Submission to the

Senate Finance and Public Administration Committee

on the

Social Security Legislation Amendment
(Community Development Program) Bill 2015

About NWRN

The National Welfare Rights Network (NWRN) is the peak community organisation in the area of social security law, policy and administration. We represent community legal centres and organisations whose role is to provide people with information, advice and representation about Australia's social security system.

NWRN member organisations operate in all states and territories of Australia. They are organisations which have community legal services and workers dedicated to social security issues. Their services are free and they are independent of Centrelink and government departments.

The NWRN also has as Associate Members the Central Australian Aboriginal Legal Aid Service (CAALAS) and the North Australian Aboriginal Justice Agency (NAAJA).

The NWRN develops policy about social security, family assistance and employment assistance based on the casework experience of its members. The Network provides submissions to government, advocates in the media and lobbies for improvements to Australia's social security system and for the rights of people who use the system.

Overview

The main purpose of the Social Security Legislation Amendment (Community Development Program) Bill 2015 (**the CDP Bill**) is to amend the *Social Security Act 1991* (Cth) (**the Act**) by inserting a new Part 2.28.

Part 2.28 creates a separate legislative regime for remote income support payments sitting outside the general provisions of the Act. It also makes amendments to the *Social Security Administration Act 1999* (Cth) (**the Administration Act**), as it contains the compliance framework and appeal provisions.[1]

As the CDP Bill's explanatory memorandum makes clear, the new legislative regime is to be used to create a distinct set of arrangements for the Community Development Program (**the CDP**).

The CDP is the government's labour market program for remote communities. It is a modification of the Remote Jobs and Communities Program (**RJCP**) introduced by the Minister for Indigenous Affairs (**the Minister**) from 1 July 2015. The RJCP was in turn introduced in late 2013 by the former government to replace the Community Development Employment Projects (**CDEP**) scheme. Although the government presents the CDP Bill and the CDP as being about a remote labour market program, the reality is that the overwhelming majority of CDP participants are Indigenous people living in remote communities and the remainder of this submission focuses on the impact of the CDP and the CDP Bill on these communities.

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[1] Schedule 2 of the CDP Bill also proposes amendments to repeal a number of references in the Act and the Administration Act to the Community Development Employment Projects scheme which was finally phased out entirely from 1 July 2015.

One of the main modifications the CDP made to the RJCP from 1 July 2015 was to impose more onerous participation requirements on job seekers aged 18 to 49, who are on the full rate of payment and do not have an injury, illness or disability that would be aggravated by the work conditions.[2] This group of job seekers are currently required to participate in approved activities for five hours per day, five days per week *all year round*. When it was introduced in July 2015 this requirement was criticised because it was more onerous than the full time time "work for the dole" requirement which could be imposed in certain circumstances on job seekers in non-remote Australia. Currently, non-remote jobseekers enter their work for the dole phase six to 12 months after commencing in jobactive. After *six months* of work for the dole phase, they re-enter case management phase. DSS guidelines set activity hours at 25 hours per week for people under 30, 15 hours per week for people aged 30 to 59. For principal carer parent and people with a partial capacity to work the hours are correspondingly halved.[3]

To support the creation of a distinct set of arrangements for the CDP, the CDP Bill:

- Transfers responsibility for making remote income support payments from the Department of Human Services (**DHS**) to CDP providers;

- Provides for weekly, rather than fortnightly, payments;

- Empowers the Minister to create a separate compliance and penalty regime for recipients of remote income support payments and to determine what activities will meet activity test requirements and what will count as a reasonable excuse for absence by legislative instrument; and

- Increases the income free threshold for remote income support payments to $1300 per fortnight.

The CDP Bill empowers the Minister to determine the regions ("remote income support regions") in which these measures will operate by legislative instrument.

It requires the Minister to have regard to a number of considerations but does not confine the matters the Minister may have regard to.[4] The Minister has said that the new framework will be trialled from 1 July 2016 in four regions out of the sixty currently covered by the CDP.

In the explanatory memorandum the Minister says that the CDP Bill is necessary to address problems with the CDP in its current form. The main concern he reports is that despite CDP participants making up only 5% of job seekers, they account for 60% of No Show No Pay penalties. The Minister's explanation for this staggeringly disproportionate rate of penalties is that the Act's compliance framework is complex and difficult to understand and that because it takes DHS longer to determine whether a penalty should apply in remote regions, the delay in their application means that job seekers do not connect non-attendance at their compulsory activities with the penalty.

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[2] Guide to Social Security Law, 3.2.9.60, at http://guides.dss.gov.au/guide-social-security-law/3/2/9/60 (accessed 31 January 2016).
[3] Guide to Social Security Law at 3.2.10.30 updated 9 November 2015 (accessed at 31 January 2016)
[4] Proposed s 1061ZAAZ.

The Minister says that he will use the CDP Bill to address this problem by using the powers it confers on him to create a tailored set of arrangements for the CDP. As this will be by legislative instrument, the detail of what he plans is unknown at this stage. But the explanatory memorandum suggests that he will use his power to create “more immediate No Show No Pay penalties” within a “simplified compliance framework”. The suggestion is that more rapid application of penalties, along with weekly payments being made by CDP providers, means that job seekers will feel the consequences of non-attendance sooner, understand the requirements imposed on them better and therefore avoid penalties in the future. Presumably the intended result is a fall in the overall number of penalties.

In addition, the significant increase to the income free threshold to $650 per week is intended to reduce the disincentive to work that income testing creates and thereby encourage more job seekers to take up available work.

The National Welfare Rights Network (**NWRN**) opposes the CDP Bill. This submission restricts itself to the major technical problems with the CDP Bill and its approach to the CDP, drawing on the experience and expertise of the NWRN’s members in social security law, administration and service delivery.

However, the NWRN echoes the view of many submissions to this Committee that there is an urgent need for reform of the CDP.

It is clear that a far more balanced and accurate assessment of the CDP is necessary. Analysis of Department of Employment data by Lisa Fowkes, a researcher at the Australian National University,[5] provided to this Committee shows grossly disproportionate and escalating application of penalties between September 2013 and June 2015, with a steeper escalation since the shift towards more structured activities in 2014 and work for the dole in 2015. We now learn from the explanatory memorandum that current rates of No Show No Pay penalties in the CDP are 12 times the national average.

This is a disaster. It reduces income to Indigenous people in remote communities already struggling on inadequate payments such as Newstart Allowance. It also reduces income levels in remote Indigenous communities, entrenching poverty and potentially impacting on enterprises and businesses in those communities.

The Minister’s suggestion in the explanatory memorandum is that the problem is job seekers not understanding their requirements because of a delay in imposing penalties. These disastrous statistics suggest that the problem clearly goes much deeper than that. A number of submissions to this Committee have highlighted the possibility that structural problems, such as the incentive fee agreements with CDP providers may be giving them to apply penalties instead of other, more beneficial, approaches to engaging job seekers.[6]

There has to be a thorough evaluation of the CDP, not a response premised on the blinkered view that what is needed is more effective penalties to drive change in Indigenous behaviour. It is quite clear from the data that the penalty system is not driving behavioural change and the explanatory memorandum’s response that “outcomes suggest that current incentives within the income support system need to be stronger for those in remote

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[5] Submission 1, Lisa Fowkes, at p 4
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Social_Security/Submissions

[6] See particularly Submission 1, Lisa Fowkes and Submission 8, Jon Altman

communities to drive the behavioural changes needed to get people active, off welfare and into work" seems blind to this reality.

More fundamentally, it is clear that the CDP, and the RJCP it modified, is failing. Although there are some differences, our view is that these programs are in their essentials an extension of the approach to labour market programs and job seekers used in non-remote Australia. The NWRN again echoes the submissions of many to this Committee which call for a recognition of the strengths (and weaknesses) of the CDEP scheme and a return to its key features, including community control of activities and priorities, and employment at award rates. Research shows that participants in the CDEP scheme tended to gain extra hours of work and have significantly greater incomes than those on unemployment benefits.[7]

The CDP Bill should be withdrawn. The government needs to urgently develop a replacement for the CDP program, drawing on the body of research and evaluation of what works and what does not work in remote Indigenous communities. This program must provide an adequate income to participants and not lead to grossly disproportionate application of penalties.

In the remainder of this submission, we focus on major technical deficiencies with the CDP Bill.

The CDP Bill transfers excessive power to the Minister and undermines basic protections in social security law without adequate justification

Although the explanatory memorandum to the CDP Bill focuses on the need to develop tailored activity test and compliance arrangements in remote regions, the CDP Bill itself goes much further than this without any justification being offered. As we explain below, it undermines basic protections in social security law such as appeal rights.

The Minister is given a general power to determine the regime of obligations and compliance applicable to recipients of activity tested payments, such as Newstart Allowance, who reside in designated remote regions by legislative instrument.[8] Without limiting that power, the bill permits the determination to deal with matters such as:

- activity requirements and obligations
- activity test exemptions
- penalties for non-compliance
- reasonable excuse for non-compliance
- treatment of voluntary acts and misconduct
- functions duties and powers of CDP providers
- review of decisions made by CDP providers

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[7] Altman, Grey and Leviticus *"Policy Issues for the Community Development Employment Projects Scheme in Rural and Remote Australia"*, Centre for Aboriginal Economic Policy Research Discussion Paper No. 271/2005 pp 10-12
http://caepr.anu.edu.au/sites/default/files/Publications/DP/2005_DP271.pdf

[8] Explanatory Memorandum Item 25 proposed section 1061ZAAZA(1) at p 12

- the application of the Social Security Act 1991 **(the Act)** and the Social Security Administration Act 1999 **(the Administration Act)** [9]

Going further, the bill contains a general provision that authorises the Minister to "determine that the social security law (including this part) has effect………with any modifications that are prescribed".[10] The determination may prescribe provisions of the Act that do not apply, or that apply with prescribed modifications, to remote income support payments to remote income support recipients.[11] Simply put, the Minister has power to override or modify the Act.

The Minister has not provided a justification for the width of this power.

In the first place, the Minister has not justified the need for such a wide power to determine key features of the activity test and compliance regime applicable to Indigenous people living remotely by legislative instrument. It can be accepted that there is a need to have flexible arrangements tailored to the circumstances of remote communities. However, the current legislative framework already provides for this flexibility. There is already power to specify the circumstances which may count as a reasonable excuse for not meeting participation requirements in s 42U of the Administration Act, and this power could be used to specify particular circumstances relevant to life in remote Indigenous communities. Similarly, a broad discretion exists in s 603A of the Act to exempt someone from the activity test in special circumstances and existing policy takes into account circumstances relevant to life in Indigenous communities.[12] And as the existing 25 hour per week requirement for CDP participants shows, there is already scope to create distinctive obligations for remote Indigenous job seekers.

The Minister needs to both identify and explain where there is need for more flexibility and, if there is a case for this, put forward a bill that focuses on addressing that issue. Instead the current bill seeks to transfer as wide a power as possible to the Minister.

Nor has the Minister explained why an appropriate set of amendments cannot be introduced into social security legislation, so that any changes can be fully scrutinised by Parliament, rather than having the reduced scrutiny that legislative instruments inevitably have.

In addition, the CDP Bill's transfer of power to the Minister is so wide as to undermine basic protections for income support recipients such as appeal rights. The explanatory memorandum, and the Department's submission[13], maintains that the CDP Bill preserves appeal rights. However, in the NWRN's reading of the bill, this is not so clear.

It is true that proposed s 125 makes decisions of *departmental officers* in relation to the new regime reviewable in the ordinary way, even if made under a legislative instrument. [14] However proposed s 144(da) precludes AAT review of decisions by CDP providers. This is problematic, because the bill also gives the Minister a wide power to make determinations regarding the powers and functions of CDP providers, and review rights in relation to CDP

[9] Explanatory Memorandum Item 25 proposed section 1061ZAAZA(1) at p 12
[10] Explanatory Memorandum Item 25 proposed section 1061ZZAAZC (1) at p 15
[11] Explanatory Memorandum Item 25 proposed section 1061ZZAAZC(2) at p 15
[12] Guide to Social Security Law, 3.2.11.40 at http://guides.dss.gov.au/guide-social-security-law/3/2/11/40 (accessed 31 January 2016).
[13] Submission 9, Department of Prime Minister and Cabinet.
[14] Explanatory Memorandum Item 40, amending s 125 of the Administration Act.

provider decisions.[15] On its face, this would authorise the Minister to transfer certain decisions (perhaps certain decisions about compliance) to CDP provider staff and, unless he determined otherwise, s 144(da) would preclude merits review of these decisions.

This is a real concern, given that the government has previously introduced bills that, had they passed, would have transferred certain decisions to mainstream employment service providers and reduced appeal rights in relation to certain compliance decisions.[16]

Assurances in the Department's submission about the Minister's current intentions are lacking in detail and are no substitute for legislated appeal rights.

This is all without considering the apparent power in proposed s 1061ZZAAZC (1) to modify the application of social security law generally, but in particular of "this part", ie, Part 2.28 the remote payments regime, in other words to alter the remote payments legislation itself by legislative instrument.

The new income threshold and penalty deductions may create disincentives to work

The CDP Bill introduces a new income free threshold of $650 per week,[17] the assumption being that this will operate to remove the disincentive posed by the low income free threshold and taper rate for Newstart Allowance to taking up paid work.

The NWRN regards the low threshold and high taper rates as a disincentive for Newstart Allowance recipients to take up paid work through high effective marginal tax rates and welcomes raising the threshold in remote communities.

There is an urgent need to address poverty traps for job seekers in non-remote Australia too.

However, it is not clear that this new approach to determining the rate of payment for CDP participants will be an effective incentive to take up work or benefit many of those participants.

Under current arrangements, CDP participants receiving Newstart Allowance have an income free threshold of $102 per fortnight, with a taper rate of $0.50 for every dollar earned between $102 and $252 per fortnight, and a taper rate of $0.60 for every dollar earned over $252. Under current policy, they also exit the full time 25 hours per week activity test if they work for more than a fortnight (and earn more than $102 per fortnight), as they no longer receive a full rate of payment.[18] This is because the Social Security Act currently provides that a person cannot be required to undertake work for the dole if their income support payment has been reduced under the income test[19].

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[15] Proposed subsections 1061ZAAZA(2)(f) and (g).

[16] See the Social Security Legislation Amendment (Strengthening Job Seeker Compliance Framework) Bill 2014 http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5344

[17] Item 27 Point 1064-E4 (table), Item 29 point 1066A-F3 (table), Item 37 Point 1068-G12(b), Item 41 Point 1068A-E14

[18] Guide to Social Security Law, 3.2.9.60, at http://guides.dss.gov.au/guide-social-security-law/3/2/9/60 (accessed 31 January 2016).

[19] *Social Security Act 1991* section 607B (1)(a)

Under the CDP Bill, recipients of a remote income support payment can earn up to $650 week before the income test and taper rate start to affect their payment. The rationale for this is that this increase to the income free threshold will encourage employment by removing the poverty trap posed by means testing.

However, the proposed increased free area would mean that payments would rarely be reduced under the income test. The Department's submission suggests the Minister would determine that full-time work for the dole requirements continue to apply, despite a person receiving income from work, and create an alternative scheme in which penalties for non-attendance at activities would reduce payments, rather than the income test.

This seems to be what the explanatory memorandum assumes, when it says that where a person obtains work on a day, they will lose income support payment as a penalty for not attending their usual work for the dole activity:

> "If a job seeker undertakes paid work instead of attending their CDP activities, they would receive less income support (as penalties are applied)[20]

That is, paid work would not count as meeting the compulsory work for the dole requirement. So if a remote income support recipient meets their 25 hour requirement and then takes up additional paid work on top of that, they will not lose their income support payment (up to a threshold of $650 per week). However, if a remote income support recipient takes up paid work in the hours they are supposed to be meeting the 25 hour requirement, they will lose some of their income support payment (presumably at an hour by hour rate).

The situation is that someone who wants to work 25 hours per week for the Newstart Allowance (at roughly $10 per hour) and then take up additional paid work, this will be beneficial. But there are a number of situations, such as wanting to take up part-time work only (the kind of work the Minister acknowledges in the explanatory memorandum is more likely to be available in remote communities), or only paid work at award wages (rather than 25 hours work per week for the Newstart Allowance at approximately $10 per hour), where the person may not be better off.[21]

Proposed compliance framework for remote income support recipients

The Minister suggests that the reason behind the grossly disproportionate application of penalties to Indigenous job seekers in remote communities is a lack of understanding of their obligations caused by a delay in the imposition of penalties by DHS.

The Minister's solution is to propose more "immediate" penalties.

However, if the problem is a lack of understanding of obligations or a delay in the imposition of penalties, the Minister has not explained why the solution is not increased resourcing of DHS to improve its service delivery in remote communities such as more resources for

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[20] Explanatory Memorandum page 9
[21] Submission 1, Lisa Fowkes p 17, Table 1

remote servicing teams to go to remote communities and for interpreters in Indigenous languages.

Experience with non-remote job seekers has shown that simple administrative changes can have a dramatic effect on the incidence of penalties. In September 2013 administrative changes to how reconnection appointments were made resulted in a rapid increase in attendance at those appointments. Within only two months of this simplified administrative process, attendance at appointments had increased by 10%, to 78% in October.[22]

It is also vital to improve remote service delivery by DHS before applying a compliance framework to Indigenous job seekers which assumes that DHS has accurate information about a person's circumstances, barriers to employment, illness and injuries, homelessness and so forth. Without that information, it is impossible to fairly and accurately determine if a person has a genuine and good reason for failing to attend an activity, or might be exempt from the activity test.

Indeed, the NWRN is aware of cases where only the intervention of its member's caseworkers and lawyers ensured that Indigenous people who had been incorrectly placed on the activity tested Newstart Allowance, were placed on the correct payment for their level of injury and disability, the Disability Support Pension. Common factors in these cases seems to be the use of phone rather than face to face assessment, and lack of interpreters or clear explanation of decisions and appeal rights.

There needs to be an urgent and significant improvement to remote service delivery by DHS to address these issues, including increased ability to provide face to face appointments and services and increased use of interpreters in Indigenous languages. Without that, key safeguards such as the Comprehensive Compliance Assessment for job seekers who repeatedly fail to meet requirements cannot make accurate assessments, a problem noted in 2010 in the last major review of the compliance system.[23]

For years NWRN has been highlighting the need for increased resourcing for administration of social security payments in remote indigenous communities. NWRN has been calling in its Federal Budget submissions for increased funding to increase the numbers of social workers and job capacity assessors. Remote servicing teams should always have a social worker and job capacity assessor available to do face to face appointments. More resources are required to increase the number of interpreters used and available for use.

Increasing the functioning and capacity of DHS, which is the government's specialist service delivery agency in remote areas is the answer, not handing over administrative functions to CDP providers, especially if the increased burden on those providers diverts them away from their core functions of providing valuable activities and helping job seekers into employment. [24] Effective communication and administration by the relevant departments are critical, but are currently undermined by the lack of face to face assessment of job seekers, insufficient use of interpreters, insufficient numbers of social workers and job

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[22] Commonwealth of Australia, *Committee Hansard Senate Education and Employment Legislation Committee Estimates,* 1 June 2015, p. 92.

[23] Disney, Buduls and Grant "Independent Review of the Job Seeker Compliance Framework" September 2010, Chapter 5.
https://docs.employment.gov.au/system/files/doc/other/impacts_of_the_new_job_seeker_compliance_framework_report_of_the_independent_review.pdf

[24] See for example the NWRN 2015-2016 Federal Budget Submission http://www.welfarerights.org.au/nwrn-2015-2016-federal-budget-submission p 17

capacity assessors to accompany remote servicing teams, and a lack of community, health and other support services.

As DHS continues to report annual savings from its move to online service delivery, this money needs to be returned to the system in the form of increased quality and resourcing for services for the most vulnerable income support recipients, including Indigenous people in remote communities.