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

Matthew Thomas
Social Policy Section

Contents

Purpose of the Bill .......................................................... 3
Background ........................................................................ 3
Rudd-Gillard Government changes .................................. 3
Independent review of the new job seeker compliance framework ................................... 5
Number of serious failures, sanctions and waivers .......... 5
Committee consideration .................................................. 6
Senate Standing Committee for the Scrutiny of Bills .......... 6
Senate Community Affairs Legislation Committee .......... 6
Policy position of non-government parties/independents .... 6
Opposition ........................................................................ 6
Greens ............................................................................. 7
Position of major interest groups .................................... 7
Financial implications ....................................................... 8
Statement of Compatibility with Human Rights .......... 8
Key issues and provisions .................................................. 9
What are the impacts of non-payment penalties on job seekers? ................................................. 11
Compliance effects of breaching ..................................... 12
Adverse impacts of breaching ........................................ 12
Concluding comments ..................................................... 13
Appendix A: current job seeker compliance arrangements ................................................................ 14
No show no pay failures ............................................... 14
Connection and reconnection failures ......................... 14

Date introduced: 4 June 2014
House: House of Representatives
Portfolio: Employment
Commencement: 15 September 2014

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.
Persistent non-compliance—Comprehensive Compliance Assessments ......................................... 14
Unemployment non-payment periods ............................................. 15
Purpose of the Bill
The purpose of the Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Bill 2014 (the Bill) is to amend the Social Security (Administration) Act 1999 to, firstly, remove the possibility for job seekers who refuse a suitable job offer to have their eight week non-payment period waived and, secondly, allow persistently non-compliant job seekers only one opportunity to have their eight week non-payment period waived while in receipt of an activity tested income support payment.

Background
The Bill gives effect to the tougher compliance measures for job seekers who refuse work without good reason or fail to comply with participation requirements that were announced as part of the 2014–15 Budget.1 As the Assistant Minister for Employment’s second reading speech indicates, the measures have their origins in government dissatisfaction with changes made by the Rudd-Gillard Government to the compliance arrangements relating to serious failures to meet activity test and work search requirements.2 A brief summary of current job seeker compliance arrangements is at Appendix A. The summary outlines the four kinds of failures, which are:

- no show, no pay failures
- connection failures
- reconnection failures and
- serious failures.

Rudd-Gillard Government changes
When the Rudd-Gillard Government introduced the new employment services system, Job Services Australia, in July 2009, it replaced the job seeker compliance arrangements that operated under the previous Job Network system.3 A majority of the compliance system changes made were in relation to lower levels of failure to comply

1. Under the Social Security Act 1991, all recipients of income support payments with participation requirements must comply with the activity test, as well as other participation requirements. This means that a person must be actively seeking and willing to undertake paid work that is suitable for that person.

   In most instances, job seekers have a specific requirement to demonstrate that they are looking for work, for example, submitting a fortnightly job search report that details contacts with prospective employers. These requirements are typically included in job seekers’ Employment Pathway Plan (EPP), along with other activities that are deemed necessary to help them gain employment. These activities could include attendance at various forms of assessment and assistance and at specified training, work experience and job interviews. While some of these activities may be optional, others may be compulsory. As such, job seekers are required to comply with both the Activity Test and an EPP.

   The general job search activity test and EPP apply at all times unless other specific activities are required (as outlined in the EPP) or the person is exempt from the activity test and an EPP requirement (if they are sick, injured or unable to meet their activity test requirements because of a personal crisis).

   A person may meet the Activity Test in the following ways:

   - meet the general requirement to seek and undertake suitable work
   - undertake specific job search requirements
   - enter into an Activity Agreement or
   - undertake mutual obligation requirements or other activities such as community or voluntary work, Work for the Dole, or part time study.

   Where a person has been required to do one of the above things and they do not comply, the fact that they may have been actively seeking and willing to undertake paid work during the income support payment period may not be enough to satisfy the activity test. A person must comply with the particular requirements that have been imposed in their case.

   Where they do not comply, they may face penalties as severe as an eight week no payment period. An eight week non-payment period is applied where there has been persistent and willful non-compliance, for refusing an offer of suitable work, for voluntarily leaving work or being dismissed from a job for misconduct.

2. It has always been a requirement that unemployed people in receipt of government income support must meet certain demands as a condition for receipt of payment. And, since 1947, social security legislation has stipulated a non-payment period for certain instances in which activity test and work search requirements are not met. Where an unemployed job seeker fails to attend a job interview or training program, or fails to accept a reasonable job offer, the Secretary can determine that the person has failed to meet the requirement that they be actively seeking and willing to undertake suitable work. As such, they could be deemed to not qualify for payment and the payment can be cancelled.

   Job seeker compliance arrangements have been changed on a number of occasions since the introduction of the unemployment benefit in 1945. For a chronology of the main changes and initiatives from 1945 to 2009 see P Yeend, Social Security Legislation Amendment (Employment Services Reform) Bill 2008, Bills digest, 55, 2008–09, Parliamentary Library, Canberra, 7 November 2008, accessed 30 July 2014.

3. For a description of the changes made see P Yeend, op. cit.
and, in particular, **connection** and **reconnection** failures.⁴ These are instances where job seekers fail without reasonable excuse to attend appointments and activities.⁵

However, changes were also made to the procedures for serious failures, which are failures in which a job seeker refuses a suitable job offer without a valid reason or persistently fails to comply with participation or activity test requirements. The penalty for a serious failure is an eight week non-payment period.

In order to reduce the incidence of hardship caused to vulnerable job seekers subject to serious failure sanctions, the Rudd-Gillard Government gave these job seekers the option of participating in an activity similar to work experience for at least 25 hours per week for the eight week period, rather than lose their payment.⁶ This change was intended to ensure that job seekers did not become disengaged, as those job seekers who were serving an eight week non-payment penalty had no requirement to look for work or to have contact with their employment service provider or Centrelink. Where job seekers were unable to undertake a compliance activity, or where the eight week non-payment penalty would cause severe financial hardship, the penalty could be waived.

The Rudd-Gillard Government also introduced a comprehensive compliance assessment (CCA) for job seekers who had incurred three participation failures within a six month period and were thus potentially subject to an eight week non-payment period. Essentially, this assessment was to determine if a job seeker had been wilfully non-compliant, or if they were experiencing extreme disadvantage that had impacted on their ability to comply with their participation requirements. Under the previous compliance system, where a job seeker had committed three failures this automatically resulted in an eight week non-payment period, with no discretion given to employment services providers or Centrelink.

The Rudd-Gillard Government changes to arrangements for serious failures were made partly in response to submissions to the 2008 Employment Services Review which raised concerns about the impact on vulnerable job seekers of imposing eight week non-payment periods. According to the Department of Education, Employment and Workplace Relations’ (DEEWR) submission to the Independent Review into the Impact of the Job Seeker Compliance Framework, the introduction of the previous compliance system from 1 July 2006 had resulted in a significant increase in the number of eight week losses of payment.⁷ A number of welfare and other non-

---

4. Currently, a connection failure does not result in a financial penalty but contributes towards the count of failures used to determine whether a job seeker has committed a serious failure due to persistent non-compliance. Once the job seeker contacts or is contacted by Centrelink and agrees to attend a further appointment, their payment is restored from the date it was suspended (that is, they are fully back paid). If the job seeker does not agree to attend the further appointment, it is booked regardless and their payment remains suspended. Failure to attend the further appointment without giving prior notice of a reasonable excuse results in a reconnection failure and suspension of payment.

5. Under the Job Network, connection and reconnection failures were known as participation failures.

In 2011 the Rudd-Gillard Government introduced to the parliament a Bill that sought to tighten up the connection and reconnection arrangements introduced in 2009. The Bill was assented to on 27 June 2011 and the **Social Security Legislation Amendment (Job Seeker Compliance) Act 2011** allowed for the immediate suspension of the income support payment of a job seeker who fails to attend a scheduled appointment or activity until they attend a rescheduled appointment or resume the relevant activity. If the job seeker attends the rescheduled appointment or resumes the activity, their income support payment is reinstated and they are back-paid any income support that was withheld as a result of the suspension. If a job seeker does not attend the rescheduled appointment or resume the activity without a reasonable excuse, their income support payment is suspended until they do so, and they are not back-paid for this period. The Act also introduced the requirement that a job seeker notify their employment services provider or Centrelink in advance of their scheduled appointment or activity of any excuse for non-attendance.

6. Such activities include Work for the Dole, part-time work, work experience, approved training or intensive job search.


Similar concerns were raised by community welfare agencies and other organisations in the late 1990s and early 2000s. These organisations had observed a dramatic increase in the incidence of breaches and penalties and consequential adverse impacts on individuals, families, welfare agencies and other organisations. The increase was largely a result of the expansion of obligations and requirements placed on working age income support recipients with the introduction of the Job Network system. In response, nine leading charities and other organisations established in 2001 an Independent Review of Breaches and Penalties in the Social Security System. The final report of the Review, which was authored by Dennis Pearce, Julian Disney and Heather Ridout, was published in March 2002.

Generally speaking, the Review found that there were instances in which the compliance system produced ‘arbitrary, unfair or excessively harsh’ outcomes. It also found that the system was acting counterproductively in that it was not assisting those people who had been breached and penalised to find work or to get back into the workforce. Indeed, the Review observed that the regime actually diminished many jobseekers’ prospects of finding employment. D Pearce, J Disney and H Ridout, **Report of the independent review of breaches and penalties in the social security system**, Canberra, 2002, accessed 30 July 2014.

In response to the Review (as well as a 2002 report of the Commonwealth Ombudsman on the imposition of breaches) the Howard Government introduced a series of measures that resulted in a significant reduction in breach numbers. It also established a Breaching Taskforce Review, which reported in December 2004. Broadly speaking, the Review found that, in terms of effectiveness and reasonableness,
government organisations argued that this had led to many already vulnerable job seekers being at even greater risk of disconnection, and that it had imposed flow-on costs to the community through additional demands placed on the health, housing and justice systems.  

It was also argued that the imposition of eight week penalties was counter-productive because those job seekers who were penalised were disengaged from employment services during the penalty period and, without income support, could not afford to look for work.

**Independent review of the new job seeker compliance framework**

The report of an independent review of the above changes to the job seeker compliance framework (as required under the *Social Security Legislation Amendment (Employment Services Reform) Act 2009*) was tabled in parliament on 30 September 2010.

The authors of the review were at pains to stress that it was too early to draw firm conclusions about the overall impact of changes to the job seeker compliance framework. They also pointed out that historical comparisons of job seeker compliance data needed to be treated with great caution in light of the major changes in labour markets, policy settings, administrative arrangements, concepts and terminology over the decade preceding the review.

Nevertheless, based on the available data, the review suggested that the overall impact of the new structure had been beneficial:

> The combination of greater flexibility for providers and a more modulated range of sanctions appears to have led to modest improvements in job seekers’ engagement with providers and to a major reduction in concerns about unduly harsh treatment of vulnerable job seekers. As intended, the system has led to a substantial increase in the number of early, lower-level sanctions and a substantial decrease in the number of higher-level sanctions.  

**Number of serious failures, sanctions and waivers**

As at 30 June 2013 there was a total of 821,789 job seekers, of whom 614,474 were ‘active’ job seekers.  

Job seeker compliance data for the 2012–13 financial year indicate that the vast majority of serious failures (25,286 – 94%) were for persistent non-compliance. Relatively few serious failures in 2012–13 were for job seekers who refused a suitable job (777 – 3%) or did not commence a suitable job (941 – 3%).

The Explanatory Memorandum observes that the number of penalties for job seekers refusing an offer of suitable work in 2012–13 (1,718) represents an increase on the figure of 644 for 2008–09. However, the National Welfare Rights Network argues that these crude total figures are deceptive in that they do not account for the fact that there was a significant increase in the number of people claiming Newstart Allowance (NSA) after June 2008, largely as a result of the Global Financial Crisis.

The Department of Employment has contested such arguments, insisting that there was not a comparable change in the total job seeker population and vacancy rate in the years between the introduction of waiver...
provisions (2008–09) and 2012–13. It maintains that ‘the only available explanation for the trebling of the number of penalties is that they no longer provide an adequate deterrent to refusing work because job seekers are able to return to payment with virtually no consequence’. It makes a similar case in relation to serious failures applied for persistent non-compliance.

Three quarters of the sanctions for serious failures in 2012–13 (20,141) were waived. A substantial proportion of the penalties (19,662 – 73%) were waived due to job seekers participating in a compliance activity, rather than due to financial hardship (479 – 2%). The Explanatory Memorandum notes that of those penalties that were waived, 12,699 were the job seeker’s first waiver and 5,789 were the second or subsequent waiver.

Ultimately, a non-payment period was imposed on 6,863 job seekers in the 2012–13 financial year.

Generally speaking, these data indicate two main things. Firstly, very few job seekers refuse suitable employment. And, secondly, based on first and subsequent waiver figures, relatively few job seekers are non-compliant more than once. This suggests that the existing compliance measures for serious failures do have a deterrent effect, if not of the magnitude sought by the Government.

**Committee consideration**

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee has considered the Bill and has not made any comments.

**Senate Community Affairs Legislation Committee**

The Bill has been referred to the Senate Community Affairs Legislation Committee for inquiry and report by 26 August 2014. The link to the inquiry homepage is here.

**Policy position of non-government parties/independents**

**Opposition**

The Opposition opposes the measures contained in the Bill.

In his speech on the Bill of 16 July 2014, Shadow Minister for Employment and Workplace Relations, Brendan O’Connor, argued that the measures are ‘cruel and unfair’ and that they are likely to prove counterproductive.

O’Connor observes that the Rudd-Gillard Government instituted the current compliance arrangements based on evidence which suggested that irreversible eight-week non-payment penalties were ‘not economically sound and not socially responsible’. He insists that, to re-introduce an eight-week non-payment penalty:

> ... without any capacity or discretion to reverse that if the person seeks to resume [job search and participation] activities, is too harsh and unfair and is not economically sound. It means effectively that rather than those people engaging and having the modest means by which to re-engage and look for and find work, they are more likely to be less able and less inclined to do that, and, ultimately, the cost to society is greater. The reason it is greater is that other agencies of government have to pick up the pieces as a result of people finding themselves, for example, without accommodation. For example, they may not be able to pay rent. They may find themselves on the street or precariously accommodated, which makes it difficult to find work, even if they have decided to disregard the government’s offer to make some payment to them.

---


15. Ibid.


22. Ibid.
**Greens**

Senator Rachel Siewert has criticised the severity of the measures contained in the Bill. In particular, Senator Siewert has expressed concerns about the removal of the requirement that a job seeker’s capacity to serve a serious failure period be considered where they incur an eight week non-payment penalty for refusing suitable work:

... existing regimes are already tough and can see people denied income support for eight weeks at a time in various circumstances of non-compliance. The measures proposed by this Bill remove important protections, such as those where denying income support would create severe financial hardship.23

Siewert has also argued that the measures are likely to prove counter-productive in that job seekers who are forced to take on any job will end up returning to income support:

The Government seems intent on placing so much pressure on people to accept any job, whatever the conditions or relevance to the job seeker. In these circumstances, people will simply move back and forth between Newstart and unsuitable, insecure work. This will achieve nothing in addressing the barriers jobseekers face to secure employment.24

**Position of major interest groups**

Several issues have been raised by community welfare groups in submissions to the Senate Community Affairs Legislation Committee inquiry into the Bill.

The submissions generally acknowledge that penalties need to be available and at times applied so as to ensure job seeker compliance with reasonable participation requirements. However, for the most part they argue that there is no evidence to support the need for a tougher approach and that the stricter measures are likely to prove counterproductive and damaging.25

There is strong support for the existing arrangements, which provide job seekers with an incentive to reengage and prove themselves willing to work rather than incur a non-payment penalty.26 Under the proposed changes it is argued that even if non-compliant job seekers are penitent and want to re-engage and look for work, they will be unable to do so, given the financial, emotional and time-related costs associated with job seeking.27 Some of the submissions argue that there is also a risk that the mandatory imposition of penalties could impair job seekers’ ‘ability to meet future compliance obligations, putting them at risk of a perpetual cycle of breaches and penalties’.28

Rather than introduce tougher penalties, a number of the submissions argue that greater effort needs to be made to understand the circumstances of the relatively few job seekers who do fail to comply with participation requirements and how to ensure their engagement without harming them.29

---

24. Ibid.
25. For example, the National Welfare Rights Network insists that ‘there is no convincing evidence that mandatory penalties or one-time waiver would be more effective than the current system and no independent assessment of the risks that a return to mandatory eight week penalties may pose’. National Welfare Rights Network, op. cit., p. 3.
Financial implications

According to Budget Paper No. 2, the Government expects to achieve savings of $20.9 million over four years as a result of the measure.\textsuperscript{30} The Explanatory Memorandum anticipates net savings of $20.5 million over the forward estimates period.\textsuperscript{31}

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.\textsuperscript{32}

In its Ninth Report of the 44th Parliament the Parliamentary Joint Committee on Human Rights has taken issue with the Government’s assessment.\textsuperscript{33} It has argued that the statement of compatibility either does not accurately reflect or sufficiently justify the limitation on human rights that the Bill’s proposed measures entail.

For example, the statement has used data showing an increase in the number of waivers applied in recent years to justify the proposed tougher measures and their limiting the right to social security and an adequate standard of living. However, the Committee contends that ‘the assessment does not establish that the removal or limitation of the waiver will, of itself, provide a deterrent against non-compliance with jobseekers’ obligations’.\textsuperscript{34} It maintains that this is especially so given that the statement has not demonstrated that the waivers that have been applied were ‘unjustified, excessive or misused’.\textsuperscript{35}

The Committee has also insisted that the ‘characterisation of the bill as promoting the right to work by providing a stronger incentive to accept an offer of suitable work is not an accurate assessment of the limitation on human rights proposed by the measure.’\textsuperscript{36} The statement does not, for example, account for the punitive elements of the measure and provide an explanation of how these are outweighed by the ‘asserted indirect promotion of the right to work’.\textsuperscript{37} In the Committee’s words:

\begin{quote}
Based on the information and analysis provided the committee does not consider that the statement of compatibility adequately demonstrates that the proposed amendments are needed for the purpose of meeting a pressing and substantial concern, that there is a rational connection between the measure and the identified objective and that the measure is a reasonable and proportionate one for the achievement of that objective.\textsuperscript{38}
\end{quote}

In the Committee’s view, the Bill could also potentially ‘have a disproportional or unintended negative impact on particular groups’, and thus engage and limit the rights to equality and non-discrimination.\textsuperscript{39} As such, the Committee expressed concern that the statement had not provided any assessment of the compatibility of the Bill with these rights.

The Committee has sought further advice from the Assistant Minister for Employment regarding the concerns outlined above.

There are a few further brief points worth noting in relation to the statement.

An emphasis is placed on the need to encourage income support recipients to engage with their right to work. In this context, the Explanatory Memorandum claims that ‘the imposition of an eight week non-payment for refusing an offer of suitable work does not unreasonably restrict the right to freely choose or accept work … while the Bill provides a stronger incentive to accept an offer of suitable work, it does not force a person to do

\begin{footnotes}
\item[31] Explanatory Memorandum, op. cit., p. 2.
\item[32] The Statement of Compatibility with Human Rights can be found at page ten of the Explanatory Memorandum to the Bill.
\item[34] Ibid., p. 68.
\item[35] Ibid.
\item[36] Ibid., p. 69.
\item[37] Ibid.
\item[38] Ibid., p. 68.
\item[39] Ibid., p. 70.
\end{footnotes}
Given that the alternative is for people with very limited or no means to potentially go without any income support for eight weeks, this is something of a moot point. It recalls to some degree Anatole France’s observation that the rich as well as the poor are forbidden to sleep under bridges, beg in the streets, and steal bread. In other words, arguably, disadvantaged job seekers’ right to freely choose or accept work is somewhat circumscribed by their social situation. Relatvely, it might be argued that there is a fundamental problem with changes which are designed to provide a greater ‘incentive’ for increased participation and the right to freely chosen work, when ‘incentive’ manifests itself as a punitive system. The Parliamentary Joint Committee on Human Rights touched on this question in its report.

This leads to a second point, which is that job seekers’ ability to engage with their right to work is dependent on the availability of paid work for them to engage with. As at May 2014, there were around 4.9 unemployed people for each job vacancy in Australia.

It should be noted, however, that this average is deceptive in that it assumes that every unemployed person is equally qualified for each job. In reality a substantial proportion of all vacancies (39.7%) were for highly skilled occupations (professionals and managers) and thus unlikely to go to a majority of job seekers, most of whom are likely to be young and relatively inexperienced. When many young people’s inexperience is taken into account, the labour market is, Greg Jericho argues, ‘quite narrow’.

Finally, it is worth noting that little attention is given to serious failure on account of persistent non-compliance with participation obligations arising from the particular circumstances of a recipient of unemployment benefits. The Parliamentary Joint Committee on Human Rights has alluded to this problem in the context of its comments on the compatibility of the Bill with the rights to equality and non-discrimination.

The amendments treat all unemployed people as if they were a homogenous group. This is despite the fact that those experiencing distinct and considerable labour market barriers, such as homeless people, single parents, people with disability (for example, those with a mental illness), people with a drug or alcohol disorder and women escaping domestic violence, may find it especially difficult to meet the compliance and participation obligations and thus be in breach of their agreements. Thus, the effect of these amendments (in circumstances where the failure is not ‘wilful’ or ‘deliberate’) may be a loss of income beyond a person’s control and to an extent that violates both the right to social security and, in turn, the right to an adequate standard of living.

Key issues and provisions

The Bill has one schedule. As set out above and in further detail in Appendix A, the Secretary of the Department of Social Services may determine that a job seeker has committed a ‘serious failure’ in two circumstances—firstly for persistent non-compliance with participation obligations (section 42M of the Social Security (Administration) Act 1999 (the Act)) and secondly, where the person has refused or failed to accept an offer of suitable employment (section 42N of Act). Section 42NC of the Act currently provides that if the Secretary determines that a person has committed a serious failure, the Secretary must also determine that the non-payment period will apply unless the Secretary is satisfied that the job seeker does not have the capacity to undertake any serious failure requirement (for example, ‘because they now have significant caring responsibilities, or if undertaking the activity would aggravate an existing health condition’) and serving the penalty would cause them to suffer severe financial hardship. Item 1 amends section 42NC so that the Secretary’s discretion in relation to imposing a non-payment period will not apply where the serious failure has occurred due to the job seeker refusing or failing to accept an offer of suitable employment.

Removal of the requirement that the Secretary consider whether the penalty would cause a job seeker to suffer severe financial hardship is tough. Under existing arrangements, a number of penalties are waived on the grounds of severe financial hardship because few affected job seekers would have sufficient liquid assets to

---

41. ILO Convention (No. 29) concerning Forced or Compulsory Labour, done in Geneva on 28 June 1930, [1933] ATS 21 (entered into force for Australia 2 January 1933), article 21).
qualify as not being in financial hardship. 46 This change will increase the number of penalties imposed on people who have very limited means. It might be argued that job seekers who refuse work are demonstrably employable and can be expected to find work, thereby rendering the imposition of an immediate penalty justifiable and less damaging. 47 This may or may not be a reasonable assumption.

In some cases it is possible that a job seeker who refuses or fails to accept an offer of employment will have a vulnerability indicator; that is, they will have a diagnosed condition or personal circumstance that may have impacted on their capacity to comply with their participation requirements. While a vulnerability indicator does not exempt a job seeker from their participation requirements, it does alert Job Services Australia service providers and Centrelink to the fact that a job seeker may experience difficulty in meeting their activity test or participation requirements, and that their vulnerabilities should be taken into account in setting these requirements and imposing sanctions for failure to meet them.

At 31 March 2014 there were 118,329 job seekers with a vulnerability indicator. This represented 14 per cent of all job seekers. 48

While job seekers are serving their eight week non-payment penalty, they are still required to meet their activity test and participation requirements in order to remain on payment. Given that concerns have been expressed about the impact of the low rate at which NSA and Youth Allowance (YA) are paid on job seekers’ ability to find and gain employment, it is highly unlikely that penalised job seekers will be in a position to look for, find and accept work. 49 Indeed, the fact that job seekers serving an eight week non-payment penalty are only eligible for Stream One limited services could be viewed as a recognition of this. 50 This situation would appear to run counter to the general stated objective of increasing employment participation. This issue is considered in further detail below.

Section 42P of the Act sets out the consequences of a ‘serious failure’, one of which is a non-payment period. Current subsection 42P(1) provides that a non-payment period will apply where the Secretary has determined that the person has committed a serious failure AND has determined that section 42NC applies. (As set out above, the Secretary is to determine that section 42NC applies unless he or she is satisfied that the job seeker does not have the capacity to undertake any serious failure requirement and the penalty would cause severe financial hardship.) Item 2 repeals and replaces subsection 42P(1) of the Act to reflect the fact that the Secretary will no longer have discretion under section 42NC in relation to a serious failure that arises from the job seeker’s refusal or failure to accept an offer of suitable employment. In such a case, the non-payment period will apply (new paragraph 42P(1)(b)).

Section 42Q of the Act sets out the circumstances in which the Secretary may end a non-payment period imposed for a serious failure, before the expiry of eight weeks. Item 3 adds to section 42Q of the Act three new subsections. New subsection 42Q(4) provides that the Secretary’s discretion under subsection 42Q(1) to end a non-payment period early does not apply where the non-payment period was imposed for a serious failure under section 42N (refusing or failing to accept an offer of suitable employment). New subsections 42Q(5) and (6) provide that where a job seeker is determined to have persistently failed to comply with their obligations and to have committed a serious failure, the Secretary is only able to end that job seeker’s eight week non-payment period once. If a job seeker subsequently fails to comply with their participation obligations and commits another serious failure within a continuous period on payment, then the Secretary cannot end their eight week non-payment period.

It should be noted that under section 42NA of the Act the Secretary must conduct a comprehensive compliance assessment in relation to a job seeker before determining whether or not they have committed a serious failure

47. This is similar to the proposition put forward at page 11 of the Explanatory Memorandum: ‘the fact that a person incurs such a failure means that the person is employable and they are likely to have other choices as to what work they do’.
50. Stream One is reserved for those job seekers who are most work ready and require little assistance. Stream One limited job seekers are eligible for the services provided during the first three months of Stream One, including an initial interview, assistance with preparing a resume and advice about the local labour market.
due to persistent non-compliance. There is no similar requirement for such an assessment to be conducted in relation to serious failures for refusing or failing to accept an offer of suitable employment. While this appears to be inconsistent, it undoubtedly reflects the view that these serious failures are ‘more serious’ than those for persistent non-compliance.

The Government has recently introduced changes to the Social Security (Reasonable Excuse – Participation Payment Obligations) (DEEWR) Determination 2009 (No. 1) that are of some relevance to the changes proposed in this Bill. (These changes are not mentioned in the Bill’s Explanatory Memorandum.) This Determination specifies matters that the Secretary must take into account in deciding whether or not a job seeker has a reasonable excuse for failing to meet participation requirements. The changes to the 2009 Determination, set out in the Social Security (Reasonable Excuse - Participation Payment Obligations) (Employment) Determination 2014 (No. 1), reduce significantly the range of matters that must be taken into account. Under the revised Determination, the Secretary need no longer take into account:

- that the person did not have access to safe, secure and adequate housing, or was using emergency accommodation or a refuge, at the time of the failure
- the literacy and language skills of the person
- that the person was subjected to criminal violence (including domestic violence and sexual assault)
- that the person was adversely affected by the death of an immediate family member or close relative and
- If the person has recently been released from prison.

Further, where previously the Secretary was obliged to take into account a person’s illness, impairment or condition so long as it required treatment, under the proposed changes a person’s failure must be a result of their being incapacitated due to illness, injury or disability.

The National Welfare Rights Network is of the view that the above changes will ‘severely restrict the discretion not to apply certain penalties based on reasonable excuse’ and see ‘a significant increase in the number of penalties being imposed in situations where a person was not being wilfully non-compliant and may have had a reasonable excuse, but for some reason didn’t provide prior notice’.

New subsection 42R(4) provides that compliance with a serious failure requirement cannot result in an eight week non-payment period being waived, if the penalty is applied for a job seeker’s refusal or failure to accept an offer of suitable employment.

What are the impacts of non-payment penalties on job seekers?

The imposition of penalties on income support recipients for failure to comply with social security rules and requirements is sometimes referred to as ‘breaching’. Arguably, the most systematic and comprehensive analysis of breaching and its impacts on income support recipients conducted in Australia is that undertaken by the Social Policy Research Centre (SPRC). The final report of this study was published in 2005.

Prior to this study, the only research that had been conducted on the impact of breaches was heavily reliant on small-scale case studies or surveys of clients of service organisations. These studies provided a general picture of the risk factors associated with being breached, and the difficulties faced by income support recipients who had been breached. However, the findings of these studies were not necessarily representative of the experience of all people who had been breached. Further, they did not provide substantive information on how income

---

51. [Social Security Act](http://www.legislation.gov.au/Details/C2009C0197) Section 42R(4). The changes are of some relevance to the changes proposed in this Bill. (These changes are not mentioned in the Bill’s Explanatory Memorandum.)


54. T Eardley, J Brown, M Rawsthorne, K Norris and L Emrys, *The impact of breaching on income support customers*, SPRC report 5/05, University of New South Wales, Sydney, 2005, accessed 30 July 2014. At the time of the study, the penalties were as follows: a) a reduction of 18 per cent (for the first activity test breach within two years) in the basic rate payable for a period of 26 weeks or b) a reduction of 24 per cent (for the second activity test breach within two years) in the basic rate payable for a period of 26 weeks or c) cancellation of entitlement (for the third or subsequent activity test breach within two years) for a period of eight weeks. Failures to meet administrative obligations could result in a penalty of a reduction of 16 per cent in the basic rate payable for a period of 13 weeks. Breaching Review Taskforce, op. cit., pp. 3–4.
support recipients who had been breached coped with their reduced income, or how the sanction of being breached impacted on their future compliance with social security rules.

In response to this lack of data, the then Department of Family and Community Services (FaCS) commissioned the SPRC to conduct a broad study of the impacts of breaching that would assist in future policy development. SPRC was careful in designing its methodology to include those population groups identified as being disproportionately affected by breaching. These incorporated: Aboriginal and Torres Strait Islander people; young people, particularly those with casual labour market attachment; people with mental or other health problems; people with family responsibilities; and people from non-English speaking backgrounds.

In terms of its impact on compliance with activity test and participation requirements, the SPRC found mixed results.

**Compliance effects of breaching**

Based on responses to survey questions regarding the possible long-term impacts of breaching, nearly ninety per cent of breached income support recipients reported that their participation in prescribed activities had increased as a consequence of the breach. More than two-fifths of respondents said that they had found some kind of work or increased their existing hours of work, with almost one-third of respondents indicating that they started reporting all of their earnings. These earnings amounts tended to be small.

That said, breaching was also found to have had a negative impact on the participation efforts of more than one-third of participants, with these people reporting reduced job search activity and more unreported ‘cash-in-hand’ work. These general findings were borne out by other research instruments used in the project. It was found that around two-thirds of participants agreed that having their payments cut made them more determined to find work, with three-fifths of respondents stating that having been breached actually made it more difficult for them to look for work.

**Adverse impacts of breaching**

The impacts of breaching vary widely. The SPRC study found that around one-fifth of income support recipients breached experience relatively minor effects. This, the SPRC attributed to these people’s finding work, already having some income from work or, where they are living with or being partly supported by families, having their income loss absorbed by these families. In many cases young people who were breached suffered from a reduction in their social lives, which contributed to the social isolation that frequently accompanies unemployment.

The safety net role played by family and friends of people who had been breached alleviated the more serious impacts of breaching for most, with the majority of participants being able to manage on reduced benefits due to this support. However, where family support was lacking, some income support recipients experienced serious difficulties. For example, around ten to twenty per cent of those people breached ended up losing their accommodation or having to move to cheaper housing. A small minority ended up homeless or participating in serious criminal or risk taking behaviours as a result of their being breached. Where people with children were breached, this tended to exacerbate existing problems that they had in negotiating the income support system.

Many participants experienced health-related, psychological and social impacts as a result of being breached. For example, around one-third experienced stress in their relationships and serious household arguments; seventeen per cent reported having to cut back on necessary medication; around thirteen per cent reported increasing harmful behaviours such as drinking or drug use with around four percent reporting an increase in gambling.

In summarising the impacts of breaching on income support recipients, the SPRC maintained:

> The main issue with breaching, apart from the monetary level of penalties, seems to be not so much that it falls out of all proportion on the most vulnerable customers, but that it tends to be the more disadvantaged job seekers who face the most difficulties when they are breached. Many unemployed income support customers lead lives that are

---

55. This finding is supported by Department of Education, Employment and Workplace Relations survey data on the impacts of breaching on job seekers. These data indicate that fifteen percent of job seekers serving an eight week non-payment period lost their accommodation and fifty per cent of job seekers without payment for eight weeks experienced difficulty in paying their rent and were put at risk of homelessness. Department of Education, Employment and Workplace Relations, Submission to Senate Standing Committee on Education, Employment and Workplace Relations Inquiry Into the Social Security Legislation Amendment (Employment Services Reform) Bill 2008, [2008], p. 2.
constrained, stressful and easily disrupted by a sudden reduction or loss of income. For some, the impact of income loss at the current level can be severe and may be long lasting, especially if they lack networks of support. While there is clearly public support for penalties for people not meeting income support requirements, and some apparent compliance effects arising from them, there would seem to be opportunities to reduce further the extent of breaching through more effort to contact customers and to review their circumstances before imposing breaches. 56

**Concluding comments**

The changes proposed in the Bill could help to improve job seeker compliance through a deterrent effect. However, serious concerns have been raised with regard to their likely disproportionate impact on vulnerable job seekers.

---

Appendix A: current job seeker compliance arrangements

The following summary describes the penalty structure of the current job seeker compliance framework, which applies once a job seeker becomes subject to formal compliance action. However, it should be noted that a key element of the framework introduced in 2009 was an increase in the level of discretion available to employment services providers. This meant that providers were encouraged to adopt alternative strategies to re-engage job seekers without taking formal compliance action.

No show no pay failures

A job seeker commits a No Show, No Pay failure if, without a reasonable excuse, they:

• fail to attend an activity that they are required to attend on a particular day
• commit misconduct while in attendance at an activity
• fail to attend a job interview or
• during a job interview, intentionally act in a manner that may result in an offer of employment not being made.

The consequence of a No Show, No Pay failure is the application of a penalty amount equivalent to one ‘working day’ of a person’s payment (normally 10 per cent of a person’s 14 day instalment) for each day on which a failure is committed (for example, three days’ absence from an activity, even if consecutive, will count as three failures and result in the loss of three days’ payment). Rent assistance and other non-participation-related add-on payments are not affected by the penalty.

Connection and reconnection failures

A job seeker commits a connection failure if they fail, without reasonable excuse, to:

• attend an appointment with their provider
• meet their job search requirements or
• comply with a requirement to enter an Employment Pathway Plan EPP (previously an Activity Agreement).

If a job seeker commits a connection failure, their income support payment is immediately suspended until they attend a rescheduled appointment or resume the relevant activity. If the job seeker attends the rescheduled appointment or resumes the activity, their income support payment is reinstated and they are back-paid any income support that was withheld as a result of the suspension. If a job seeker does not attend the rescheduled appointment or resume the activity without a reasonable excuse, their income support payment is suspended until they do so, and they are not back-paid for this period.

Persistent non-compliance—Comprehensive Compliance Assessments

Repeated failures do not result in an automatic escalation in the severity of the penalty as they did under the previous system. Instead, following three connection or reconnection failures or three No Show, No Pay, failures (counted separately) during a six month period, a job seeker is referred for a Comprehensive Compliance Assessment (CCA).

During this assessment, a Department of Human Services social worker looks at why the job seeker has been failing to meet their requirements and identifies any barriers to employment. The CCA report thus seeks to establish whether the non-compliance was persistent and deliberate or the job seeker is in need of more appropriate participation requirements and/or greater assistance in complying with their participation requirements.

Serious failures and Compliance Activities

A job seeker commits a serious failure if:

• following a Comprehensive Compliance Assessment, the Department of Human Services determines the job seeker has persistently failed to comply with their participation obligations and has done so intentionally, recklessly or negligently (the job seeker must have incurred at least three failures) or
• the job seeker, without reasonable excuse, refuses an offer of suitable employment or fails to commence suitable employment.
The consequence of a serious failure is an eight week period of non-payment. However, unlike under the previous system, the non-payment period ends if:

- the job seeker agrees to undertake a Compliance Activity (generally 25 hours per week for eight weeks of Work for the Dole) or
- the job seeker does not have the capacity to undertake a Compliance Activity and serving an eight week non-payment period would cause financial hardship (a job seeker who has less than $2,500 in liquid assets ($5,000 for a couple or for a job seeker with children) is considered to be in financial hardship).

If the job seeker is already undertaking an activity, they can continue to participate in that activity as part of their Compliance Activity, with any shortfall in hours made up through other activities.

**Unemployment non-payment periods**

A job seeker’s participation payment is not payable for a period of eight weeks if they:

- are unemployed due to their misconduct as a worker or
- voluntarily leave a suitable job (unless the voluntary act is reasonable).

For new claimants, this eight week non-payment period is effectively a waiting period as they will not have been granted payment yet. Job seekers cannot end unemployment non-payment periods by undertaking a Compliance Activity, although some vulnerable job seekers who are in hardship can have the penalty waived.