NATIONAL WELFARE RIGHTS NETWORK

A tale of two systems – the application of the national compliance framework to remote job seekers under the Community Development Program

Briefing note by the National Welfare Rights Network

June 2016

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About the National Welfare Rights Network

The National Welfare Rights Network (**NWRN**) is the peak community organisation in the area of social security and family assistance law, policy and administration. Our member organisations are community legal centres and other legal services which provide free, independent and specialist legal services in the area of social security and family assistance law.

There are NWRN member organisations in each State and Territory, including two associate members in the Northern Territory, the Central Australian Aboriginal Legal Aid Service (**CAALAS**) and the North Australian Aboriginal Justice Agency (**NAAJA**).

The NWRN draws on its member organisations' experience providing legal services to current and former recipients of social security and family assistance payments to develop proposals for legislative, policy or administrative reform, make submissions to government and advocate for the rights of people who need the support of the social security and family assistance system.

Background

The Community Development Program (**CDP**), the Australian Government-funded employment service program in remote communities, began on 1 July 2015. It replaced the Remote Jobs and Communities Program (**RJCP**), which was introduced in July 2013. There are about 36,000 people in the CDP, about 85% of them Indigenous. These are some of the poorest communities in Australia, many with very low rates of employment and a heavy reliance on income support.

Most people in the CDP are recipients of income support payments who are expected to look for work as a condition of receiving income support (**activity tested payments**), such as Newstart Allowance for unemployed job seekers and Parenting Payment for parents of older children. Recipients of activity tested payments, generally referred to as job seekers, are required to participate in activities as a condition of receiving payment provided by employment service providers.

Job seekers in the CDP are subject to a different and significantly more onerous set of requirements than other job seekers nationally. The main requirement for most job seekers in the CDP is daily attendance and participation in compulsory activities for five hours per day (that is, 25 hours per week). This is similar in nature to the Work for the Dole requirement for other job seekers, but much more demanding. This kind of intensive and continuous activity generally only applies outside remote communities to long term recipients of income support payments, and even then for fewer hours per week.

Like other recipients of activity tested payments, participants in the CDP are subject to the compliance framework in social security legislation, which includes a system of financial penalties which may be imposed under social security law on people who fail to comply with their requirements. These penalties range from suspension up to complete loss of payment.

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A key aspect of the compliance framework is the discretion that employment service providers, including CDP providers, have as to what action to take in response to a person's failure to meet a requirement, such as attending a regular appointment with the provider or an activity. Even if the provider does not think that the person has a valid reason for the failure, in most cases they can still choose whether to recommend that the Department of Human Services (**DHS**) investigate the application of a penalty or to take some other action. If the provider does recommend the application of a penalty, DHS will determine whether to apply a penalty in accordance with social security law, including considering whether the person had a reasonable excuse for the failure to comply with their obligations.

This discretion enables the provider to exercise its judgment about the best way to achieve the aim of engaging the person in their program and improving their chances of getting a job. In the case of attendance at appointments with the provider, if the provider chooses to use the compliance system, it also has a choice about whether to use suspension (with full backpay, once the person attends a rescheduled appointment) or recommend that DHS investigate the application of a penalty.

In important research, Lisa Fowkes and Will Sanders, researchers at the Australian National University, have shown that penalties under the compliance framework were applied at a much higher rate to participants in the former RJCP than to participants in employment service programs nationally during its two years of operation from July 2013 to July 2015.[1] Although data about penalties under the CDP was not available to them, they feared that penalties would continue to escalate.[2]

The Department of Employment recently released data concerning the operation of the compliance framework under the CDP for the period 1 July to 31 December 2015 which shows that their fears were well-founded.[3]

The data tells a shocking tale of two systems, despite a common legislative framework.

On the one hand, the overall national data shows a significant decline in the number of penalties applied nationally, improved rates of compliance and providers generally choosing to use the compliance framework in a proportionate way. These trends show improvements in the fairness and effectiveness of the national compliance framework.

On the other, there has been a dramatic escalation of penalties being applied to participants in the CDP. Although making up only about 4-5% of job seekers nationally, in the three months to December 2015 they attracted 57% of all penalties applied nationally; that is, more penalties than the other 95% of job seekers. Over 30,000 penalties for failure to attend compulsory activities without a reasonable excuse, known as "No Show No Pay failures" (**NSNP failures**) under social security law, were applied in the last three months of 2015. This type of penalty results in a

[1] L Fowkes and W Sanders, "Financial Penalties and the Remote Jobs and Communities Program", CAEPR Working Paper No. 108 of 2016, available at http://caepr.anu.edu.au/Publications/WP/2016WP108.php (accessed 4 June 2016).
[2] L Fowkes and W Sanders, note 1, p 11.
[3] https://www.employment.gov.au/job-seeker-compliance-data (accessed 4 June 2016).

reduction in income support of 10% of the job seeker's payment for each missed day of activities, a significant penalty for someone on a poverty level of income support payment. It can be appealed. But it is not refunded, even if the job seeker's attendance and compliance improve in response to it.

This is a shocking statistic, amounting to more than $1.5 million in lost income in the last quarter of 2015. In communities that are heavily reliant on income support, it suggests the real risk that these individuals and communities are struggling to meet basic needs.

As Fowkes and Sanders have shown, this trend has been worsening since the introduction of the RJCP in 2013. Under the CDP the level of penalties has now dramatically escalated to an unsustainable level.

A tale of two systems

Nationally, the data shows improvements in the fairness and effectiveness of the compliance system as a whole, for instance:

- overall penalties have declined significantly;
- recent changes to the compliance system appear to have led to increased rates of compliance in some areas, especially with attendance at re-engagement appointments with providers following a missed appointment or other failure to meet requirements; and
- providers appear to be choosing to use suspension with full backpay over recommending a financial penalty in the majority of cases where they consider a person misses an appointment without a valid reason.

Overall, in 2015 there were 202,774 financial penalties applied nationally. This was less than half the number of penalties for the previous year, with 448,993 financial penalties applied.

This trend was associated with a significant improvement in rates of attendance at certain provider appointments, known as re-engagement appointments. These are rescheduled appointments intended to get a job seeker back on track after a previous missed appointment or other instance of non-compliance.

As missing a re-engagement appointment without reasonable excuse may lead to a financial penalty (known as a "reconnection failure") this has helped drive the reduction in penalties overall. This is demonstrated in the table below[4]:

[4] Derived from compliance data at https://www.employment.gov.au/job-seeker-compliance-data (accessed 4 June 2016).

Quarter	No. of re-engagement appointments attended	%	Reconnection failures
1 Jul – 30 Sept 2014	163,860	66%	44,193
1 Oct – 31 Dec 2014	181,112	78%	27,221
1 Jan – 31 Mar 2015	206,958	88%	14,945
1 Apr – 30 Jun 2015	179,956	88%	12,806
1 Jul – 30 Sept 2015	296,617	89%	221
1 Oct – 31 Dec 2015	299,035	89%	844

Another important factor in the overall picture is the discretion that providers have concerning whether to recommend the imposition of a penalty if they believe a job seeker has failed to meet a requirement without a reasonable excuse and, in some cases, what type of penalty.

This can be illustrated in the case of missed appointments with providers. In the case of missed regular appointments with providers, providers are exercising their discretion not to recommend any form of compliance action in about 8% of cases overall, consistent with long term trends. Further, the latest statistics, extracted below, appear to show increased use of suspension as a tool, rather than other types of financial penalty, in cases where the provider does not consider there was a reasonable excuse for non-attendance[5]:

Quarter	No. of non-attendance reports by providers initiating suspension	As percentage of absences where the provider does not consider there was a reasonable excuse[6]
1 Jul – 30 Sept 2014	309,944	39.4%
1 Oct – 31 Dec 2014	255,985	38.5%
1 Jan – 31 Mar 2015	325,320	46.0%
1 Apr – 30 Jun 2015	266,179	44.1%
1 Jul – 30 Sept 2015	515,265	55.2%
1 Oct – 31 Dec 2015	488,187	59.5%

Suspension is a significant sanction for someone on a poverty level payment, but unlike other forms of penalty at least allows for backpay once the person begins to comply with requirements again by attending a rescheduled ("re-engagement") appointment.

These improvements appear to be attributable to a series of changes since mid-2014. From September 2014, when a person misses their regular appointment with their employment service, they have to contact the provider directly to reschedule their appointment (instead of the DHS).

[5] Extracted from historical data provided by the Department of Employment at https://docs.employment.gov.au/system/files/doc/other/summary_of_changes_to_job_seeker_compliance_public_data.pdf (accessed 4 June 2016).

[6] This includes instances where the provider was unable to speak to the job seeker and so does not know whether they had a reasonable excuse or not.

Since 1 January 2015, when a person misses their regular appointment and the provider choses to recommend suspension of their payment, the suspension continues until they attended the rescheduled ("re-engagement") appointment, not as previously until they agree to do so. These changes appear to correspond with the significant improvements in attendance at re-engagement appointments and a decline in failures for not doing so noted above.

By contrast, the data concerning the operation of the compliance framework in remote communities in the CDP is shocking.

There has been a staggering escalation in the level of NSNP penalties applied for non-attendance at compulsory activities without a reasonable excuse, especially since 1 July 2015. These have risen from 3,748 penalties in the September 2014 quarter (under the former RJCP) to a staggering 30,105 in the 3 month period from October to December 2015. This is more than double the number of penalties in the previous 3 months period from July to September 2015 and more than triple the number of NSNP penalties applied in the last 3 months of the RJCP (from April to June 2015).

This is 30,000 penalties applied to a cohort of 36,000 or so job seekers in just 3 months. It has driven a situation where the small cohort of CDP participants account for 57% of all penalties applied nationally.

Across remote communities which are the most disadvantaged in the country (about a quarter with employment rates under 30%), this is alarming. Local individuals and economies are significantly reliant on income support payments. The application of 30,000 penalties in 3 months amounts to more than $1.5 million withdrawn from these communities. In addition there are reports of people exiting the income support system and the data shows large, and escalating, numbers of suspensions over this period as well. The number of suspensions for disengagement from an activity under the CDP nearly doubled in the last 3 months of 2015, compared to the previous quarter, to more than 15,000.

Lining this up with Fowkes and Sanders' analysis of penalties under RJCP shows that this is part of a long term trend, with a steady escalation in penalties from July 2013 to July 2015. This has accelerated dramatically since the introduction of the CDP.

Factors driving the rise in penalties under the CDP

One factor contributing to the rise in penalties under RJCP which was identified by Fowkes and Sanders was the more onerous activity requirements for RJCP participants, typically 20 hours per week of year-round activities. As they put it, this meant there were simply more opportunities for participants to "fail" and incur a penalty. These requirements were further increased under CDP, with an emphasis on daily attendance and an increase in hours per week to 25.

However, given that there were already significant levels of required activity under the RJCP, this does not appear to explain the dramatic increase in penalties towards the end of 2015 shortly after the introduction of the CDP.

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Another factor emphasised by Fowkes and Sanders was evidence that protections for vulnerable job seekers are less effective for vulnerable job seekers.

The compliance framework contains a range of protections to ensure that obligations for vulnerable job seekers are appropriate and that penalties are not applied to job seekers whose compliance is affected by their circumstances, rather than wilful non-compliance.

Fowkes and Sanders argue that these protections are not working effectively in remote communities. They rely on complex assessments of personal circumstances and work capacity which are generally designed to be conducted face to face, often by senior or specialist DHS officers. In remote communities these are often conducted by phone or on a file review and, where contact is made with a job seeker, mostly without an interpreter. The assessments also often rely on evidence supplied by health or community services professionals (doctors, social workers, refuge workers) and the lack of such services in many remote communities also undermines these protections.

The National Welfare Rights Network has long shared these concerns. The issues extend to inadequate assessment of Disability Support Pension claims, with many claims assessed by phone or on the papers, leading to concern that some remote job seekers should in fact be in receipt of disability payments. Others may have inappropriate levels of requirements or not be receiving exemptions from their requirements in appropriate circumstances. People struggling to meet the more onerous program requirements, while dealing with unrecognised personal and health problems, may partly explain the high level of penalties being applied to remote job seekers.

Again, however, this long term problem does not appear to explain the escalation of penalties under CDP.

The key factor here appears to be the fee arrangements with CDP providers made by the Australian Government. Fowkes and Sanders argued that these arrangements, which linked fees paid to providers with recorded hours of attendance at compulsory activities, created pressure on providers to report non-attendance for potential application of penalties.[7] In particular, if the provider considered that the person failed to attend without a reasonable excuse, they received reduced payments if they exercised their discretion to allow the absence instead of reporting it to DHS for possible application of a penalty.

This seems to be borne out by the data which shows that in the last 3 months of 2015 the number of "participation reports" (which includes recommendations of compliance action for failure to attend compulsory activities) doubled from about 50,000 in the previous quarter to over 114,000 nationally about 95,000 of them for failure to attend an activity. This reversed a trend of declining reports since mid 2014. The most likely explanation appears to be a surge in such reports by CDP providers.

Alarmingly, it may be that the full impact of CDP program settings has not yet been seen in the data. Provider payments were guaranteed under transitional arrangements up to 31 December 2015 (provided 75% overall attendance was achieved), meaning that the full impact of pressures to report

[7] Fowkes and Sanders, note 1, p 10.

non-attendance may have only taken effect from January 2016. This data is not yet available.

Conclusion

The rate at which penalties are being applied to CDP participants is shocking. It is unacceptable and unsustainable to apply penalties at these levels to the poorest individuals and communities in the country.

The escalating level of penalties since 2013 shows that the compliance framework is not operating in a fair, proportionate and effective way in remote communities. Levels of penalties are sky rocketing without any evidence to show that this is leading to increased levels of attendance and engagement with the employment service providers. It is reasonable to suspect that, in fact, high levels of penalties may contribute to further dis-engagement from the CDP.

If it is ever acceptable to impose this level of hardship on some of the poorest and most vulnerable in our community, it is certainly not acceptable to do this when evidence shows that it is not effective in addressing levels of attendance and engagement in the employment service program.

Urgent action is necessary. There needs to be an urgent review of fee arrangements for CDP providers. Contractual arrangements with CDP providers need to be aimed to increasing levels of attendance and engagement with employment services in remote communities, without undermining the discretion providers have as to how best to promote attendance and engagement with their service. The crude linkage of attendance and provider fees is an utter and predictable public policy failure.

An urgent review of these contractual arrangements needs to be followed with an independent review of both the operation of the income support system and remote labour market programs in remote communities. The CDP appears to be failing at the cost of great hardship in remote communities. The NWRN has long held concerns that protections for vulnerable people under social security law are not working effectively, due in part to insufficient resources for DHS to operate effectively in remote communities.[8] A review of the operation of these protections and levels of service provision by DHS in remote communities should be a critical part of any review of labour market programs in remote communities.

[8] For more information see the NWRN submission in relation to the *Social Security Legislation Amendment (Community Development Program) Bill 2015*, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Social_Security/Submissions (accessed 4 June 2016).