

**National Welfare Rights Network
(NWRN)**

**Submission to the Education,
Employment and Workplace**

Relations Senate Inquiry

**Into Social Security Amendment
(Employment Services Reform) Bill**

2008

November 2008

1.	The National Welfare Rights Network	3
2.	Overview	4
3.	Numerous problems in the design of the system: inconsistent and too complex.....	6
4.	No place for an eight week no payment penalty	8
5.	Proposed “No Show No Pay” category: worse and harsher than current regime	10
6.	Hardship Provisions: too few protections	12
7.	Legislative Instruments.....	13
8.	Decision making principles for a fair and effective compliance system.....	14
9.	Comprehensive Compliance Assessment.....	14
10.	Employment Pathway Plan	19
11.	Vulnerable Job Seekers	20
11.1	Vulnerability Indicators	20
11.2	Extra support for Personal Support Program	23
12.	Legislation Specific Issues	24
12.1	Unemployment resulting from a voluntary act or misconduct.....	24
12.1.1	Refusing a “suitable job offer” and becoming “voluntarily unemployed”	26
12.1.2	Dismissal for misconduct.....	27
12.1.3	Removing the preclusion period	29
12.2	“No Show No Pay” Failures	29
12.2.1	Activities included in the “No Show No Pay”	30
12.2.2	Penalties should only be imposed as a last resort	31
12.2.3	The practical application of “No Show No Pay”	33
12.2.4	Penalty balances carried over – both counterproductive and punitive	35
12.2.5	Proposed timing for “No Show, No Pay” penalties	36
12.2.6	The issue of “recoverability” – compliance or punishment	38
12.2.7	Lack of a safety net	39
12.3	Connection/Reconnection Failures.....	40
12.3.1	Connection and RapidConnect.....	40
12.3.2	Reconnection Failures.....	42
12.4	Serious Failures	43
13.	Payment Pending Review provisions.....	44
14.	Problems with proposed changes to sections 63 and 64.....	45
15.	Monitoring, data availability and evaluation.....	46
16.	Conclusion and Recommendations.....	47

National Welfare Rights Network (NWRN)
Submission to the Education, Employment and
Workplace Relations Senate Inquiry into
Social Security Amendment
(Employment Services Reform) Bill 2008
November 2008

1. The National Welfare Rights Network

NWRN is an incorporated national peak body of 14 community legal centres throughout Australia which specialise in Social Security law and its administration by Centrelink. NWRN members provide casework assistance to their clients and others in the community sector in the form of information, advice, referral and representation. NWRN members also conduct training and education for community workers, produce publications to help Social Security recipients and community organisations understand the system and maximise their client's entitlements, undertake research and policy advocacy and support the NWRN in dealing with these issues at the national level.

Based on the experience of clients of NWRN members, the Network also undertakes research and analysis, develops policies and position papers, advocates for reforms to law, policy and administrative practice and participates in campaigns consistent with the aim to reduce poverty, hardship and inequality in Australia and to build a fair, inclusive and sustainable Australia underpinned by a comprehensive, rights based Social Security safety net for all.

The NWRN advocates that the Social Security system in Australia should be characterized by an uncompromising recognition of the following rights:

- the right of all people in need to an adequate level of income support which is protected by law;
- the right of people to be treated with respect and dignity by Centrelink and those administering the Social Security system;
- the right to accessible information about Social Security rights and entitlements, obligations and responsibilities;
- the right to receive prompt and appropriate service and Social Security payments without delay;
- the right to a free, independent, informal, efficient and fair appeal system;
- the right to access an independent complaints system;
- the right to independent advice and representation; and
- the right to natural justice and procedural fairness.

2. Overview

The NWRN welcomes the opportunity to provide a submission to this Senate Inquiry into the Social Security Legislation Amendment (Employment Services Reform) Bill 2008. NWRN members throughout Australia deal with people who have been penalised under the current compliance regime on a daily basis. We see the reality of how penalties are applied (as opposed to the theory) and the impact they have on people, often the most vulnerable people in the Social Security system. We have seen how the 8 week non payment period, which lies at the heart of the current compliance regime, has caused extreme hardship, been counterproductive (because it has led to the total disengagement of job seekers as it has been neither reasonable nor lawfully possible to impose activity test requirements during the non payment period) and has contributed to both homelessness and social exclusion.

NWRN agrees with the object of the Bill as set out in clause 42B, in particular its stated focus on encouraging reconnection and compliance rather than punishment. Within this context, NWRN welcomes a number of aspects of the new system which includes a comprehensive compliance assessment, the removal of the automatic 'three strike' rule and the cessation of penalty periods on re-engagement for serious failures and the hardship provisions for serious failures and the 8 week preclusion period.

It is crucial that a fair and effective compliance regime is put in place, especially in light of the global financial crisis and predictions that an additional 200, 000 Australian are unlikely to lose their jobs as a result of the current international instability.

However there are a number of structural flaws in the proposed design of the new system and consequently a number of problems with the provisions of the Bill, precisely because they do not adhere to these principles and directions and do not move away from a 'penalise first approach'.

The main problems are:

- Rather than simplifying the system, its design makes it extremely complex thereby increasing the risk of job seekers falling foul of it;
- It retains the now discredited eight week non payment periods;
- It introduces a new No Show No Pay failure category which is already being referred to as '**No show, no pay, no stay, no home**';
- The proposed hardship provisions contain too few protections to achieve the stated objects of the Bill;
- Too much of the detail is to be left to legislative instruments and policy guidelines; and
- It does not adhere to key decision making principles that should underpin any compliance regime.

3. Numerous problems in the design of the system: inconsistent and too complex

The new system should aim to simplify the compliance system, rather than complicate it further. The existing rapid connect system is to remain in place and the existing compliance system is to be retained for full time students on Youth Allowance and Austudy payment (i.e. the “participation failures” and “repeated participation failures” system is retained for these students).

In addition to these categories of failures, the proposed new model will include a further five categories of failures and penalties, namely, “No Show No pay failures” , “Connection failures”, “Reconnection failures”, “Serious failures”, and a Preclusion/waiting period for “unemployment resulting from a voluntary act or misconduct”.

Sounds confusing? It is. Added to the multiple categories of failures and penalties, is another layer of complexity because the principles and rules underpinning each category both vary and are inconsistent. For example, some categories have reasonable excuse provisions whilst some do not. Even within categories, some failures have reasonable excuse provisions whilst some do not. Some categories enable a person to shorten or avoid a potential penalty by taking up certain activities (e.g. training or work experience) whilst others do not. Some failures are limited to one per day whilst others are not. Some are subject to external review whilst others are not. Some provide discretionary powers to a decision maker whilst others do not. Some have hardship provisions whilst others do not. The penalty category for unemployment resulting from a voluntary act or misconduct is referred to as a “preclusion period” rather than a failure even though it may apply to someone already on a payment.

Whilst a “one size fits all” approach is not necessarily the solution, the system proposed is too complex and is likely to increase the hardship caused to job

seekers. In NWRN's opinion, both Centrelink and Employment Service Providers will find it difficult to both understand and to explain to job seekers exactly how the new system works. NWRN is concerned that job seekers will struggle to understand just how the new system will work, their obligations under it and second how they can avoid penalties and if an error occurs how it can be remedied. This is of great concern, given NWRN members' current experience that jobseekers' lack of understanding of how the existing compliance regime operates in practice has led to the imposition of penalties. As it currently stands, the proposed new compliance regime will also in practice be bureaucratically cumbersome and administratively expensive for Centrelink to implement. The unnecessary level of complexity has the real potential to result in a higher rate of error in Centrelink's implementation of the system resulting in significant hardship to job seekers.

The system is also likely to cause protracted and costly appeals (both internal and external) especially around the imposition of individual "No Show No Pay" failures and place further pressure on an already under resourced appeals system within Centrelink.

NWRN believes that remedying inconsistent requirements and approaches within and between the different failure and penalty categories is not only necessary but critical to both ameliorating the current inequity and unfairness inherent in the proposed model but also to making it workable in practice.

Recommendations

That the "reasonable excuse" provision apply to each category and to all grounds within categories.

That each category provide the Secretary (or delegate) with a residual discretion to take individual circumstances into account and not apply the failure/penalty even though the legislative elements are otherwise satisfied.

That each category enable a penalty or non payment period to be shortened or avoided through participation in an appropriate activity.

That each category contains a hardship provision.

That all decisions to impose failures are subject to both the internal and external avenues of appeal.

4. No place for an eight week no payment penalty

To be clear from the outset, whilst NWRN acknowledges that the Social Security system in Australia has both entitlements and rights alongside obligations and responsibilities that necessitate the inclusion of a compliance regime. However, NWRN has never endorsed a compliance regime which includes no payment penalties. We have always opposed these and compliance penalties that both lack an evidence base and are unnecessary harsh.

The retention of an eight week no payment period in the proposed compliance regime is therefore of great concern to the NWRN and is a major disappointment given the Government's pre-election commitment to the breaching principles set out in the 2004 "Breaching Review Taskforce Report". Endorsement of these principles in Opposition necessitate the removal of the eight week no payment penalty in

Government especially as the “Future of Employment Services in Australia: A Discussion Paper” itself recognised that an eight week no payment penalty:

- reduces a person’s ability to comply;
- Is counter productive;
- can cause extreme hardship; and
- contributes to both homelessness and social exclusion.

The number of eight week no payment penalties that were imposed has more than doubled during the last two financial years. According to DEEWR, 15% of all job seekers have a mental illness and 5% have unstable accommodation. In 2007-08 three out of four job seekers who received an eight week no payment penalty returned to income support, most within the next payment cycle after serving the eight week no payment period. This evidence clearly shows that cutting payments for eight weeks does not assist job seekers to engage but simply drives them deeper into poverty.

The removal of payment for such a sustained period (which equates to a financial penalty of \$1,797.20)¹ means in effect that a job seeker does not have the financial capacity to look for work or to travel to interviews or even to do a shift of work if they are offered a job. It also significantly limits the job seeker’s capacity to cover even the most basic job search activity, such as the cost of telephone calls to make contact with prospective employers.

Whilst we welcome the Government’s intention to reduce the eight week no payment penalty in some cases through such mechanisms as comprehensive compliance assessments and the re-engagement and hardship grounds a non payment period of any length should not be a part of a compliance structure in an income support system. The damage caused by such a provision so far exceeds any possible deterrent effect that it is, totally counter productive.

¹ *A Guide to Australian Government Payments*, 20 September – 31 December 2008. The rate of Newstart Allowance was \$449.30 a fortnight

Any compliance regime seeks to be effective must be fair, reasonable and encourage re-engagement, as opposed to offering only punishment. The Government current proposal to retain the eight week no payment period fails to meet each of these benchmarks.

5. Proposed “No Show No Pay” category: worse and harsher than current regime

We are greatly concerned that this proposed new feature of the compliance regime alone is enough to compromise and undermine the entire approach. The design of this category absolutely runs contrary to the benchmarks stated above. Under the proposed category, there is no provision to recover “No Show, No Pay” failures through re-engagement, there is no upper limits on the numbers of days that can be lost and there are no hardship provisions.

Loss of one day’s payment, as a result of “No Show No Pay” infraction is equal to \$44.93 per day. This is the absolute minimum that a job seeker will lose out of their income support. If a job seeker misses two weeks of training at 3 days a week, the total loss of income support is almost \$270 – more than half of their fortnightly income support payment.

Whilst we acknowledge that the rent assistance component will be quarantined, this alone will not be enough for a jobseeker to meet regular bills, pay for food and other essential expenses, let alone meet the costs of job search, attending interviews with Centrelink, Employment Service Providers or look for work. Whilst under the current system, a job seeker who faces an eight week non payment penalty may have their bills and essential expenses paid under Financial Case Management, this option will be removed from the proposed new compliance regime.

Under the “No Show No Pay” regime, a person could face a significant loss of income, not be able to pay bills or buy medicines or feed their children, but be left with no income support safety net as the new system is currently proposed. This makes this aspect of the system worse than the one that it replaces because for the first time it will leave families with children and people requiring medicines as well as other exceptionally vulnerable people with few financial resources and no available safety net.

This proposed aspect of the new system is also harsher because a person will face an immediate loss of payment if they are not determined to have a reasonable excuse for the non compliance. The Government has lauded this aspect of the proposals on the grounds that it will embed a work like culture and provide for the penalty to be imposed as close as possible to the offence or transgression. The Government has argued that the current imposition of a third penalty diminishes its deterrent effect because it is imposed some time after the first infraction of the rules. However, no evidence has been adduced in support of this argument.

Based on NWRN members daily casework experience, the current system of giving a ‘warning’ before the imposition of a financial penalty has enabled job seekers to better understand their obligations and has assisted in facilitating compliance and avoiding loss of payment. So not only will individuals face an immediate loss of payment (if they do not have a ‘reasonable excuse’) under the new arrangements it is proposed that wherever possible, the loss of payment on a daily rate will occur within the same fortnight as the “infraction” took place.

Whilst in theory the alignment of the penalty within the same instalment payment fortnight of the ‘infraction’ might have merit, the practical application will result in unfairness and cause unnecessary hardship as it will leave Centrelink and the Employment Service Providers with little time to carefully investigate whether the penalty should be applied and leave the jobseeker with no real opportunity to reorganise their financial arrangements.

6. Hardship Provisions: too few protections

Whilst we welcome the inclusion of hardship or a safety net provisions in the Bill which will allow the Secretary (or the delegate) to end non payment/preclusion periods, its limited scope is of concern.

Firstly, the hardship provisions need to be extended so that they apply to all categories of penalties, including the “No Show No Pay” category.

Secondly, the criteria for the hardship provisions needs to be expanded. As the hardship provisions are currently proposed, a person will need to be in severe financial hardship and fall within the class of persons specified by the Secretary. According to the Explanatory Memorandum, the intended class appears to be along the lines of the current financial case management categories, for example, parents with dependent children or persons who incur significant costs associated with a medical condition.

The NWRN proffers that the underutilisation and underspending in relation to financial case management in the period since the introduction of Welfare to Work is clear evidence that the safety net which was to be provided by these regulations excluded many who should have been considered ‘vulnerable’ according to community standards. Unless the current proposed provisions are amended a significant number of vulnerable people will still be left without payment for an 8 week period without any safety net.

NWRN also considers that the severe hardship liquid assets limit of \$2,500 for a single person is too low and fails to take into account that unlike a member of a couple they are unlikely to have access to other financial resources. Accordingly, for this reason, NWRN recommends that the definition of severe hardship for a job seeker who is not a member of a couple is amended to include where their liquid assets are less than \$5000 rather than the proposed \$2,500.

Recommendations:

That hardship provisions are modified to ensure that there is a safety net for those impacted by 'No Show No Pay', Connection/Reconnection failures, Serious failures and Preclusion periods for unemployment resulting from a voluntary act or misconduct.

That the financial hardship criteria is extended to include other vulnerable people apart from the classes included in the existing Financial Case Management Guidelines.

That the definition of severe hardship for a job seeker who is not a member of a couple is amended to include where their liquid assets are less than \$5,000 rather than the proposed \$2,500 amount.

7. Legislative Instruments

NWRN again wishes to place on record our concerns that extremely important details are left to legislative instruments, or policy guidelines, such as the definition of reasonable excuse (s42U) and determining what activity requirements will be required by job seekers in 'Stream 4' who are those job seekers with the most significant employment barriers and vulnerabilities.

If this is to remain the case, NWRN strongly urges the Committee to recommend that DEEWR and Centrelink consult, in good faith, with a range of key stakeholders with regard to the detail of the legislative instruments and policy guidelines which will stand below the legislation underpinning the new system.

8. Decision making principles for a fair and effective compliance system

No compliance system will be fair, efficient or effective in contributing to the goal of increased participation for job seekers unless it is underpinned by the following decision making principles:

- No penalty should ever be imposed unless Centrelink is satisfied that the original requirement was appropriate and no reasonable excuse or special circumstances exist. The onus should rest with the decision maker rather than the job seeker whose very vulnerabilities limit their capacity to establish special circumstances or reasonable excuse.
- No penalty (financial or otherwise) should be imposed on a jobseeker without them having an opportunity to argue that the penalty should not apply because:
 - (i) they were unaware of the requirement;
 - (ii) the original requirement was not suitable in the first place; or
 - (iii) they have a reasonable excuse of special circumstances apply; or
 - (iv) they have subsequently met the requirements (either original or substituted requirements).

9. Comprehensive Compliance Assessment

A critical tool of the new Compliance Framework is the Comprehensive Compliance Assessment (CCA). According to the Second Reading Speech of Minister O'Connor "the role of the new Comprehensive Compliance Assessment is to ensure that the new system is tough on any job seekers who intentionally does not meet their obligations, but is also able to differentiate when a job seeker is experiencing

circumstances beyond his or her control.”² However the fundamental lack of detail about how the new CCA will work in practice makes it difficult to analyse how effective it will be as the main tool intended to safeguard the objects of the legislation,

The NWRN considers that such a critical aspect of the new framework should be part of the Bill to ensure that the protections that it promises to deliver are ensured.

The NWRN welcomes the new Comprehensive Compliance Assessment and strongly believes that this process is critical to the whole new compliance framework because it is the main tool/mechanism that can safeguard the objects of the legislation.

The NWRN understands that the intended function of the Comprehensive Compliance Assessment is principally to:

- consider job seeker’s compliance history based on Job Network Provider’s report(s) and Centrelink records;
- talk to the job seeker and identify any undisclosed issues (that have not been taken into account before) and which impact on their ability to meet their individual compliance requirements;
- investigate why the job seeker has failed to fulfil their compliance requirements;
- examine whether the job seeker is experiencing circumstances beyond their control;
- identify any barriers to engaging in job seeking activities and employment;
- recommend alternative assessment/intervention;
- make referrals to appropriate services or programs (e.g. JCA, Specialised JSP);
- determine whether the person has “reasonable excuse” for not complying;

² The Hon. Brendan O’Connor, Minister for Employment Participation, *Social Security Legislation Amendment (Employment Services Reform) Bill 2008*, Explanatory Memorandum

- determine whether the person has capacity to comply and offer an intensive activity option to work off the penalty; and
- determine whether the person will have an 8 week non payment period imposed.

Despite the central importance of the CCA to the compliance framework, as yet NWRN is not aware of the development of any clear set of policy guidelines to detail when a CCA will be conducted, what the CCA process will entail, who will conduct the CCA and how the assessment process will work and the time frames for the completion of a CCA. In NWRN's view a set of principles guiding the policy will also need to be developed and adopted.

NWRN is also of the view that the CCA process should be subject to the normal appeals process. This would need to be legislated.

According to information provided, in the Employment Services Tender and in recent Senate Estimates Hearings, DEEWR have advised the triggers for the completion of a CCA will be where a job seeker has had three (3) Connection/Reconnection Failures in a six month period or six (6) days of "No Show No Pay" in a six month period.³ Additionally both Employment Service Providers and Centrelink can request a CCA at any other time. The right to request a CCA should also be extended to job seekers.

The CCA process is central to the success of the new compliance system. It is important to get this process right in order to prevent the continuation of the adverse impacts of the previous system some of which were detailed by the Minister in his Second Reading Speech to the Bill.⁴ The process should be clear, quick, efficient,

³ Hansard, Senate Standing Committee on Education, Employment and Workplace Relations, *Supplementary Budget Estimates*, 23 October 2008

⁴ The Hon. Brendan O'Connor, Minister for Employment Participation, *Social Security Legislation Amendment (Employment Services Reform) Bill 2008*, Explanatory Memorandum

appropriate, fair and decisive. The need for the new system to be quick and co-ordinated is a priority. In the past the use of a centralised approach in the National Participation Solutions Team with Welfare to Work resulted in long delays where job seekers had their payments suspended immediately and languished for up to 12 weeks whilst waiting for a decision to be made as to whether or not a serious participation failure had occurred or was to be imposed. During that period job seekers were routinely barred from having their payments restored pending the outcome of a review, as it was deemed that a decision had not as yet been made. Additionally the Commonwealth Ombudsman found in their investigation into Application of Penalties under Welfare to Work released in December 2007 that those subject to immediate suspension pending a participation failure decision being made were not provided with access to Financial Case Management.⁵

Early intervention and expedient CCA will enable the Centrelink Delegate to determine whether or how much the person is able to comply with and/or suggest remedies to address those barriers or whatever is determined. If this is done reasonably quickly the job seeker may be exempted or placed on reduced requirements without having to lose payments under any of the penalty types.

It is important that the new CCA is efficient in that the assessments are conducted properly and accurately by professionals who have expertise about the issues/barriers affecting disadvantaged job seekers. It is unclear who within Centrelink will be responsible for these assessments although DEEWR has advised that CCAs will be completed by Centrelink Social Workers. Whilst NWRN accepts that Centrelink social workers are appropriate professionals to undertake such assessments we would question their capacity to take on this additional work without a huge increase in resources. Also NWRN is concerned that their role as helping professionals will be further compromised, as they will ultimately be required to determine whether a person will be subject to the imposition of a serious failure which brings with it an eight week non payment period.

⁵ Commonwealth Ombudsman, *Application of penalties under Welfare to Work*, December 2007

Similarly, another feature of the new CCA should be the appropriateness of the assessments in identifying barriers or issues which prevent the person from complying and make appropriate referrals to suitable services or support programs that are actually going to assist and support the person in addressing those barriers, it may include no action or referral if there is no such specific service available. To be effective the CCA will also need to take into account all/or any unintended consequences and the impact on disadvantaged job seekers affected by the compliance measures in all of the proposed types of penalties.

The NWRN consider that it should be a requirement that the CCA process occurs in a face to face situation, although acknowledging that this may not be practical in some remote and rural locations. A priority for this process to work is to ensure that the job seeker is provided with a genuine opportunity to engage with the professional completing the CCA. In our experience, a job seeker's barriers to complying are more likely to be disclosed through a face to face appointment because it provides a greater opportunity for a relationship to be established between the job seeker and the assessor. The NWRN remains unconvinced of the appropriateness of CCAs being completed by Social Workers over the telephone from a different geographic location who may have little or no knowledge of the local context in which a job seeker lives. Too often under the existing compliance framework we have seen instances where vulnerable job seekers have not been adequately assessed for access to Financial Case Management in these circumstances.

Recommendation

That the Comprehensive Compliance Assessment be underpinned by legislation and that the outcomes of assessments be reported on annually in Parliament, and the decisions subject to the normal appeals process.

10. Employment Pathway Plan

A key element of the Government's Employment Services Reforms is the introduction of an Employment Pathway Plan (EPP). These plans, which will replace "activity agreements", are to be individually tailored to the needs and requirements of job seekers. Individual job seekers will, through their EPP, have access to a specified sum of funds to assist in training, work preparation or skills acquisition, etc. The level of EPP funds available increases with the level of disadvantage experienced by the job seeker.

The Network's view is that the introduction of the EPP is potentially an extremely positive step, and if the job seeker and the Employment Service Provider are properly engaged in the process of developing and implementing the EPP, it could be the "circuit breaker" which can give individual job seekers the right assistance and supports, to get the job that is right for them, or at least make them better prepared to enter the workforce at the appropriate time.

In order to ensure that the EPP lives up to its promise, it is imperative that the EPP be individually tailored to overcome or minimise specific barriers and address other problems that are identified by the job seeker and the Employment Service Provider. Our experience is that "activity agreements" that are not individualised and which are standardised, "off the plan" agreements and non-specific to individualised requirements and circumstances, are of little real assistance to job seekers and are hardly worth the paper that they are written on. Engagement and ownership of EPP's by unemployed job seekers themselves, is consistent with the Government's support for engagement in mutually beneficial activities.

Recommendation

That DEEWR and Employment Service Providers should collaborate on discrete, small-scale research projects to develop "best practice" guidelines

for developing and negotiating, refining and monitoring EPP's. The research should closely monitor the development of a number of EPP's and undertake assessments to determine what style and type of plans and best processes used in developing EPP's that result in better employment and satisfaction outcomes for job seekers and Employment Service Providers.

11. Vulnerable Job Seekers

11.1 Vulnerability Indicators

The NWRN is concerned about the lack of safeguards for vulnerable people in the proposed legislation. Vulnerable people are job seekers whose personal circumstances make them vulnerable to particular difficulties in receiving, understanding or being able to comply with communications regarding their obligations. These circumstances are often not immediately apparent and include:

- illiteracy and innumeracy;
- poor English comprehension;
- medical, psychiatric and psychological disabilities;
- substance dependency;
- no accommodation, temporary or short term accommodation or remote location;
- dysfunctional domestic circumstances or exposure to violence; and
- poor access to other support and resources.

The lack of safeguards combined with the increased complexity of the proposed compliance system can only put vulnerable people at increased risk of committing an infraction and having their payments reduced or suspended; ultimately placing these people at risk of homelessness and further exclusion from the community. These outcomes would be entirely contrary to the Objects of the Bill.

NWRN notes that DEEWR has recently reviewed its Vulnerability Indicator Guidelines, including both the categories and the time periods which are provided before the review of the vulnerability is required. The NWRN commends DEEWR on the inclusion of additional categories and the amended definition of homelessness. The NWRN would however question the evidence base which requires review of both the categories for the homeless and recent prison releases to 4 weeks. This fails to recognise that these types of vulnerabilities and the impact of homelessness and incarceration are unlikely to be resolved within a short term. It is also of concern that those with an undiagnosed mental health condition or no insight into their condition may be excluded from the limited protections afforded those with a vulnerability indicator, as they do not have the requisite medical evidence to support the application of such an indicator.

Cameo 1

Ahmed had been diagnosed as paranoid schizophrenic with psychosis and suffering from auditory hallucinations which have resulted in involuntary admissions to psychiatric facilities over the preceding two years. Ahmed did not accept that he had a mental illness although he does speak of the physical symptoms which he experiences including hearing voices in his head. He incurred an 8 week no payment participation failure as he incurred a third participation failure. Despite providing consistent accounts of how he was being impacted by his condition the ARO and the SSAT did not accept he had a reasonable excuse as there was no supporting medical evidence. As a result, he received no income for 8 weeks, and was forced to live on the streets.

It is of great concern to NWRN that under the current vulnerability guidelines it is not accepted that particular types of vulnerabilities are not automatically exempted from the penalty regime. The NWRN is aware that under the existing compliance regime there were high numbers of people with vulnerability indicators who are still placed on 8 week non payment periods despite the presence of a vulnerability indicator flagging potential issues with compliance. The NWRN is concerned that even when there is direction provided to consider the impact of vulnerabilities that

this has still resulted in vulnerable people being without payment for 8 weeks. The NWRN considers that there needs to be greater legislative protections to prevent the most vulnerable from being subject to penalty or reduced or no payment within the new Compliance Regime.

NWRN believes that the Bill should be amended to introduce an automatic flagging of Vulnerability Indicators. The automatic vulnerability indicator should be applied to the current vulnerability indicators as detailed in DEEWR's Vulnerability Indicator Guidelines. In addition, it should also be applied to:

- principle carers;
- a person with a manifest disability which prevents them from claiming DSP;
- a person with an acquired brain injury;
- a recently arrived refugee;
- a young person on the "unreasonable to live at home" rate;
- a person who has been subject to domestic violence; and
- a person who has recently been moved from Disability Support Pension to Newstart Allowance.

The Bill should also provide that where a person is subject to the automatic flagging of Vulnerability Indicators:

- a modified EPP needs to be negotiated with the jobseeker, with activities realistically tailored to that person's capacity and amended as the person's situation changes. This would reduce the likelihood of the person agreeing to an EPP which is beyond their capacity to fulfil and would increase the likelihood of the person actively engaging with the process, as per the Object of the Bill (s42B); and
- the jobseeker is exempted from financial penalties arising from the penalties associated with the new Compliance Framework. This would recognise that vulnerable people are least likely to be able to always comply with their EPP.

The Bill already makes provision for the particular difficulties faced by those on Parenting Payment. For example s42E (4)(e) exempts a person receiving Parenting Payment from a Connection Failure. Or, s42F (1) (b) exempts a person receiving Parenting Payment from the requirement of applying for particular number of job vacancies in a certain period. These exemptions acknowledge that a parent's circumstances could make it extremely difficult for them to comply with all the participation requirements; so therefore it is unfair to penalise them for failing to do so. Such consideration should also be extended to other vulnerable people whose circumstances make it similarly difficult for them to comply.

Recommendations

That the Bill be amended to provide for automatic flagging of Vulnerability Indicators.

That the Bill be amended to provide that job seekers subject to an automatic Vulnerability indicator require a modified EPP and are exempted from the penalties associated with the new Compliance regime.

11.2 Extra support for Personal Support Program

Many vulnerable job seekers who experience multiple barriers to employment are engaged with the Personal Support Program (PSP). Lack of resources, long waiting lists and a dearth of suitable locally available programs has meant that, to date, very disadvantaged job seekers have often experienced problems in accessing this widely supported and beneficial program of support. Under the Employment Services Review caps on the numbers of places in PSP have been removed which are welcomed by the NWRN. There have however, been new time limits placed upon the length of time that a person can receive assistance from the program, with assistance reduced from 24 to 18 months. In addition, requirements that all Employment Service Providers must offer the full suite of supports from Stream 1

through to Stream 4 will mean in practice there will be reduced capacity for specialist providers of intensive assistance programs. This is likely to impact on existing providers of PSP who offer specialist, tailored assistance to specific groups (e.g. young people, released prisoners, refugees) and such services may not be viable in the future.

The Government needs to be mindful of the importance of the expertise and range of assistance provided through the PSP as it is currently formulated and that the move to the new Employment Service Model does not reduce either its effectiveness or availability to the most vulnerable job seekers.

Recommendation

The Government should not proceed with changes to the Personal Support Program which will reduce access to specialist services for vulnerable job seekers or limit the period of assistance currently available to marginalised income support recipients.

12. Legislation Specific Issues

NWRN will now examine each of the five categories of penalties and highlight the main problems and deficiencies we foresee in their practical effect and operation.

12.1 Unemployment resulting from a voluntary act or misconduct

It is a major disappointment that the proposed Bill maintains the existing provisions relating to unemployment resulting from a voluntary act or misconduct given the Government's policy position as set out in an ALP discussion paper entitled, 'Reward for Effort: Meeting the Participation Challenge' November 2006. In relation

to two fundamental issues, the ALP paper indicated significant differences to the then Government and the dismissal for misconduct provisions where they argued:

A new compliance regime is part of the welfare changes. It includes a particularly harsh penalty of an eight week non payment period for certain infringements. This includes three minor breaches, or a single case of refusing what the government describes as a 'reasonable job offer' (which may be less than reasonable in the light of the industrial relations changes), or being dismissed for 'misconduct'.

And more importantly, it goes on to state:

This means that if an employee gets sacked unfairly, and the employer claims that it was for 'misconduct', the sacked worker faces an eight week non payment penalty. The workers most at risk are those who have no access to unfair dismissal protection under the Howard Government's extreme new industrial relations laws. Aside from fostering an unhealthy and un-Australian climate of fear in workplaces, it is likely that leaving a sacked worker penniless for eight weeks is not going to help them along the path to a new job.

Under the proposed Bill, unemployment resulting from a voluntary act or misconduct will attract an 8 week preclusion period.

Compared to the system that it replaced, the Welfare to Work compliance arrangements, with the imposition of a category of immediate eight week no payment penalty (serious failures) represented a significant toughening of the penalty system. Previously being "dismissed for misconduct" or "voluntarily leaving work" led to a percentage loss of payment depending on whether it was a first or second breach, and only resulted in an eight week penalty if it was a third activity test penalty over a two year period.

Becoming "voluntarily unemployed" (57%) and being "dismissed for misconduct" (24%) are the main reasons as to why a person currently faces an immediate eight

week no payment period. This is illustrated by the following Table 1 which sets out the reasons for “serious participation failures” in 2006/07.⁶

Table 1

Reason for “serious” participation failures 2006/07	Number	(%)
Voluntarily unemployed	5,443	(56.9%)
Dismissed for misconduct	2,329	(24.37%)
Refused a suitable job or start offer as arranged	1,483	(15.52%)
Failure to participate in Full Time ‘Work for the Dole’	228	(2.39%)

12.1.1 Refusing a “suitable job offer” and becoming “voluntarily unemployed”

For people who have “voluntarily” left suitable work however, a penalty is not imposed if the person had a “reasonable excuse” for leaving their employment. In our experience, people are often not aware that this will be a consequence of their actions. It is patently unfair to impose such a harsh penalty in circumstances where a person has not been put on notice that this could be a consequence of their actions.

Cameo 2

Peter is a 39 year old man who commenced work full time work. Peter worked for 5 weeks and during that time he was not paid by his employer. Peter left his job voluntarily as he had not been paid despite approaches to his employer to secure payment of his wages. Peter was put on an eight week no payment period because he became “voluntarily unemployed” even though he had a reasonable excuse for leaving employment.

⁶ www.workplace.gov.au/workplace/Publications/ResearchStata/Participation

Recommendation

That the legislation is amended so that the non payment period is only imposed after a repeated pattern of leaving employment voluntarily without reasonable excuse is established.

12.1.2 Dismissal for misconduct

No penalty in the proposed compliance regime should operate as a punishment for a “strict liability” action. No penalty should be imposed if the person had a “reasonable excuse” for their actions or if the person did not intend the consequences of their actions. Unfortunately, the proposed Bill perpetuates the current regime’s use of automatic eight week no payment penalties (in the new form of an eight week preclusion period) for some acts where a person may not have fully understood or intended the consequences of their actions.

For example, the current regime provides for an automatic eight week no payment penalty where a person has been dismissed from employment because of misconduct. One significant problem with the implementation of this policy is that “misconduct” is not clearly defined. The test for establishing misconduct should be based on employment law principles – and that the actions have led to an irretrievable breakdown in the relationship between employer and employee, and has resulted in a complete breach of trust.

It is NWRN’s experience that most of our clients have had no idea that being dismissed for misconduct would automatically trigger an eight week no payment period. They have generally had no warning that a penalty could be imposed, as most of them had not previously been in receipt of a Social Security payment. The current regime unfairly states that it is enough for a person to have been dismissed for misconduct for the eight week no payment penalty to apply. Centrelink does not

have to establish that the misconduct was serious enough to have warranted dismissal. Nor does Centrelink have to prove that the person knew that their actions could lead to dismissal.

Under the current system the eight week no payment period applies as soon as it is made clear that the dismissal could be linked to actions that the employer considered to be “misconduct”. This approach is patently unfair as most people not only have had no idea that an act such as being late for a shift could lead to dismissal, but they also have no idea that one of the consequences of such an act would be an eight week period without income support. Additionally there should be capacity for there to be “reasonable excuse” in relation to misconduct as a worker.

Cameo 3

Karen is dismissed from her job as she was unable to turn up for two shifts due to the illness of a child and her caring responsibilities for that child. Karen is not a principal carer but due to an acrimonious arrangement with a former spouse she is was not willing to refuse a request from her former spouse to care for her sick child. Karen considered refusal on her part could compromise her ongoing contact with her children. Karen considers her relationship with her children to be of greater importance than her job. Karen is dismissed for misconduct as a worker and is subject to an 8 week preclusion period. As Karen is not a principal carer she would not be within the classes included for the hardship provisions.

Recommendation

That the Bill is amended so that before a non payment penalty is imposed for “misconduct” it should at least be established that the person “intentionally” behaved in that way, knowing that it was likely to result in dismissal.

12.1.3 Removing the preclusion period

NWRN would urge the legislators to reconsider the imposition of a preclusion period in these circumstances. As previously stated, NWRN is opposed to non payment or preclusion periods, however if the Government insists on imposing a non payment period of 2 weeks is more than enough to achieve the stated objective of the provision.

12.2 “No Show No Pay” Failures

Under the proposed “No Show No Pay” arrangements, a jobseeker will lose up to one-tenth of their fortnightly payment for each day they:

- fail to participate in an activity that the person is required to undertake by an employment pathway plan;
- fail to comply with a serious failure requirement;
- intentionally acts in a manner (including failing to attend a job interview) and it is reasonable foreseeable that acting in that manner could result in an offer of employment being made; or
- commit misconduct whilst participating in a mandatory Employment Pathway Plan activity or whilst purporting to comply with a serious failure requirement.

The main problems with the “No Show No Pay” categories are:

- its broad application which has the real potential to capture not only work like activities but also administrative requirements;
- the lack of any limit (other than a cap of one deduction per day) on the number of “No Show No Pay” failures that can be applied in a fortnightly instalment period can result in a person losing up to their entire fortnightly payment;
- it mandates the Secretary (or their delegate) to impose the “No Show No Pay” failure where a reasonable excuse for non compliance has not been

- established. The Secretary (or their delegate) is given no discretionary power not to apply the discretion in appropriate circumstances in the absence of a reasonable excuse;
- the principle of recoverability does not apply to this category. So there is no ability to recover any monies deducted for non-compliance in the event of ultimate compliance within a reasonable time;
 - there are no safety net or hardship provisions.
 - the timing of the “No Show No Pay” penalty is not prescribed by legislation but left to a legislative determination;
 - penalty balances will be carried across to subsequent fortnights, on transfer to another participation payment and not expunged on cessation of payment.

12.2.1 Activities included in the “No Show No Pay”

NWRN is concerned that the range of activities included in the “No Show No Pay” provisions has been extended beyond its original intention to encompass work experience (including work for the dole) and training activities.

The Government’s stated rationale for the No Show No Pay category is to instil a “work like” culture to employment services.⁷ Yet in our view, the extension of the range of activities to include any aspect of failing to complete an activity in an Employment Pathway Plan (EPP) is enough to compromise and undermine the entire approach. It creates the real risk that administrative requirements, such as attendance at interviews, which are most appropriately dealt with in the Connection and Reconnection categories, will be subject to this harsher penalty category simply because they have been written into the EPP. The consequence of this will be that a much larger number of jobseekers (including parents, people with disabilities and other vulnerable people) will be unfairly exposed to a tougher set of penalties than is necessary to achieve the Government’s overall objective of encouraging

⁷ The Hon. Brendan O’Connor, Second Reading Speech, Social Security Legislation Amendment (Employment Services Reform) Bill 2008

participation and compliance. This design fault was identified as a flaw in the previous breaches and penalties system which was modified by the “*Australians Working Together*” legislation.⁸

Consistent with its stated rationale, the activities to be included in the “No Show No Pay” should be limited to participation in work experience and training programs and should not include the other grounds currently proposed. In our view, such actions as non compliance with other EPP requirements, non attendance at a job interview and intentionally acting in a manner to not get work more appropriately fall within the scope and intention of the Connection and Reconnection categories.

Recommendation

That the “No Show No Pay” activities be limited to work experience, training or similar programs included in the Employment Pathway Plan, as well as to Serious Failure requirements.

12.2.2 Penalties should only be imposed as a last resort

Before a “No Show No Pay” penalty is imposed the relevant legislative provisions should impose an obligation on the Secretary (or the delegate) to consider whether the activity itself (which the person failed to undertake) was “reasonable” and/or whether the job was “suitable”.

This assessment should be comprehensive and take into account a job seeker’s capacity to comply with the requirement and their needs taking into account, but not limited to, such matters as the person’s education, experience, skills, age, disability, illness, mental and physical conditions, family and caring responsibilities,

⁸ Disney J, Ridout H and Pearce D, *Report of the Independent Review of Breaches and Penalties in the Social Security System*, March 2002

involvement in any court proceedings, the financial costs of compliance with the requirement, such as travel costs and the capacity to pay for such compliance.

This is necessary to ensure that people are not unfairly penalised because either the requirement imposed is not reasonable or it is unrealistic taking into account a person's capacity or other relevant circumstances.

Additionally, the general discretion that allows the Secretary (or their delegate) not to apply a repeated failure even where there is a determination that the person does not have a "reasonable excuse" should be retained. Currently, this provision is permitted and is contained in s629(3) of the *Social Security Act 1991*. Though these provisions exist NWRN has not seen this general discretion applied in practice. Guidelines need to be developed to ensure that these provisions are utilised.

We remain at a loss to understand why the "reasonable excuse" requirement does not extend or apply to the misconduct ground.

Recommendations

That the Bill is amended to impose an obligation on the Secretary (or their delegate) to consider whether the activity itself (which the person failed to undertake) was reasonable taking into account a person's circumstances.

That the Bill is amended to provide a general discretion that allows the Secretary (or their delegate) not to apply a failure even where there is determination that a person does not have a 'reasonable excuse'.

That the Bill is amended so that the "reasonable excuse" requirement also applies to the misconduct ground.

12.2.3 The practical application of “No Show No Pay”

The proposal may mean that for some job seekers, who do not attend a stipulated activity, like Work for the Dole or a training program without a “reasonable excuse” will be contacted quickly by their Employment Services Provider or Centrelink. In this contact they will be advised of the consequences of non attendance, have capacity to remedy the matter almost immediately thereby minimising the penalty to the loss of one or two day’s payment.

However, even on this benign view, the docking of two days (two tenths of payment) from a jobseeker’s fortnightly entitlement which is already at or below bedrock level will be significant (especially if the penalty is accompanied by other Centrelink deductions, such as debt withholdings). Any deduction will be significant given the very low rates of unemployment payments, which has recently been found by the Organisation for Economic Co-operation and Development as the lowest amongst the 30 most prosperous nations.

For example, for a single person in receipt of the maximum rate of Newstart Allowance, the docking of 2 days’ payment will amount to a loss of \$89.86. The impact will be greater if the person has the standard rate of debt withholdings of 14%. In that situation, the person will only receive in hand \$296.54 instead of the maximum statutory fortnightly entitlement of \$449.30.

However, it will not work this way for many people. Rather, for them it will result in a significant penalty of up to the loss of an entire fortnightly payment (without any capacity to work off the penalty or access a safety net) depending on:

- when their “offence” occurred in the 14 day payment cycle;
- when they found out about the offence; and
- how long they take to re-engage (if re-engagement is in fact even possible).

The system has the real potential to create unfairness and inconsistency in the treatment of the “offence” depending on when it was committed in the payment cycle. There is the potential for two people in exactly the same circumstances other than that one “offends” on day 1 and the other on day 11 of their payment cycle could end up with very different penalties.

Cameo 4

Sam is recovering from a drug addiction and does not have stable accommodation. He stops attending the course on day 1 of his payment cycle because he is embarrassed and ashamed that he is not managing it as well as other course participants. His Employment Service Provider and Centrelink are unable to make contact with him because he has lost his mobile. He only becomes aware of the penalty when he lodges his SU19 form. On lodgment he is advised that his payment will be docked by 9 days because he has not attended the course.

Cameo 5

Sally has exactly the same circumstances and stops attending on day 11 of the payment cycle. On lodgment of her SU19 form, she is advised that her payment will be docked by 3 days because she has not attended the course.

The disproportionate effect that this system is likely to have on people who are especially vulnerable is of great concern.

Also during our discussions with DEEWR over the proposed new compliance arrangements it was made clear that the intention of the Bill was that only primary income support payments were to be included in the portion that would make up the “No Show No Pay” financial penalty, yet the legislation does not make this clear. Supplementary payments such as FTB and Rent Assistance are not to be in the calculation, nor according to the Bill, is Pharmaceutical Allowance and Youth

Disability Supplement. As other payments are not ruled out, it is not entirely clear whether, for example, Mobility Allowance or other additional supplements will be included in the calculation of the “No Show No Pay” penalty amount.

Recommendations

That a cap is placed on the number of “No Show No Pay” penalties that can be imposed in a fortnightly instalment period.

That the legislation makes it clear that only primary income support payments will be subject to “No Show No Pay” penalties.

12.2.4 Penalty balances carried over – both counterproductive and punitive

The proposed arrangements provide for penalties to be carried over to a future payment instalment period if the entire amount is unable to be deducted from the determined payment period. This is most likely to happen where a person has received a reduced rate of payment due to earnings, as illustrated in the case study of Ian, taken from the Explanatory Memorandum at page 21:

Ian commits three no show no pay failures in an instalment period, resulting in a penalty amount of \$75. Centrelink determines the penalty amount will be deducted from Ian's next instalment. However, Ian earned income in the next instalment, so his instalment of Newstart Allowance was only \$50. Accordingly, not all the penalty amount can be deducted from this instalment. \$50 is deducted, reducing Ian's instalment to nil, and the remaining penalty amount is deducted from Ian's subsequent instalment.⁹

⁹ The Hon. Brendan O'Connor, Minister for Employment Participation, Social Security Legislation Amendment (Employment Services Reform) Bill 2008, Explanatory Memorandum, p.21

The effect of the proposed arrangements is that any unapplied penalty amount remains on a job seeker's record indefinitely. So, using the above example, as a result of Ian securing full time work, he goes off payment before the unapplied penalty amount is deducted. He remains in this position for 3 years until he is retrenched. On reapplying for payment, Centrelink advises him that the unapplied penalty amount will be applied in his first instalment payment period.

In our view, these proposed arrangements have no place in a compliance system aimed at encouraging participation. These provisions do not provide any employment incentive but instead punishes a jobseeker who manages to obtain employment in the application fortnight where there was to be a "No Show No Pay" penalty applied.

Recommendation

That the provisions are amended so that unapplied penalty amounts can not be carried into subsequent payment periods.

12.2.5 Proposed timing for "No Show, No Pay" penalties

The timing of the "No Show No Pay" penalty is not prescribed by the Bill but will be subject to the discretion of the Secretary (or their delegate). We understand from our discussions with DEEWR that the timing of the "No Show No Pay" penalty will be the subject of a legislative instrument. However, the crucial issue still to be determined is whether the payment deduction will occur in the payment fortnight which immediately follows the "No Show No Pay" infringement or in the subsequent fortnight.

NWRN is strongly of the view that the only way this system can operate fairly is to have the deduction, even if only one day's pay, taken from the next fortnight's payment, the one after the fortnight in which the infringement occurs. On any other

approach there is a very real risk that a job seeker will not be afforded natural justice before the penalty is imposed (especially if it occurs in the latter half of the cycle) because there will be insufficient time for either Centrelink to conduct a thorough investigation of the matter or for the jobseeker affected to have had a reasonable opportunity to present their case in response to the assertions being made against them.

Whilst it may be possible for Centrelink to make a decision in accordance with the principles of natural justice if the infringement "No Show" occurs in the first couple of days of the payment fortnight, it will be virtually impossible (no matter what Centrelink may advise) for this to happen in the latter part of the fortnight. Therefore for some 50% to 60% of those people who have such a penalty, the deduction will occur in the fortnight after the infringement. Such a dual system would be patently unfair.

In addition, there is a massive problem with imposing such a significant payment reduction (10% of payment as a minimum) without at least a week to a fortnight's notice to anyone, let alone receiving only \$224.65 per week. One of the biggest faults in the original Welfare to Work penalty system (RapidReconnect) proposed by the former Government was that payment cuts were to occur in the fortnight in which the infringement occurred. The prospect of job seekers first finding out about their payment reduction on lodgment or at the ATM proved to be unsustainable and was rapidly withdrawn. It would be a great shame to have that mistake repeated in the design of this system where there is no justification or need for it and when such a system would impose destructively harsh punishment.

If a person is to have any chance of surviving a payment reduction (say from \$449.30 to \$404.37 or \$359.44 per fortnight) then it is essential that they have sufficient notice to adjust or reschedule rent, food and other payments, especially if they are automatic payment deductions through Centrepay. Also this is necessary

to minimise the risk of job seekers incurring direct debit dishonour fees of up to \$40 because of insufficient funds in the account to cover the authorised payments.

Recommendation

That the “No Show No Pay” payment deduction is imposed in the subsequent fortnight and not to the fortnight’s payment in which the infringement occurred.

12.2.6 The issue of “recoverability” – compliance or punishment

The failure of the “No Show No Pay” category to enable a job seeker to recover any monies deducted for non compliance in the event of ultimate compliance within a reasonable time is a serious flaw which must be remedied.

The ability to recover monies deducted for non compliance through undertaking a suitable replacement activity was a key recommendation of the Breaching Review Taskforce that was established under the previous Government and included in its membership Job Network members, as well as officers from the former Department of Employment and Workplace Relations. We acknowledge that Employment Service Providers will be given discretion not to submit participation reports where a job seeker is willing and able to negotiate with their provider to undertake a replacement activity to make up for their infringement. In practice, this is unlikely to assist a lot of job seekers as once a participation report has been submitted by an Employment Service Provider to Centrelink there is no capacity for the job seeker to negotiate with their Provider to complete “make up” activities to prevent the imposition of the penalty.

The option of completing “make up” activities will only be available for those who have missed one or two days of activity and only then, where the cost impact on the Employment Service Provider to offer the “make up activity” is negligible or very

low. Additionally the capacity to be provided with a suitable “makeup” activity may be further limited by the type of activity missed wherein missing one or two days of a training course may prevent this option being used. Also, whether the “make up” activity is offered will be at the sole discretion of the Employment Service Provider which will inevitably create inequities and inconsistencies within the system depending on the approach adopted by each Provider and their relationship with the job seeker.

If the whole aim of the proposed new compliance regime is to achieve increased participation, then any penalty system should encourage this and allow a person to recover full payment without punishment if they subsequently comply with what is judged to be still an “appropriate” requirement.

Recommendations

That the “No Show No Pay” system is modified so that a person can recover any monies deducted for non compliance through undertaking a suitable replacement activity.

That Employment Service Providers have capacity to withdraw Participation Reports where a negotiated suitable replacement activity is arranged with the job seeker.

That it be mandatory for Employment Service Providers to provide suitable replacement activity for those who would be subject to “No Show No Pay”.

12.2.7 Lack of a safety net

Even if the proposed arrangements are modified so that a cap is placed on the number of “No Show No Pay” failures that can be accumulated and applied in a fortnight, a safety net or hardship provision needs to be put in place to prevent

principal carers and especially vulnerable people given the hardship that even one or two days' loss of payment will cause.

In this regard, we refer the Committee to our comments at section, Hardship provisions: too few protections.

12.3 Connection/Reconnection Failures

Our main concerns regarding the operation of these provisions are as follows:

12.3.1 Connection and RapidConnect

Whilst the Bill imposes notification requirements on the Secretary (or their delegate) that a failure to comply with a reconnection requirement or a further reconnection may result in a penalty amount being deducted, the notification is not required to be in writing. We understand that it is critical in the RapidConnect scheme for Centrelink to have a fast and effective method of notifying job seekers of their RapidConnect requirements to attend interviews and so on. However the importance of written notice as a baseline requirement can not be underestimated. The postal system is generally more reliable than other forms of communication. Using the postal system results in a more accurate and reliable record of the information provided than the alternative of "file notes" by Centrelink officers who, unavoidably, must interpret and paraphrase telephone conversations. Such file notes are inherently fraught to the possibility of error and inaccuracy.

Further notification by telephone assumes that jobseekers have the capacity to understand and retain the crux of the "notice" for example, the requirement to attend an interview, as well as the "details" of the notice, for example, time, day, place, purpose etc. It further assumes that the Centrelink officer responsible for the notification has the skills to use appropriate wording, effectively communicate all

aspects of the notice, ascertain the level of understanding or comprehension (which is not specifically required anyway) and provide details of the consequences of failure to comply and details of appeal rights. Based on our experience of the current compliance system, it is clear neither Centrelink nor the job seeker is capable of satisfying all that is required for such notice to be effective. We have seen numerous examples where oral communications under the RapidConnect system has led to misunderstandings regarding what is required and has resulted in the unfair imposition of penalties.

There are also practical difficulties affecting the certainty of “notice”. For example, in the case of mobile telephone SMS messaging which has previously been suggested as an appropriate communication option. Some foreseeable problems include the continued availability and affordability of mobile telephones (particularly where payments have not been granted or have been cancelled or suspended), prepaid credit running out, flat batteries, misplaced telephones and phones which are shared by communities (particularly Indigenous communities).

Whilst it is clear that “RapidConnect” requires some amendment to notice requirements, it is essential that written notices are reinstated as the basic legislative standard for notices generally and should only be departed from where it is absolutely necessary.

Also the Bill does not explicitly state that no penalty can be applied if there has been a failure to notify in writing though the Explanatory Memorandum states that this is the intention of the provision.

Recommendations

That written notices are reinstated as the basic legislative standard for notices generally.

That RapidConnect provisions provided limited scope to depart from a written notice where it is absolutely necessary.

That the proposed section 42K is amended to explicitly state that no penalty can be imposed if the consequences of non compliance has not been notified.

12.3.2 Reconnection Failures

The reconnection failure period does not appear to take into account any practical delays that might arise in the job seeker complying. The proposed s42H(4) states that the reconnection failure period ends on the day before the person fails to comply with any further reconnection requirement imposed on the person in relation to the reconnection failure. This can be contrasted with s42R which enables the job seeker to be paid pending the commencement of a serious failure requirement.

It would be a most unfair outcome for a jobseeker to incur a penalty in circumstances where they are willing to comply but because of practical administrative difficulties, there is an unavoidable delay in the jobseeker being able to undertake the requirement. For example, the requirement necessitates the job seeker to attend an appointment with their Employment Services Provider but they have to wait 2 days for an appointment.

Recommendation

That the Bill is amended to include a similar provision to section 42H (4) for Reconnection Failures.

12.4 Serious Failures

The imposition of a serious failure penalty follows the completion of a Comprehensive Compliance Assessment (CCA) where it is determined that a person has persistently and wilfully failed to comply with their obligations in relation to a participation payment. The NWRN has outlined its concerns about the CCA process earlier in this submission and the priority which this tool has in relation to the decision of whether or not a serious failure has occurred.

It remains of concern that the Bill mandates that a legislative instrument will be developed which sets out the matters which are to be taken into account when determining whether a person has persistently failed to comply with their participation requirements. The NWRN opposes that terms such as “persistently” and “wilfully” so critical to serious failure determinations are not set out in the Bill but are left to legislative instruments. The NWRN encourages DEEWR and Centrelink to consult with community organisations, such as the NWRN in the development of these legislative instruments.

The NWRN continues to oppose the imposition of an 8 week no payment period because of a determination that a serious failure has occurred as it is both punitive and counter-productive to participation. The NWRN welcomes the provisions in the Bill which permit the serious failure period to cease where a person engages in the completion of a serious failure requirement or for a person without capacity to undertake any serious failure requirement and they would be in financial hardship to have the serious failure period end. The NWRN is concerned that under s42Q the end day of the serious failure period will be the day before Centrelink make the determination. Any decision making delays by Centrelink would be unduly harsh for job seekers willing to complete activities or where unable to complete activities and are in financial hardship.

Recommendations

That the matters which are to be taken into account when determining whether a person has persistently failed to comply with their participation requirements are set out in the Bill.

That where a decision is made that a serious failure period is to end through the powers of section 42Q that payments are restored immediately without loss of payment as the job seeker has complied and reengaged.

13. Payment Pending Review provisions

The *Social Security (Administration) Act 1999* gives the Secretary certain powers to continue a person's payment after an "adverse decision" is made affecting it, if that person has sought a review of the cancellation by an Authorised Review Officer or the Social Security Appeals Tribunal – ss 131-145. These sections leave it to the Secretary's discretion to formulate guidelines as to when payment will continue pending review.

The "payment pending review" powers were augmented by the *Family and Community Services Legislation Amendment (Australians Working Together and other 2001 Budget Measures) Act 2003* (No, 35, 2003). That Act introduced the concept of "automatic payment" pending review, where a decision is made to impose a penalty period if a NSA, YA or Special Benefit recipients delay entering into an activity agreement or seeks a review of the agreement's terms. These sections were inserted in order to recognise the care that must be taken before a person is penalised in relation to actions they have taken in negotiating their activity agreement. If a decision is made to penalise a person in relation to their actions in negotiating an activity agreement, then the person should at least be entitled to be paid at the full rate of payment until the decision is revised.

The provisions allowing for “automatic payment” pending review in these cases were repealed by the Employment and Workplace Relations Legislation Amendment (Welfare to Work and Other Measures) Act 2005.

NWRN believes that these “automatic payment” pending review provisions should be reinstated as a feature of the proposed model. This protection is necessary to ensure that jobseekers are not placed in hardship pending the outcome of a review. If the decision to impose a penalty is affirmed upon appeal, then the penalty can be served after the person has had the opportunity to obtain a review.

Recommendation

That the Bill be amended to provide for the automatic continuation of payment pending the outcome of a review against the imposition of a penalty under the proposed new model.

14. Problems with proposed changes to sections 63 and 64

Currently s63 of the *Social Security (Administration) Act 1999* provides that a notice to attend a particular place for a particular purpose will be invalid if the notice does not specify what the particular purpose is. The proposed new s63(6) removes this requirement. NWRN opposes this proposed amendment on the basis that it is only fair and reasonable that a person should be told why they are being required to attend an appointment.

Section 63(7) currently carries a requirement that a notice include a warning regarding the consequences of failing to comply with a requirement notified under s63. The Explanatory Memorandum justifies this proposed amendment on the basis that it is “no longer workable” because connection failures “have no immediate consequences”. Whilst it may not have any immediate consequences, it does set

the person onto a path into the compliance penalty system. A connection failure may also be taken into account when considering a person's compliance history for determining whether a serious failure should apply.

Recommendation:

That the proposed amendments to section 63(6) and 63(7) be withdrawn.

15. Monitoring, data availability and evaluation

For some years, the NWRN along with ACOSS on behalf of the entire sector has been drawing attention to the growing problem of the withdrawal or withholding of data by government departments under the previous Government.

Given the lack of detail about how the new compliance system will operate, it is critical for the relevant Departments to closely monitor the impacts of the new arrangements.

- It is imperative that the data includes the following (but is not limited to) and is made available on a quarterly basis-the number and impacts of the various penalties;
- triggers for CCAs;
- number of CCAs undertaken and outcomes;
- the time it takes to complete CCAs and make penalty decisions;
- numbers subject to hardship provisions; and
- outcomes of reviews against decisions to impose penalties.

DEEWR should also commit to monitoring of the impact of the new arrangements on vulnerable groups, including young people, Indigenous people, and the impacts on job seekers with a mental health condition.

Given the significant impacts of the previous regime upon individuals with mental illness and upon a person's accommodation instability, it will also be important for DEEWR to commit to the making available data on the effects of the new arrangements on vulnerable job seekers.

Recommendation

That a set of relevant data showing the effect and impact of the compliance system is produced and publicly available on a quarterly basis.

16. Conclusion and Recommendations

The promise to reform an unjust and punitive compliance regime was welcomed by NWRN. As highlighted in our submission, there are a number of aspects contained in the Bill which we welcome and support. However, NWRN remains strongly of the view, that the Bill in its current form will not achieve the stated object of the Bill and some aspects of the Bill; in particular the "No Show No Pay" category is likely to lead to the same harsh and unfair outcomes which prompted calls for reform in the first place.

Substantial amendments are required to this Bill if the intended legislation is to deliver a new compliance regime that is fair and effective, focused on re-engagement and compliance rather than punishment. This is especially important in light of the expected increase in the numbers of unemployed who will be subject to these provisions.

The following is a list of the NWRN'S recommendations in relation to proposed amendments to the Bill for the Committee's consideration:

- i. That the "reasonable excuse" provision apply to each category and to all grounds within categories.

- ii. That each category provide the Secretary (or delegate) with a residual discretion to take individual circumstances into account and not apply the failure/penalty even though the legislative elements are otherwise satisfied.
- iii. That each category enable a penalty or non payment period to be shortened or avoided through participation in an appropriate activity.
- iv. That each category contains a hardship provision.
- v. That all decisions to impose failures are subject to both the internal and external avenues of appeal.
- vi. That hardship provisions are modified to ensure that there is a safety net for those impacted by “No Show No Pay”, “Connection/Reconnection failures”, “Serious failures” and “Preclusion periods for unemployment resulting from a voluntary act or misconduct”.
- vii. That the financial hardship criteria is extended to include other vulnerable people apart from the classes included in the existing Financial Case Management Guidelines.
- viii. That the definition of severe hardship for a job seeker who is not a member of a couple is amended to include where their liquid assets are less than \$5,000 rather than the proposed \$2,500 amount.
- ix. That the Comprehensive Compliance Assessment be underpinned by legislation and that the outcomes of assessments be reported on annually in Parliament, and the decisions subject to the normal appeals process.
- x. That DEEWR and Employment Service Providers should collaborate on discrete, small-scale research projects to develop “best practice” guidelines for developing and negotiating, refining and monitoring EPP’s. The research should closely monitor the development of a number of EPP’s and undertake assessments to determine what style and type of plans and best processes used in developing EPP’s that result in better employment and satisfaction outcomes for job seekers and Employment Service Providers.

- xi. That the Bill be amended to provide for automatic flagging of Vulnerability Indicators.
- xii. That the Bill be amended to provide that job seekers subject to an automatic Vulnerability Indicator require a modified EPP and are exempted from the penalties associated with the new Compliance regime.
- xiii. The Government should not proceed with changes to the Personal Support Program which will reduce access to specialist services for vulnerable job seekers or limit the period of assistance currently available to marginalised income support recipients.
- xiv. That the legislation is amended so that the non payment period is only imposed after a repeated pattern of leaving employment voluntarily without reasonable excuse is established.
- xv. That the Bill is amended so that before a non payment penalty is imposed for “misconduct” it should at least be established that the person “intentionally” behaved in that way, knowing that it was likely to result in dismissal.
- xvi. That the “No Show No Pay” activities be limited to work experience, training or similar programs included in the Employment Pathway Plan, as well as to Serious failure requirements.
- xvii. That the Bill is amended to impose an obligation on the Secretary (or their delegate) to consider whether the activity itself (which the person failed to undertake) was reasonable taking into account a person’s circumstances.
- xviii. That the Bill is amended to provide a general discretion that allows the Secretary (or their delegate) not to apply a failure even where there is determination that a person does not have a “reasonable excuse”.
- xix. That the Bill is amended so that the “reasonable excuse” requirement also applies to the misconduct ground.
- xx. That a cap is placed on the number of “No Show No Pay” penalties that can be imposed in a fortnightly instalment period.
- xxi. That the legislation makes it clear that only primary income support payments will be subject to “No Show No Pay” penalties.

- xxii. That the provisions are amended so that unapplied penalty amounts can not be carried into subsequent payment periods.
- xxiii. That the “No Show No Pay” payment deduction is imposed in the subsequent fortnight and not to the fortnight’s payment in which the infringement occurred.
- xxiv. That the “No Show No Pay” system is modified so that a person can recover any monies deducted for non compliance through undertaking a suitable replacement activity.
- xxv. That Employment Service Providers have capacity to withdraw Participation Reports where a negotiated suitable replacement activity is arranged with the job seeker.
- xxvi. That it is mandatory for Employment Service Providers to provide suitable replacement activity for those who would be subject to “No Show No Pay”.
- xxvii. That written notices are reinstated as the basic legislative standard for notices generally.
- xxviii. That RapidConnect provisions provided limited scope to depart from a written notice where it is absolutely necessary.
- xxix. That the proposed section 42K is amended to explicitly state that no penalty can be imposed if the consequences of non compliance have not been notified.
- xxx. That the Bill is amended to include a similar provision to section 42H (4) for Reconnection Failures.
- xxxi. That the matters which are to be taken into account when determining whether a person has persistently failed to comply with their participation requirements are set out in the Bill.
- xxxii. That where a decision is made that a Serious Failure period is to end through the powers of section 42Q that payments are restored immediately without loss of payment as the job seeker has complied and reengaged.
- xxxiii. That the Bill be amended to provide for the automatic continuation of payment pending the outcome of a review against the imposition of a penalty under the proposed new model.

- xxxiv. That the proposed amendments to section 63(6) and 63(7) be withdrawn.
- xxxv. That a set of relevant data showing the effect and impact of the compliance system is produced and publicly available on a quarterly basis.