment periods applied. So the net result of all this discretion, that mostly doesn't apply now, will be less 8 week non-payment periods imposed and non-payment periods of less than 8 weeks. Some non-payment periods will be less than the current full 8 weeks, for example where the jobseeker complies with a serious failure requirement.

No

As can be also seen in Table 1 above, serious breaches make up about 45 per cent of all 8 week non-payment periods imposed numbering about 3 000 to 4 000 breaches in a quarter. This is nearly half of all 8 week non-payment periods applied. Is this a lot of penalties applied for serious breaches or is this a small number? In the context of the total number of NSA and YA Other recipients on payment at any one time,²⁴ it is a relatively small number.

To impose an 8 week non-payment period is a very difficult decision for any delegate. Delegates are very aware that to deny payment to an income support recipient for 8 weeks is a major decision with serious consequences. Bearing this in mind, the 8 week non-payment period penalties applied for serious breaches (Table 1 above) is a reasonable estimate of the number of breaches that have had to be applied for serious breaches. Remembering, reasonable excuse provisions apply now.²⁵

Decisions of delegates to impose an 8 week non-payment period are subject to review under the SSA. This in order can be to the original decision maker, then to the Authorised Review Officer (ARO), then to Social Security Appeals Tribunal (SSAT), then to Administrative Appeals Tribunal (AAT) and beyond. This means that delegates will only impose 8 week non-payment periods for serious breaches where the facts of the case compel them to apply the penalty and where they think the decision will stand up to examination and review.

Bearing all these factors in mind, serious breaches resulting in an 8 week non-payment period tend to be in those cases where the breach is evident and the case is clear cut. In this context, it can be expected that there will not be a significant reduction in the number of 8 week non-payment periods applied for serious breaches. There may be a reduction in non-payment periods applied for cases of severe financial hardship and also in the length of the non-payment periods, as there will be the flexibility to stop the non-payment during the 8 week period where the jobseeker complies with a serious breach requirement.

24. 550 650 unemployed jobseekers on Newstart Allowance (NSA) and Youth Allowance (Other) in July 2006, op. cit.

25. 624(2) Despite subsection (1), op. cit.

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Use of Legislative Instruments in this Bill

There are several provisions in this Bill which empower the Minister or the Secretary to use Legislative Instruments. For example, what is a 'reasonable excuse' for a serious breach, how many repeated breaches are to be considered as a serious breach and also the penalty amounts for 'no show no pay' and 'reconnect' failures. The detail is not in the Bill but is to be set out in various different Legislative Instruments to be made by the Secretary or the Minister.

Historical use of Legislative Instruments in welfare payments legislation

Historically, the use of Legislative Instruments made under the SSA, the *Family Assistance Act 1999* (FAA) or the *Veterans' Entitlements Act 1986* (VEA) has been very minimal. Where there needs to be qualification or payment requirements spelt out, this has been placed in the Act, not in a delegated Legislative Instrument. The culture has been one of; if you are to make payments to a person, the qualification requirements and the payment conditions should be spelt out in legislation. More recently this has changed. For example, the major legislation supporting the previous government's Welfare to Work initiatives was the *Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Act 2005*.²⁶ This Act did make extensive use of attached Legislative Instruments to spell out in more detail the conditions of payment eligibility, activity testing exemptions and other matters.

The use of Legislative Instruments has persisted and now has become regular. Some examples are:

- Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007,²⁷ and
- Social Security and Veterans' Entitlements Legislation Amendment (Schooling Requirements) Bill 2008.²⁸

26. Dale Daniels and Peter Yeend, *Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Act 2005*, *Bills Digest No. 70 2005-06*, Parliamentary Library, Canberra, 6 December 2005.
<http://www.aph.gov.au/library/pubs/bd/bd05-06.htm>, accessed October 2008.

27. Peter Yeend and Coral Dow, *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007*, *Bills Digest No. 27 2007-08*, Parliamentary Library, Canberra, 13 August 2007, <http://www.aph.gov.au/library/pubs/bd/2007-08/08bd027.htm#Contact>, accessed October 2008.

28. Marilyn Harrington and Peter Yeend, *Social Security and Veterans' Entitlements Legislation Amendment (Schooling Requirements) Bill 2008*, *Bills Digest No. 14 2008-09*, Parliamentary Library, Canberra, 2 September 2008,
<http://www.aph.gov.au/library/pubs/bd/index.htm>, accessed October 2008.

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Perhaps Legislative Instruments were a feature in the Welfare Payment Reform Act because of the very short lead time between when the Government announced the initiatives on 21 June 2007 and when legislation was presented to the Parliament on 7 August 2007. It may be that there was not time to develop and write the detailed provisions that might apply to trigger the Income Management Regime (IMR) provisions in specific situations; especially considering the IMR arrangements presented in that Act were unprecedented and very new. The short lead time and the use of Legislative Instruments does not apply in this Bill.

Some administrators prefer Disallowable Instruments

Disallowable Legislative Instruments still get some scrutiny by the Parliament, but a parliamentary debate is not required and unless there is a motion of disallowance, there is no debate. Legislative Instruments can be favoured by administrators as they are more easily updated or changed than provisions in an act, which require amending legislation to be passed by the Parliament. Notwithstanding a Legislative Instrument can be subject to a motion of disallowance, they are subject to less parliamentary scrutiny than a Bill and some program administrators may prefer that.

Main provisions

Schedule 1–Compliance with obligations in relation to participation payments

Part 1– Compliance with obligations in relation to participation payments

Social Security (Administration) Act 1999

Item 1 inserts **new Division 3A** into the *Social Security (Administration) Act 1991* (SSAA). **Proposed section 42A** provides an outline of what these new provisions contain. A feature is the discretionary power provided to decision makers to determine when a person commits a ‘no show no pay’ failure, a connection failure, a reconnection failure or a serious failure. Some of the other features of these proposed provisions are:

- The new term ‘participation payment’ is used in these new provisions and refers to NSA,²⁹ youth allowance,³⁰ parenting payment³¹ and special benefit.³²

29. Newstart Allowance is provided to unemployed jobseekers, op. cit.

30. Youth Allowance (Other) is provided to unemployed jobseekers aged 16 to 20. Youth allowance is also paid to full-time students aged 16 to 24.

31. Parenting payment refers to both Parenting Payment – Partnered (PPP) and Parenting Payment – Single (PPS). PPP is paid where the person is partnered and has a qualifying dependent child. PPS is paid where the person is single and has a qualifying dependent child. Some PPP and PPS recipients have Mutual Obligation requirements where the youngest dependent child is aged 6 or more (PPP) or 8 or more (PPS).

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- For ‘no show no pay’ failures, a penalty amount can be deducted from the jobseeker’s on-going participation payment.
- An 8 week non-payment period penalty can still be imposed for a serious failure but there is increased flexibility to end the 8 week period early in some circumstances.
- An 8 week non-payment period penalty can be imposed at grant.

Proposed section 42C sets out the ‘no show no pay’ failure types and they include:

- failure to participate in an activity under an Employment Pathway Plan,
- committing misconduct, and
- failure to attend a job interview.

Where there is more than one ‘no show no pay’ failure on a day, it is to be counted as only one failure.

Proposed subsection 42C(4) allows the discretion to decide to not impose a ‘no show no pay’ failure where the person ‘has a reasonable excuse’ as described in **proposed section 42U**. **Proposed section 42U** (see below) empowers the Secretary to set out in a legislative instrument what is to be considered a ‘reasonable excuse’. Legislative Instruments are generally disallowable by the Parliament under the LIA³³ unless the Principal Act otherwise provides.

The Explanatory Memorandum details that there is no intent to change policy about what can be considered a ‘reasonable excuse’, the exception to this is that jobseekers should not be penalised for actions that are beyond their control.³⁴ This is in effect what happens now and jobseekers are not penalised for matters or actions beyond their control or where they have a reasonable excuse.³⁵

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32. Some Special benefit payment categories have the same look for and accept work and Mutual Obligation requirements as NSA.
 33. Moira Coombs, Acts Interpretation Amendment (Legislative Instruments) Bill, op. cit.
 34. Explanatory Memorandum, p. 8.
 35. Department of Education, Employment and Workplace Relations, Guide to Social Security Law, *Instruction 3.2.13.10 Types of Penalties and Failures*, An 8-week non-payment period must not be imposed without Centrelink having consulted an appropriate Centrelink specialist officer. This should ensure that if a job seeker has personal issues or circumstances that may have impeded their ability to comply these will be taken into account when considering whether or not the job seeker had a reasonable excuse for the failure.

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Proposed section 42D empowers the application of a deduction penalty amount for a ‘no show no pay’ failure. The deduction penalty amount is set out in **proposed section 42T** – see below.

Proposed section 42E sets out ‘connection and reconnection’ failures. These failures are like those ‘administrative’ and ‘activity’ test failures that currently apply like not attending an interview, failure to enter into an activity agreement, failure to complete a requirement in an Employment Pathway Plan, failure to keep a record of job searches in a job seeker diary, failure to return a job seeker diary.

Unlike **proposed section 42C**, **proposed section 42E** empowers the Secretary to determine that a jobseeker has committed 2 or more ‘connection’ and ‘reconnection’ failures on a day.

Like **proposed section 42C**, **proposed section 42E** allows the Secretary the discretion to not impose a ‘connection’ and ‘reconnection’ failure where the jobseeker has a reasonable excuse. A ‘reasonable excuse’ will be set out in a legislative instrument empowered by **proposed section 42U** – see below.

Proposed section 42F sets out requirements that a jobseeker apply for job vacancies. As highlighted in the introductory remarks in this Digest, there is the general requirement under section 601 of the SSA³⁶ that the Secretary is satisfied the person is actively seeking suitable paid work. **Proposed section 42F** sets out in more detail requirements to apply for a job or provide documentation on job applications and failure can constitute connection failure and a reconnection requirement.

Proposed section 42G provides general power to the Secretary to issue a reconnection requirement. Failure to comply with a reconnection requirement may result in a reconnection failure as set out in **proposed section 42H**.

Proposed section 42H sets out reconnection failures allowing the setting of a reconnection failure period, being the start date of the failure, for example the day the jobseeker did not attend a job interview. The reconnection failure period ends on the day before the jobseeker complies with the requirement.

This reconnection failure process is not that much different to the current participation failure process. Currently, when jobseekers commit a first or second participation failure they are contacted and given the opportunity to avoid any penalty by meeting the requirement they failed to meet. If they have not complied by their next fortnightly lodgement day,³⁷ they are interviewed when they lodge their fortnightly form and advised

36. Section 601, op. cit.

37. The majority of jobseekers on NSA or YA (Other) lodge fortnightly continuation forms declaring income earned and job search efforts. The lodgement of this form triggers a fortnightly payment (the fortnight ending on the day of lodgement).

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that, although they will be paid the next day, their next payment will be contingent upon their re-engagement. If, after this warning, they have still not complied, their payment for the coming pay period will commence only from the day they do re-engage.³⁸ So there may be a gap between when they initially did not comply and when they subsequently comply, for which they are not paid.

Proposed sub-paragraph 42H(4)(b)(ii) sets out that a reconnection failure period is not to apply where the jobseeker has a 'reasonable excuse'. The Explanatory Memorandum claims that the reasonable excuse provisions in **proposed sub-paragraph 42H(4)(b)(ii)** replicate the existing regime, and as such, previous judicial interpretations will remain applicable.³⁹ Current sub-section 624(2) of the SSA does provide for the consideration of a reasonable excuse.⁴⁰

Proposed section 42J provides power to the Secretary to impose further conditions necessary to meet the reconnection process. The Explanatory Memorandum gives some examples explaining it could include complying with what was not originally complied with, like attending an appointment, entry into an Employment Pathway Plan or completion of a jobseeker diary where the original non-compliance was insufficient job search activity.⁴¹

Proposed section 42L empowers the deduction of a penalty amount for a reconnection failure and that amount is to be the equivalent of the daily benefit otherwise payable to the jobseeker (NSA or YA (Other)). The numbers of days of the penalty amount is the number of days of non-compliance up to the day before compliance is subsequently met – see **proposed section 42H** above. This is open ended so could be one day or any number of days. So for example, the current maximum basic rate single of NSA is \$449.30 per fortnight.⁴² So for 3 days of non-compliance, the penalty would be 3 tenths of \$449.30 or \$134.80.

Proposed section 42M sets out provisions empowering the Secretary to determine that repeated 'no show no pay' failures, 'connection' failures or 'reconnection' failures can constitute a serious failure. This proposed section is one of the main differences in the proposed amendments in this Bill and the current provisions that provide for '3 strikes and you're out' and the then automatic imposition of an 8 week non-payment period penalty. There is no detail of how many repeated failures is to be regarded as a persistent failure. The use of the term 'persistent failure' in **proposed section 42M** is new in social security

38. Sections 627 and 628 of the *Social Security Act 1991*.

39. Explanatory Memorandum, p. 12.

40. 624(2) Despite subsection (1), a failure of a kind referred to, op. cit.

41. Explanatory Memorandum, p. 13.

42. NSA rate single, no children as at October 2008.

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law. The detail of this is to be set out in a Legislative Instrument by the Minister as provided for in **proposed subsection 42M(4)**. Legislative Instruments are generally disallowable by the Parliament under the LIA,⁴³ unless the Principal Act otherwise provides.

Proposed section 42N sets out provisions for a jobseeker's failure to accept a reasonable job offer to be regarded as a serious failure. Similar requirements have been in the SSA and its predecessors since 1944 – see the introductory remarks at the beginning of this Digest. Again a serious failure is not to apply where the jobseeker has a reasonable excuse. **Proposed section 42U** will provide for the Secretary to set out in a Legislative Instrument what is a reasonable excuse – see below.

Proposed sections 42P, 42Q and 42R set out the non-payment period for a serious breach (8 weeks), the ending of a serious failure period and the payment of a participation payment during a serious failure period. In short, these proposed provisions provide the flexibility to have non-payment periods shorter than 8 weeks and to re-commence payment inside 8 weeks at the discretion of the Secretary, when the jobseeker commences to comply with their requirements.

Proposed subsection 42P(3) provides for the Secretary to require the jobseeker to undertake a serious failure requirement. **Proposed section 42Q** allows for the non-payment period for a serious failure to end where the jobseeker complies with a serious failure requirement. One of the criticisms of the current arrangements made by the Minister in the second reading speech when presenting the Bill was:

The key reason that these changes are necessary is that the current compliance system has resulted in thousands of counterproductive, non-discretionary and irreversible eight-week non-payment penalties. For the duration of these eight-week non-payment penalties there is no requirement for a job seeker to look for work or to have contact with either their employment service provider or Centrelink. The consequence of this failed approach to compliance, and an obvious defect in the system, is the eight-week separation of job seekers from participation requirements, including looking for work, gaining skills or undertaking work experience.⁴⁴

Therefore, the power to require a jobseeker to undertake a serious failure requirement, as presented in **proposed subsection 42P(3)**, is one of the key changes to the new jobseeker compliance regime presented in this Bill. Currently, there is no provision for a jobseeker to undertake any compliance requirements while serving an 8 week non-payment period penalty.

43. Moira Coombs, Acts Interpretation Amendment (Legislative Instruments) Bill, op. cit.

44. The Hon. Brendan O'Connor, MP, Minister for Employment Participation, 'Second reading speech', p. 8, op. cit.

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Another feature of **proposed subsection 42P(3)** is that it is not to be a decision that is appealable by the jobseeker. See comments on **item 38** in **Schedule 1** of this Bill below. Currently, a jobseeker can appeal the application of a non-payment period penalty; payment is continued while the appeal is resolved and if the penalty is still to be applied, the non-payment period can commence after the end of the appeal decision.

The Explanatory Memorandum explains that the application of serious failure requirements should not be appealable as:

such decisions depend almost entirely on practical concerns only apparent to a decision maker at the time the decision is actually made⁴⁵

This probably makes sense. Job Network providers currently make decisions about processes and requirements a jobseeker is required to undertake (attend an interview, attend a training session) and many/most of these decisions are not appealable. While many of these requests are not appealable, a jobseeker can approach the Job Network customer service line with complaints or issues about Job Network provider servicing.

Proposed section 42Q provides amendments to the ending of a serious failure non-payment period. **Proposed subparagraph 42Q(1)(b)(ii)** refers to the Secretary ending the serious failure non-payment period in cases of severe financial hardship. See comments below about severe financial hardship.

Proposed section 42S provides for a serious failure in cases where a jobseeker is unemployed from a voluntary act or misconduct. This is like proposed **section 42N** (see above) in that it continues the application of an 8 week non-payment period penalty for existing and long-standing provisions in the SSA. **Proposed section 42S** will provide for the Secretary to set out in a legislative instrument that the 8 week non-payment period may not be applied in cases of severe financial hardship. This is empowered by **proposed section 42U**. See comments below in *Part 2–Consequential amendments* about severe financial hardship.

Proposed section 42T essentially empowers the Minister to set out in a legislative instrument the penalty amounts for a ‘no show no pay’ failure and also for a reconnection failure. Legislative Instruments are generally disallowable by the Parliament under the LIA,⁴⁶ unless the Principal Act otherwise provides.

The power provided by **proposed section 42T** for the Minister to set out the penalty amounts in a legislative instrument is not unfettered. For ‘no show no pay’ failures, the penalty amount cannot exceed 10 per cent of the fortnightly instalment (or one work day in the 10 working days in a fortnightly pay period). The amount also cannot include any

45. Explanatory Memorandum, p. 25.

46. *ibid.*

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additional payment that might be provided on top of the basic rate of payment like Rent Assistance⁴⁷. So for example, the current maximum basic rate single of NSA is \$449.30 per fortnight.⁴⁸ So the maximum penalty would be 10 per cent of this fortnightly rate or \$44.93.

The penalty for reconnection failures is different than ‘no show no pay’ failures with the penalty being at the daily rate of the basic maximum rate and for the number of days of failure. For example, if the days of reconnection failure are three days, then the penalty amount is three days of payment.

Proposed section 42U empowers the Secretary to describe in a legislative instrument the matters to be considered for a person to be considered to have a reasonable excuse for a:

- ‘no show no pay’ failure,
- reconnection failure, and
- serious failure.

Proposed section 42V empowers the deduction of penalty amounts determined under **proposed section 42D** (‘no show no pay’ failure) and **proposed section 42L** (reconnection failure) from on-going payments.

Proposed section 42W details that penalty amounts are not a debt. Put simply this means that if a jobseeker were to go off a participation payment (because they found work), and there was some penalty amount outstanding the amount is not pursued and recovered. Nor is it recovered if the person returns a participation payment at a latter date.

Part 2–Consequential amendments

Social Security Act 1991

Proposed subparagraph 42Q(1)(b)(ii) provides for the Secretary to end a serious failure non-payment period in cases of severe financial hardship. **Items 2 to 4** propose to amend the definition of severe financial hardship in subsection 14A(2) of the SSA for the purposes of the compliance and obligations sections for participation payment⁴⁹ presented in this Bill. The definition of severe financial hardship is proposed to be amended to refer to where the present value of the person’s liquid assets⁵⁰ does not exceed the person’s ‘maximum reserve’. A person’s maximum reserve is defined in section 14A of the SSA (the social security benefit liquid assets test definitions) as:

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47. Maximum single rate of Rent Assistance as at October 2008 is \$110.20 per fortnight.
 48. NSA rate single, no children as at October 2008.
 49. Participation payments are NSA, YA, parenting payment and special benefit.
 50. Liquid assets refers to cash and readily realisable assets like monies in the bank.

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"maximum reserve", in relation to a person, means:

- (a) if the person is not a member of a couple and does not have a dependent child—\$2,500; or
- (b) in any other case—\$5,000.⁵¹

In most cases, where a serious period failure is being considered for a jobseeker on a participation payment,⁵² jobseekers will meet this severe financial hardship test. This especially applies for those jobseekers who have been in receipt of a participation payment for a prolonged period and have run down any financial reserves. In short, the majority of 8 week non-payment periods will not be applied as jobseekers will be considered to be in severe financial hardship.

Items 11 to 22 propose to amend the SSA to restrict the new proposed participation failure provisions in this Bill to YA Other but not to persons paid YA if they are a full-time student or an apprentice.

Social Security (Administration) Act 1999

Items 37 and 39 propose to amend the payment pending review provisions. The compliance and penalty provisions proposed in this Bill can result in a jobseeker's participation payment not being paid for up to 8 weeks. So what happens if a jobseeker appeals a non-payment period penalty decision? Essentially, the amendments as presented would provide for the continued payment of the jobseeker's participation payment while they appeal a non-payment period penalty and this appeal is decided. If the appeal is then not successful and the penalty is to be applied, the penalty period can then be applied (or resumed) after the appeal process.

This is essentially the same process that applies for the application of non-payment periods and appeals now. Currently, a jobseeker can appeal the application of a non-payment period penalty; payment is continued while the appeal is resolved and if the penalty is still to be applied, the non-payment period can commence after the end of the appeal decision. See comments on **proposed subsection 42P(3)** above.

Part 3—Application provision

The compliance regime provisions presented in this Bill are to commence from 1 July 2009. Any non-payment period penalty being served under the current provisions that cross this start date would continue to be served under the current arrangements.

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- 51. Section 14A of the Social Security Act 1991 - Social security benefit liquid assets test definitions.
 - 52. Participation payments are, op. cit.

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Schedule 2—Amendments relating to employment pathway plans

Social Security Act 1991

Social Security (Administration) Act 1999

Generally, the provisions presented in **Schedule 2** replace the wording ‘Activity Agreements’ with ‘Employment Pathway Plans’ in the SSA and the *Social Security (Administration) Act 1999* (SSAA). The Explanatory Memorandum explains that these changes are substantially word replacement only and there is intended to be no change in the legislative provisions, that is, the application of Employment Pathway Plans is to be the same as Activity Agreements.⁵³

Schedule 3—Personal Support Programme and exemptions relating to youth allowance and newstart allowance

Social Security Act 1991

Personal Support Programme

The Personal Support Programme (PSP) is a pre-employment program aimed at helping individuals with very significant non-vocational barriers (homelessness, mental health issues, drug or gambling problems, or social isolation) that are preventing them from getting a job or benefiting from employment assistance programs such as Job Network. The objective of PSP is to assist participants to overcome their non-vocational barriers so they can move on to achieve economic and/or social outcomes.

The PSP is delivered by a network of community based and private organisations that provide individualised support and assistance to participants for up to 2 years. The participant and their provider jointly develop an intervention plan to address participant’s non-vocational barriers. PSP providers monitor participants’ progress regularly and formally complete a report after 8 and 16 months of assistance. As part of their activity agreement, PSP participants are required to fully participate in the PSP with their provider and attend all scheduled appointments as notified.

Replacement of the Personal Support Programme under the new Employment Services 2009-12

Under the proposed new Employment Services arrangements 2009-12, that are to commence from 1 July 2009, the PSP is to be replaced and integrated into the new Employment Services 2009-12 arrangements. Largely performing the role that PSP does now, there is a proposed Stream 4 arrangement. Stream 4 is described as:

53. Explanatory Memorandum, p. 28.

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Stream 4 will provide integrated, intensive assistance to the most disadvantaged job seekers in our community. This assistance will combine pre-employment and employment assistance. The pre-employment and employment activities will need to be tailored to the individual needs of the job seeker and may be delivered concurrently or sequentially, depending upon the job seeker's circumstances. Stream 4 job seekers will have complex and or multiple non-vocational barriers that prevent them from obtaining and sustaining employment or undertaking further skills development. Barriers may include, but are not limited to:

- mental illness - including episodic psychological conditions, anger management issues, mood disorders, severe depression, anxiety disorders, agoraphobia, panic attacks, stress disorders including post traumatic stress,
- social problems - including domestic violence, family and relationship issues, financial management difficulties, social isolation including alienation and poor communication or language skills,
- torture or trauma,
- addictions - including gambling, drug and or alcohol, or
- homelessness or unstable accommodation.⁵⁴

The provisions presented in **Schedule 3** of the Bill largely remove references to the PSP in the SSA.

Schedule 4–Other amendments

Social Security Act 1991

Items 2 to 5 and 8 and 9 propose to make changes so that jobseekers can be deemed to be meeting their activity test requirements. The proposed new provisions will allow the Secretary to specify, in a legislative instrument, that a class of jobseeker can be deemed to be complying with their activity test requirement by meeting their Employment Pathway Plan. No detail is provided in the Explanatory Memorandum as to what class of jobseeker is being considered to be requiring this blanket activity test compliance coverage. Legislative Instruments are generally disallowable by the Parliament under the LIA,⁵⁵ unless the Principal Act otherwise provides.

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54. Department of Education, Employment and Workplace Relations, Employment Services 2009-12, *Exposure Draft Tender*, Canberra, 1 August 2008, p. 19.
<http://www.workplace.gov.au/workplace/Publications/Purchasing/ExposureDraft/>. accessed October 2008.
55. Moira Coombs, Acts Interpretation Amendment (Legislative Instruments) Bill, op. cit.

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Social Security (Administration) Act 1999

Item 11 provides for **new sections 63 and 64** of the SSAA, which refer to general powers for the Secretary to require a person to attend an interview, to attend a medical examination or to complete a questionnaire. Failure to do as required can mean that the payment they are otherwise entitled to, is not payable (suspended or cancelled). Similar provisions have been in social security law for a very long period. The Explanatory Memorandum explains the main reason for these proposed new replacement provisions is to reduce overlap in drafting and also inconsistencies.⁵⁶

Concluding comments

Since 1944, governments have legislated for the cancellation or non-payment of unemployment benefit where a jobseeker is unemployed for not a good reason, or refuses a reasonable job offer or does not take adequate steps to look for work. What has changed over the years has been the detail of how this rigour should be applied.

For the past two years, the number of jobseekers on NSA has ranged from 472 448 (August 2006) to 429 459 (August 2008).⁵⁷ Likewise, the number of jobseekers on YA Other has ranged from 72 634 (August 2006) to 63 347 (August 2008).⁵⁸ With the Welfare to Work reforms of July 2006, there are now more persons of working age being provided with NSA as their form of income support and required to look for and accept work and Mutual Obligation requirements.⁵⁹ With this number of unemployed jobseekers on a participation payment, required to comply with look for and accept work requirements, there are going to be some who do not comply and a penalty will apply.

There are two main drivers instigating the proposed changes to the compliance regime arrangements in social security law presented in this Bill. Firstly, the government considers the current '3 strikes and your out' automatic application of an 8 week non-payment period penalty is too harsh and counter productive.⁶⁰ Secondly there are the proposed new Employment Services arrangements to commence from 1 July 2009.⁶¹

56. Explanatory Memorandum, p. 32.

57. Department of Education, Employment and Workplace Relations, *Labour Market and Related Payments – monthly profiles*, op. cit.

58. *ibid.*

59. Dale Daniels and Peter Yeend, Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Bill 2005, op. cit.

60. The Hon. Brendan O'Connor, MP, Minister for Employment Participation, 'Second reading speech', op. cit.

61. The Hon. Brendan O'Connor, MP, Minister for Employment Participation, A better pathway to employment for job seekers, op. cit.

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The proposed amendments provide a far greater degree of discretionary application of penalties. Discretion can be applied in terms of a reasonable excuse and also where the jobseeker is in severe financial hardship. At present there is the discretionary application of the reasonable excuse provisions but no provision for the consideration of severe financial hardship.

The other feature of the proposed provisions is the power to require the jobseeker to undertake a 'serious failure requirement', such as undertaking a work experience placement. Where the jobseeker complies with this serious failure requirement, the non-payment period ends and payment is recommenced.

Non-payment period penalties are not to apply where the jobseeker is in severe financial hardship. In most cases, jobseekers will meet this severe financial hardship test, especially jobseekers who have been in receipt of participation payment for a prolonged period and have run down any financial reserves.

To deny payment of income support to an unemployed jobseeker for 8 weeks is a very severe penalty. In the vast majority of cases (50.1 per cent) income support recipients rely on welfare payments for 90 per cent of their income.⁶²

62. Department of Families, Housing, Community Services and Indigenous Affairs, *Pension Review Background Paper*, Canberra, August 2008, p. 20.
http://www.facs.gov.au/internet/facsinternet.nsf/seniors/pension_review.htm, accessed October 2008.

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