

4 August 2017

Committee Secretary
Senate Standing Committees on Community Affairs

By email: community.affairs.sen@aph.gov.au

Dear Committee Secretary

NSSRN submission in relation to the *Social Services Legislation Amendment (Welfare Reform) Bill 2017*

1. The National Social Security Rights Network (NSSRN) is a peak community organisation in the area of income support law, policy and administration. Our members are community legal centres across the country that provide free and independent legal assistance to current and former social security and family assistance recipients. The NWRN draws on this front line experience in developing its submissions and policy positions.

Overview

2. In summary, we make the following recommendations concerning the *Social Services Legislation Amendment (Welfare Reform) Bill 2017* ("the Bill"):

Schedules 1 – 8 (introduction of Jobseeker Payment)

Schedule 3 (Wife Pension)

- Amend the transitional rate and means testing provisions for Wife Pension recipients who transition to Jobseeker Payment, so that they simply link to the applicable pension rate calculator
- Grandfather or continue the current portability rules applicable to Wife Pension recipients

Schedule 4 (Bereavement Allowance)

- Retain the upfront payment structure following a bereavement, but amend the formula so that the total one-off payment is equivalent to the current level of support provided by the Bereavement Allowance
- Exempt recipients from the ordinary waiting period

Schedule 5 (Sickness Allowance)

- Amend the schedule so as to provide for automatic exemption from the activity test for Jobseeker Payment recipients who qualify under the expanded eligibility criterion
- Seek further information about the basis for the projected savings from this schedule

Schedule 6 (Widow Allowance)

- Amend the transitional provisions, so that
 - From 1 January 2018 women over age pension who would have been eligible for Widow Allowance are not financially disadvantaged by their ineligibility for Newstart Allowance, and
 - From 1 January 2022 women in receipt of Newstart Allowance who would have been eligible for Widow Allowance before 1 January 2018 are eligible for the Age Pension (or otherwise exempt from the qualifying residence requirements)

Schedule 9 (mutual obligation requirements for job seekers aged 55 to 59)

Opposed

Schedules 10 and 11 (amendments to start day rules)

Opposed

Schedule 12 (establishment of drug testing trial)

Opposed

Schedules 13 and 14 (mutual obligation requirements for job seekers with drug or alcohol dependency)

Opposed

Schedule 15 (new compliance framework)

Opposed

Schedule 16 (streamlined tax file number collection)

Supported

Schedule 17 (streamlined prosecution referrals)

The provisions in this schedule which abrogate the privilege against self-incrimination for recipients of notices under s 192 of the *Social Security (Administration) Act 1999* (Cth) should be removed from this bill so they can receive proper consideration

Schedule 18 (aligning social security and disability discrimination law):

Not opposed

3. We make submissions in support of these recommendations below.

Schedules 1 - 8 (introduction of Jobseeker Payment)

Overview

4. These schedules introduce a new Jobseeker Payment from 20 March 2020. The Jobseeker Payment will replace seven current working age payments: Newstart Allowance, Sickness Allowance, Widow B Pension, Wife Pension, Bereavement Allowance, Widow Allowance and Partner Allowance. In effect, it creates a single working age payment for people with capacity to work or who are temporarily unable to work or study. Other working age payments, such as payments for parents (Parenting Payment), carers (Carer Payment), young people who are studying or looking for work (Youth Allowance) and people with a long-term disability that prevents them from working (Disability Support Pension), continue.

5. The introduction of a new Jobseeker Payment mainly affects Newstart Allowance recipients, as they make up the nearly all of the recipients who the Government anticipates will be affected. The measure renames Newstart Allowance as Jobseeker Payment (Schedule 1), which means that there will be no substantive change to the entitlements of Newstart Allowance recipients.

6. Most of the remaining payments affected by this change are “dependency” payments for women which are already closed or restricted to new claimants. The number of recipients of these payments is small and dwindling as the cohort ages and transitions to other payments such as the Age Pension. However, a small number of recipients of these payments will transition to the new Jobseeker Payment and there are a complex set of transitional arrangements designed, in most but not all cases, to ensure that recipients’ entitlements are protected or “grandfathered”.

7. Sickness allowance will also be closed by, in effect, expanding the eligibility criteria for Jobseeker Payment/Newstart Allowance. There are also substantive changes to payments to people whose partner has recently died with the closure of Bereavement Allowance.

8. Overall, this measure largely gives effect to two trends in the social security system. First, Newstart Allowance has become the system’s default working age payment, mainly due to its expansion to people with a disability and parents of older children following the “Welfare to Work” changes. The second trend is phasing out of “dependency” payments for women. Decisions to close or restrict these payments in the 1990s mean that the number of recipients of these payments is dwindling as this cohort ages.

9. It is a sensible simplification from an administrative perspective. It should support the Department of Human Services Welfare Payment Infrastructure Transformation (WIPIT) program which is replacing its ICT system.

10. Nearly all recipients affected by it will see no substantive change in their entitlements, including rate of payment. However, we have some concerns about the transitional arrangements for some recipients which we address below. As such, the NSSRN does not support the schedules in their current form. However, provided amendments are made to address these concerns, we support the general intent of this measure.

11. The explanatory memorandum indicates that the policy intent is to *treat people in similar circumstances consistently*.¹ However, we raise yet again the failure by successive Governments to address the unjustifiable disparity between people with a disability depending on whether they receive Newstart Allowance or Disability Support Pension. This is the most pressing issue in terms of equitable treatment of people in the social security system, yet remains unaddressed.

Schedule 1 (Replacement of Newstart Allowance with Jobseeker Payment)

12. This schedule replaces Newstart Allowance with Jobseeker Payment from 20 March 2020, primarily by replacing references to Newstart Allowance with Jobseeker Payment in social security and other legislation.

13. As a result, it makes no change to the substantive entitlements of Newstart Allowance recipients and we have no concerns about this schedule.

¹ Explanatory memorandum, 2.

Schedule 2 (Cessation of Widow B Pension)

14. This schedule ceases Widow B Pension from 20 March 2020.

15. Widow B Pension was a payment for widows or other women who lost the support of a partner in certain circumstances. It was closed to new entrants in the 1990s. All current recipients of this payment will be age pension age by 20 March 2020 and this schedule provides for them to transfer automatically to the Age Pension. As most recipients are overseas, the schedule also grandfathers them, in effect, from the impact of the Age Pension's different portability rules so that their rate of payment is not reduced.

16. We have no concerns about this schedule.

Schedule 3 (Cessation of Wife Pension)

17. This schedule ceases Wife Pension from 20 March 2020.

18. Wife Pension was a payment for partners of Age or Disability Support Pensioners who were not eligible for a pension in their own right. It is paid at the Age Pension rate, which is significantly higher than the rate of Newstart Allowance/Jobseeker Payment and is not activity tested. It was closed to new entrants in the 1990s.

19. The Government anticipates that there will be about 7,750 Wife Pension recipients at 20 March 2020. The transition arrangements for this cohort are complex. This seems to stem largely from two realities. Many Wife Pension recipients live overseas and, although the payment has been closed for more than 20 years, some recipients are relatively young and will not reach pension age for some time.

20. The Government estimates that around 2,250 recipients will have reached pension age by 20 March 2020. They will automatically transfer to Age Pension.

21. This schedule will also transfer around 2,400 recipients to Carer Payment. This will be done automatically, with Wife Pension recipients who receive Carer Allowance at the transition date deemed to be eligible for Carer Payment. They retain automatic eligibility provided they remain eligible for Carer Allowance. This applies whether they meet Carer Payment's more stringent care requirements or not, so this measure seems intended to provide a mechanism for preserving the level of financial support to this cohort of Wife Pension recipients.

22. Of the remaining recipients who do not transfer to Age Pension or Carer Payment, the Government estimates that most – about 2,900 out of 3,100 or so – will transfer to the new Jobseeker Payment. The schedule has a complex set of transitional arrangements for this cohort. It creates a special transitional rate of the new Jobseeker Payment for former Wife Pension recipients, so that these recipients do not suffer a financial loss at the time of transition. Recipients who receive the transitional rate also retain eligibility for the pensioner concession card. However, this rate is frozen as at the date of transition (as are the applicable pension means tests). The schedule then provides for recipients to transition to the Jobseeker Payment rate once the rate is equal to or higher than the transition rate for a sustained period (six weeks).

23. The transitional rate and means testing arrangements in this schedule are complex. The intent is to ensure that initially Wife Pension recipients are not worse off. However, it appears that over time the transition rate will fall relative to the rate of Newstart Allowance/Jobseeker Payment as it is

frozen rather than indexed to CPI like the Jobseeker Payment. The Government's underlying concern may be that some Wife Pension recipients are relatively young and may otherwise need to be grandfathered for some time.

24. We recommend that the Committee seek further clarification about the intended operation of these complex provisions and their impact over time. Given that Wide Pension recipients who receive Carer Allowance have their rate automatically preserved through deemed eligibility for Carer Payment it is unclear to us why all Wife Pension recipients should not have their rate of payment protected in the same way. This could be achieved through a simpler transitional provision which creates a specified class of former Wife Pension recipients whose rate and means testing arrangements are linked to the applicable pension rate calculator, provided they would otherwise remain eligible for Wife Pension.

25. It also appears that the Government anticipates that about 200 recipients will not transition to another income support payment. This seems likely to be because they are currently overseas and unable to transition to Newstart Allowance/Jobseeker Payment, which is generally not payable overseas.

26. The Government's concern may be that some Wife Pension recipients are relatively young and may continue to receive Wife Pension for some time. However, in our view this is in substance a change to the portability rules for this small cohort. The general principle in social security law is that people already overseas are protected from changes to portability rules because they have already committed to living overseas. Schedule 2 of this Bill grandfathers Widow B Pension recipients from changes to the applicable portability rules in this way. In our view, the same approach should be taken for this small number of Wife Pension recipients.

Schedule 4 (Cessation of Bereavement Allowance)

27. This schedule ceases Bereavement Allowance from 20 March 2020 and replaces it with a one-off higher payment for recipients of Jobseeker Payment and Youth Allowance.

28. Bereavement Allowance is a short-term payment for a person whose partner has recently died. It is generally paid for 14 weeks, but it can be for longer in some circumstances. It is paid at the Age Pension rate and subject to the pension means test.

29. This schedule replaces Bereavement Allowance with a one-off lump sum, calculated so as to be approximately twice the person's fortnightly rate of payment. The effect is that the person will receive a total amount close to triple their normal fortnightly rate of payment following their partner's death. Recipients are also exempt from the liquid assets waiting period, the income maintenance period, the seasonal worker preclusion period and activity testing.

30. The NSSRN commends the design of the new payment. It will generally ensure that a person receives a lump sum payment immediately following a bereavement when there are often large upfront costs to meet (such as the cost of a funeral). We also support the exemptions from waiting periods and activity testing during the period when a person is dealing with their loss.

31. However, the total level of support under this proposal is significantly lower than that typically provided through Bereavement Allowance due to the fact that the Bereavement Allowance is paid at the pension rate over 14 weeks or longer. This is best addressed, of course, by raising the base rate of Newstart Allowance/Jobseeker Payment so as to reduce the gap between it and the pension. Failing that, we recommend that the formula for calculating the one-off payment be amended so

that the total level of support is generally equivalent to the current payment. The financial stresses our clients often face following a bereavement may be significant as many have little or no private income or savings. We do not support a measure which reduces the support for people in these circumstances.

32. We also recommend that recipients be exempt from the ordinary waiting period.

Schedule 5 (Cessation of Sickness Allowance)

33. This schedule closes Sickness Allowance to new entrants from 20 March 2020 and ceases it from 20 September 2020.

34. Sickness Allowance is a working age payment for people aged 22 and over who are temporarily unable to work or study due to illness or injury. Recipients must have a job or study to return to when they recover. It is generally paid for 13 weeks at a time on presentation of a medical certificate. Recipients are paid at the same basic rate and under the means test for Newstart Allowance, but are automatically exempt from the activity test.

35. This schedule closes Sickness Allowance from 20 March 2020, with existing recipients to transition to the Jobseeker Payment by 20 September 2020. The eligibility criteria for the new Jobseeker Payment are made wider than for Newstart Allowance, which cannot be received by a person who is not unemployed.

36. Sickness Allowance is paid at the same basic rate and under means test for Newstart Allowance, so transitioning recipients will not be financially disadvantaged. In light of this, we are concerned that this schedule is a savings provision, with anticipated savings of \$6.9 million over the forward estimates and we recommend that the Committee seek further information about the basis for these savings.

37. Further, recipients who will now qualify for Jobseeker Payment will be subject to the activity test unless exempt. Although we expect most would be exempt from the activity test (generally on the ground of temporary incapacity), we believe an automatic exemption is appropriate as well as administratively simpler and more efficient.

Schedule 6 (Cessation of Widow Allowance)

38. This schedule closes Widow Allowance to new entrants from 1 January 2018 and ceases it from 1 January 2022.

39. Widow Allowance is a payment for older working age women who lose the support of a partner and do not have recent workforce experience. It is restricted to women born on or before 1 July 1955. It is not activity tested and paid at the same basic rate as Newstart Allowance.

40. This schedule includes complex transition arrangements. From 1 January 2018 Widow Allowance will be closed to new entrants. Women who are under age pension age may claim Newstart Allowance instead and, if eligible, are exempt from the activity test. In effect, these women are in the same position as if Widow Allowance continued. However, women who are over age pension age who could have claimed Widow Allowance before 1 January 2018 are ineligible for Newstart Allowance and must test their eligibility for Special Benefit. Special Benefit is paid at the same basic rate as Newstart Allowance, but is subject to a much more stringent means test including a general assets cut off of \$5000 in liquid assets and a dollar for dollar deduction for any income. This means

that many recipients of Special Benefit in fact receive less than the equivalent rate of Newstart Allowance and some women who may have previously received Widow Allowance will be ineligible for Special Benefit entirely despite having low incomes or little savings.

41. Widow Allowance will then cease from 1 January 2022. At this date, all women who are receiving Widow Allowance or could have received it, had they claimed it before 1 January 2018, will be age pension age. The schedule provides that a woman receiving Widow Allowance immediately before 1 January 2022 is deemed to be eligible for the Age Pension and will automatically transfer to that payment. However, a woman who would have qualified for Widow Allowance before 1 January 2018 and is instead receiving Newstart Allowance will only transition to Age Pension if they meet the residence requirements. They may instead transition to Special Benefit if they eligible

42. We recommend that the Committee seek further explanation about the rationale for this complex set of transitional arrangements. In our view it may result in women in similar circumstances being treated differently, contrary to the stated rationale for these provisions. This is particularly so in relation to access to the Age Pension. One cohort is deemed to be eligible for the Age Pension if receiving Widow Allowance at the transition date, whereas the other group receiving Newstart Allowance is not and may instead end up receiving a lower level of support on Special Benefit (if eligible) until they meet the residence requirements for the Age Pension. This may depend on the arbitrary circumstance of whether they claimed Widow Allowance before 1 January 2018.

43. Our view is that there should be a fairer transitional arrangement which ensures that:

- From 1 January 2018 women over age pension who would have been eligible for Widow Allowance are not financially disadvantaged by their ineligibility for Newstart Allowance, and
- From 1 January 2022 women in receipt of Newstart Allowance who would have been eligible for Widow Allowance before 1 January 2018 are eligible for the Age Pension (or otherwise exempt from the qualifying residence requirements).

Schedule 7 (Cessation of Partner Allowance)

44. This schedule ceases Partner Allowance from 1 January 2022.

45. Partner Allowance was an income support payment for certain partners of income support recipients without recent workforce experience. It is not activity tested. It was closed to new entrants in 2003.

46. By 1 January 2022, all Partner Allowance recipients should have reached pension age and transitioned to Age Pension. We have no concerns about this schedule.

Schedule 8 (Minister's power to make rules)

47. This schedule gives the Minister the power to make rules dealing with transitional matters related to the introduction of the Jobseeker Payment and cessation of other working age payments in Schedules 1 to 7.

48. The intention appears to be to give the Minister power to deal with unanticipated issues arising from the transition to the new Jobseeker Payment. This is reasonable, given the complexity of the changes. Provided the power is used in the circumscribed manner envisaged in this schedule, we have no concerns about this schedule.

Schedule 9 (changes to the activity test for persons aged 55 to 59)

49. This schedule removes the entitlement of Newstart Allowance recipients (and certain Special Benefit recipients) aged 55 to 59 to fully satisfy their activity test requirements through 30 hours per fortnight of approved voluntary work from 20 September 2018. Instead, they can only count 15 hours per fortnight of voluntary work towards their activity test requirements.

50. Recipients of Newstart Allowance aged 55 and over must meet the activity test which requires them to look for, and accept, suitable paid work. However, currently, they can generally automatically satisfy this test by doing 30 hours per fortnight of approved unpaid voluntary work, paid work or a combination of the two.

51. This schedule removes the option of meeting the activity test through voluntary work only for recipients aged 55 to 59. The Government argues that the current arrangements allow some recipients to engage in voluntary work without improving their prospects of finding work. It says that this measure is intended to promote people's independence from the social security system, while still recognising that volunteering may be a step towards work.²

52. The NSSRN opposes this measure. In our experience volunteering is a valuable experience for recipients who engage in it and the existing arrangements permit them to engage socially and contribute to their community. Volunteering is an important contribution to their well-being and the community, and should be valued whether it is a stepping stone to work or not. Many have a disability or other barriers to employment, such as a lack of recent workforce experience for women who have raised families. Many have experienced age-related discrimination in the workplace. Most are experiencing significant levels of poverty, due to the inadequate level of Newstart Allowance.

53. Measures to help address the exclusion of older workers from the workforce are critical, including older workers with a disability. However, in our view, there is little evidence to suggest the increased mutual obligations are likely to help many of this group into work, where it is available. Australia already imposes more onerous obligations than many comparable countries, and combines this with being a low spender on employment assistance. In our view, it is more likely to be effective for the Government to combine wider measures outside the social security system which might improve the employment prospects of disadvantaged older workers, invest more in targeted employment assistance based on evidence of best practice and raise the level of newstart allowance.

Schedules 10 and 11 (changes to start day provisions)

54. These schedules make changes to "start day" provisions in social security law.

55. Under social security legislation, a person's "start day" is the day from which they are paid, if otherwise eligible. Generally, the "start day" is the day the person makes a claim for payment in writing.

56. In limited circumstances, the person's "start day" may be an earlier day. In practice, the most common situation where this applies is under the "intention to claim" provisions. Under these provisions, if a person contacts the Department of Human Services about claiming a payment and then lodges a claim within 14 days (or longer if unable to do so within 14 days due to illness or other special circumstance), they are paid from the date of first contact.

² Explanatory memorandum, 52.

57. The practical effect of the “start day” rules is to determine the amount of a person’s first payment following claim. The earlier the start day the larger the first payment, as their period of entitlement is extended backwards prior to the day they lodged their claim.

58. Schedule 10 amends the effect of the RapidConnect rules to recipients of Newstart Allowance and Youth Allowance.

59. Currently, people claiming or transferring to the Newstart Allowance or Youth Allowance (other than full-time students or apprentices) may be subject to RapidConnect, unless exempt. Under RapidConnect, they are generally required to attend an initial appointment with an employment services provider before they become payable. Normally, this is within two business days. However, if the person has the appointment with 14 days of initial contact with the department, they are still payable from the date of first contact. Generally if the appointment takes place more than 14 days but less than 28 days after initial contact, the person will only be paid from the date of the appointment subject to a discretion to allow full backpay where reasonable (such as where the delay is not the individual’s fault). After 28 days, their claim will be rejected. RapidConnect generally applies to the most “job ready” job seekers without identified barriers to employment at the date of first contact.

60. Schedule 10 amends these rules so a person’s start day is delayed until they attend the employment services appointment if subject to RapidConnect, so long as the provider offers an appointment within two business days. The effect is to reduce the amount of a person’s first payment by delaying the start day and preventing them from being packpaid.

61. The NSSRN opposes this schedule. It serves no useful purpose, and simply reduces the level of support to an unemployed person at a time when they need the support the most.

62. As set out above, there is already a reasonable, graduated set of rules to encourage job seekers to engage with employment services providers as soon as possible by withholding their payment until they do so. It should be plain that withholding access to income support is incentive enough for most people. It serves no legitimate purpose to go further, as this measure proposes, and reduce the amount subsequently paid to the person. This is especially so when it will include situations where one person may receive less than a person in similar circumstances simply because their provider was unable to offer an immediate appointment.

63. Schedule 11 removes the “intention to claim” provisions for all claimants. The effect will be to reduce the first payment to new claimants, as in most cases they will be payable only from the date they lodged their claim with DHS, rather than the date of first contact.

64. The Government argues that online claiming and other technology has removed the need for these provisions, and that this measure will encourage “personal responsibility”.³

65. The NSSRN opposes this measure. We acknowledge that many people are now able to gather the necessary documentation and lodge a claim more quickly than in the past, and these people will be less affected by this change.

66. However, in our experience is that this measure will have the greatest impact on the most vulnerable people. This may include people with less access to online services, Indigenous people without access to the internet or a physical Department of Human Services office in remote Australia, people fleeing domestic violence or separating from a partner who do not have all their

³ Explanatory memorandum, 61.

documents readily available and in a state of crisis, people without stable housing and new migrants who are unfamiliar with the complex requirements of the social security system.

67. This schedule also removes the intention to claim provisions for people unable to make a timely claim because they are incapacitated, such as in hospital. This is unfair.

68. The effect would be to reduce the level of support for the most vulnerable people in the system, by delaying their eligibility for payment. The flow on effect is to reduce people's meagre savings, increase their level of indebtedness and undermine their financial stability.

Schedule 12 (establishment of a drug testing trial)

69. This schedule establishes the legislative framework for the Government's proposed two year trial of mandatory illicit drug testing of 5000 new claimants of Newstart Allowance and Youth Allowance (other) in three regions from 1 January 2018.

70. The NSSRN is opposed to this measure. It has justifiably attracted widespread criticism from community organisations, addiction medicine specialists and drug and alcohol treatment services. Addressing substance abuse is an important and complex issue, but there is widespread agreement that this is not the way to do it.

71. The proposal suffers a range of identified defects, including:

- It is poorly targeted, aimed at illicit drugs when alcohol has a far greater impact on workforce participation;
- It triggers income management if the person fails one drug test, despite this being a poor indicator of the professed target of the measure, which is people with an actual substance abuse disorder;
- People who refuse to agree to be tested, or refuse a test when selected, will have their payment cancelled and be precluded from payment for four weeks – this may cause the person's circumstances to worsen without income, lead to dangerous or criminal behaviour and affect their families and communities; and
- There is no funding or plan about how to prevent this measure further lengthening waiting lists for people with substance abuse disorders or how it will affect the appropriate management of those waiting lists by treatment centres.

72. The measure compounds this with some utterly unacceptable features. One is making a person who fails a second or subsequent drug test pay the costs of the test by deduction from their payment. This is disgraceful. One reason a person may fail multiple drug tests is that they have a severe substance abuse disorder or have suffered a relapse. There is no explanation of the merits of penalising a person in this situation.

73. There is also no explanation of why existing processes at the State and Territory level for managing the finances of someone with a severe substance abuse problem such as guardianship tribunals are thought to be inadequate or the policy merits of the Commonwealth operating a parallel income management process which overlaps with this.

74. Finally, there is no accompanying increase in funding to address the demonstrated need for expansion of drug and alcohol treatment services.

Schedules 13 and 14 (removal of exemptions for drug or alcohol dependence and changes to reasonable excuse)

75. Schedule 13 removes exemptions from the activity test for Newstart Allowance and Youth Allowance (other) recipients in circumstances directly attributable to drug or alcohol misuse.

76. Currently, recipients of activity tested payments, such as Newstart Allowance, may be exempt from the activity test and participation requirements in a number of situations. These exemptions include temporary incapacity due to illness or injury or there are special special circumstances beyond their control (eg homelessness) and it would be unreasonable to expect them to meet their obligations in that period. These exemptions may apply in circumstances related to drug or alcohol abuse, for example if the person has a temporary incapacity due to substance abuse.

77. This schedule seeks to prevent the temporary incapacity or special circumstances exemptions being applied where the circumstances are “wholly or predominantly attributable to the person’s dependence on alcohol or another drug”. The effect will be that a job seeker refused an exemption for this reason will continue to be subject to participation requirements and may then be subject to sanctions under the compliance framework for failure to meet those requirements without reasonable excuse.

78. It contains a discretion for the Secretary to exempt a “declared program participant”. A declared program participant is a participant in a specified employment services program. Proposed s 28C gives the Secretary the power by legislative instrument to modify the application of social security law to a declared program participant, including where the person stops being a participant. The stated intention is to use this power to exempt remote job seekers in the Community Development Program (CDP) from this measure. Job seekers in the CDP program are mostly Indigenous.⁴

79. Schedule 14 makes further changes that are intended to affect the impact of the activity test on people with drug or alcohol problems. It confers a power on the Secretary to make a legislative determination that sets out matters that a decision-maker must not take into account in deciding whether a person has a reasonable excuse for a compliance failure.

80. Currently, the general position is that a recipient with mutual obligation requirements may be penalised if they fail to meet those obligations without reasonable excuse. The Secretary has a power to specify, by legislative instrument, considerations that decision-makers must take into account in determining whether a person has a reasonable excuse, but this power may not be used to limit consideration to the matters specified (s 42U(2)).

81. This schedule adds a power to specify matters that must not be taken into account in determining whether a person has a reasonable excuse. Although this is a general power, the stated intention is to enable the creation of a scheme whereby a person’s “misuse, or dependency on” drugs or alcohol may only be taken into account once as a reasonable excuse, if the person has previously refused available and appropriate treatment.⁵ The person’s employment services provider is, it seems, to make a person an offer that they undertake voluntary treatment as a mutual obligation requirement and, if they refuse, this information will be passed on to DHS. The Government says that this scheme will help create an incentive for people to address a substance abuse problem.

⁴ Explanatory memorandum 80-81.

⁵ Explanatory memorandum 85-86.

82. The combined effect of schedules 13 and 14 is that people with substance abuse problems are more likely to be subject to participation requirements and, if they fail to meet them, financial penalties. The severity of those penalties depends on passage of schedule 15 of this Bill.

83. The NSSRN is opposed to these measures. The Government has not presented any evidence of the scale of the supposed problem of levels of exemptions for drug and alcohol abuse. Nor has it explained why the current arrangements are inappropriate. The current arrangements allow for people who are unable to meet the activity test due to a drug or alcohol problem to be exempt from the activity test and/or explain why they failed to meet their participation requirements. This is a sound approach which allows the person to continue to receive a basic level of income. It is unclear why the Government thinks that depriving a person with a serious medical problem of income is a good way to help them.

84. They will impact on people with genuine and severe substance abuse problems, despite the well understood nature of addiction as a medical condition which overbears people's self-control and will. They will cause poverty, hardship and exclusion of people with medical problems from the social security system. They are likely to increase the impact of substance abuse on individuals, their families and their communities. It is troubling to see a proposal like this put forward as a genuine option.

85. Further, legal provisions drafted in this way cannot be administered fairly. They will operate in an arbitrary way. Schedule 13 requires a decision-maker to consider whether a person's inability to meet program requirements is "wholly or predominantly attributable to the person's dependence on alcohol or another drug". If so, they are not exempt and will be expected to meet program requirements. There is no reasonable way to operationalise this legislative criterion. How is a decision-maker to determine consistently whether a person's situation such as homelessness is "wholly or predominantly" related to dependence on alcohol or drugs. In most cases it will be attributable to a range of circumstances. The drafting is unclear in other ways. Read literally the decision-maker must also consider whether the person has a "dependence" on drugs and alcohol. On its face, this means that someone who misses an appointment due to casual use can still be exempt. How is a DHS decision-maker to establish dependence or not. Does it pick up someone who "depends" on a debilitating drug for the treatment of another medical condition such as cancer, or is it supposed to apply to "addiction" only? And if the latter, how is a DHS decision-maker supposed to make this determination.

86. Similarly, the current legislation permits the decision-maker to take all relevant circumstances into account in determining whether they have a reasonable excuse for failing to meet their requirements. The scope of the discretion is essential to its fairness. Schedule 14 would permit the Secretary to arbitrarily exclude consideration of a particular set of circumstances. This is likely to render the application of this discretion unfair, inconsistent or subject to the particular agenda reflected in any exclusions. It is likely to compound the impact of Schedule 13 by exposing more people with substance abuse problems to financial penalties under the compliance framework.

87. The envisaged scheme which this power is to be used to put in place is also deeply troubling. It appears the employment services provider is to offer a person treatment as an activity requirement and tell DHS if they refuse. DHS must then determine whether it was reasonable for the person to refuse the offer. If it was not, then that person can only use drug and alcohol problems as a reasonable excuse on one occasion.

88. In our view, neither an employment service provider or DHS is in a position to appropriately make determinations about whether a person should be offered treatment or whether their response is reasonable.

89. Finally, the new proposed power for the Secretary to exempt specified classes of employment services program participants is unacceptably broad. Read literally, it gives the Secretary the power not simply to exempt participants from these measures but to modify the application of social security law to them in any way, even after they have left the program. This would be an unprecedented power for the Secretary to make wide-ranging modifications to social security law and its application to a specified group of people.

Schedule 15 (targeted compliance framework)

90. Schedule 15 introduces a new compliance framework for participation payments.

91. Under social security law, there is a system of sanctions which may be applied to recipients of activity tested payments who fail to meet their obligations without reasonable excuse. The current system has a graduated system of sanctions, ranging from suspension, financial penalties (10% or more per infraction) to complete loss of payment for eight weeks.

92. A key feature of this system is the employment services provider's discretion. The discretion extends in most cases to whether or not to recommend that DHS impose a penalty or not.

93. There are also a series of safeguards, based around assessment processes intended to make sure that individual circumstances which may affect a person's ability to comply with obligations are identified and accommodated. A key point is prior to the imposition of the most severe sanction, eight weeks loss of payment for repeated failures to comply with obligations. This penalty may only be imposed if a determination is made that a person has been persistently and deliberately non-compliance following an assessment, normally conducted by a DHS social worker.

94. There are also a series of procedural safeguards aimed at ensuring penalties are only applied for properly notified obligations of which the person was aware and with which they had reasonable time to comply. In many cases, providers recommended sanctions are not upheld because of failure to meet requirements of this nature. Overtime, the average has been for about 40- 50% of provider reports to DHS which are rejected to be rejected for this reason.

95. Finally, it is a basic principle of the current system that it is preferable for people to be engaged with the employment services system rather than cut off payment and disengaged. This reflects two basic ideas – that sanctions must be proportionate and that engagement with the employment services system is more likely to lead to better outcomes. Thus, the ultimate sanction an eight week penalty without payment (for refusing a suitable job or persistent non-compliance) may be waived for severe financial hardship or by undertaking a compliance activity (in practice, work for the dole or a similar intensive activity).

96. The new compliance framework would be a radical change in this system. Some of the key features of the new framework are highlighted below.

97. First, in the initial phase any failure by a job seeker results in a payment suspension until they meet the obligation (eg by attending a rescheduled appointment). Once they meet the obligation they receive full backpay. Currently, a financial penalty may potentially be imposed for a first missed appointment or other instance of non-compliance.

98. Second, the new system provides for a system of escalating penalties for multiple infractions, if a job seeker is found to be persistently non-compliant. As at present, this will only occur after an assessment. Under the proposed system, there will in fact be two assessment, one undertaken by the provider and one by DHS. Once you enter the second phase, your first further failure is a 50% loss of payment, the second is 100% and the third is 4 weeks without payment. The number of failures and other matters to be taken into account by a person enters this penalty phase are not spelt out in the proposed legislation but are left within the Minister's discretion to be specified by legislative instrument.

99. Third, the most severe penalty – total loss of payment – is reduced from the current eight weeks to four weeks. However, unlike the current system, this penalty cannot be waived (nor will payment continue if the person is challenging the correctness of the decision to impose it, unlike the current system).

100. Finally, the Secretary will have the power to exclude specified program participants and intends to use this power to exclude CDP participants from the new framework. The drafting of this power was criticised above (at [89]).

101. The NSSRN is opposed to this schedule. This is unfortunate as there are the seeds of some worthwhile reforms to the system in this schedule, but they are married with an approach to compliance and penalties which is unfair and disproportionately harsh, while achieving little concrete improvement in the primary objective, which is take up of employment.

102. The fundamental problem with this proposal is that, while it shortens the length of certain non-payment penalties, it makes them non-waivable. This will lead to a disproportionate level of hardship as few people have the savings to last four weeks without any income. This hardship may also fall on the person's children.

103. This is unfortunate. There is some good thinking behind aspects of this proposal. For example, making suspension the only sanction for most recipients has the potential to be fairer and less harsh than the current system, where a penalty may be imposed for any infraction in the provider's discretion. The proposal recognises, correctly, that suspension is a significant sanction for low income and effective. However, it then undermines its own insight by combining this with non-waivable loss of income support.

104. The proposal to limit the sanctions for most job seekers to suspension also has great potential to simplify the system and reduce its administrative inefficiency. Currently, a significant amount of an employment services provider's time is spent administering the compliance framework. As noted above, this involves significant inefficiency, with the complexity contributing to a situation where up to half of rejected provider reports are rejected because of procedural deficiencies.

Schedule 16 (Streamlining tax file number collection)

105. This schedule permits DHS to request a person's tax file number (TFN) and a relevant third party's (normally their partner) as part of the claim for payment.

106. Currently, DHS has the power to request a person provide TFNs from people who make a claim for a social security payment or concession. It allows them 28 days to provide their TFN, authorise the Australian Taxation Office (ATO) to provide it to DHS, or declare to DHS that they have made an

application for a TFN and authorise the ATO to provide it to DHS (a TFN declaration). Unless exempt, their claim is not granted if one of these actions is not taken within 28 days.

107. This schedule allows DHS to require the person to meet this requirement as part of the claim process. Providing a TFN declaration will meet this requirement if the person does not have a TFN. This means that the schedule does not prevent a person without a TFN from lodging an immediate claim.

108. On this basis, the N SSRN does not oppose this measure. It will streamline the claim process and realise administrative efficiencies. It must be supported by adequate and appropriate processes which allow a person without a TFN, or who does not know it, to initiate those processes immediately through DHS at the point of claim. If so, then this change should not cause anyone to experience loss of, or delay in receiving, income support.

Schedule 17 (information management)

109. This schedule makes changes to the legislative framework for DHS information gathering powers in the *Social Security (Administration) Act 1999* (Cth).

110. Broadly, it makes three types of changes. First, it contains some changes to clarify and modernise the drafting. The N SSRN has not found anything of concern in these changes.

111. Second, the schedule makes changes intended to authorise DHS to use information it obtains when investigating overpayments and fraud to hand over that information to prosecutors. This is a sensible change as it will help avoid the current situation where information or documents must be obtained a second time by an Australian Federal Police officer before being handed to the office of the Commonwealth Director of Public Prosecutions.

112. Third, the schedule contains provisions which expressly abrogate the privilege against self-incrimination, subject to immunity in relation to the use of the information or documents. This relates to DHS' general power under s 192 of the *Social Security (Administration) Act 1999* (Cth) to obtain information or documents.

113. In our view, this last change needs separate and thorough consideration and should be removed from this bill.

114. It is accepted that social security law does not abrogate the privilege against self-incrimination. DHS officers investigating suspected fraud advise people of their right to silence in standard letters. The provisions in this bill abrogate that privilege in relation to the exercise of the information gathering power in s 192. The explanation given for this is that this power is used to obtain information from third parties.

115. It is correct to say that, as a matter of practice, the power in s 192 is generally used to obtain information or documents from third parties. This is partly because DHS has other powers specifically directed at current recipients and which authorise them to suspend a person's payment if they do not comply. However, there is nothing in the words of s 192 to prevent it being used in relation to current or former social security recipients who are the target of an investigation and therefore potential defendants in a criminal prosecution.

116. In our view, therefore, as currently drafted these provisions have the potential to abrogate the privilege much more widely. This is a matter whose implications require careful consideration,

including by criminal law experts. It should not be dealt with as part of a large and complex social security bill where the issues this raises cannot be given proper consideration.

Schedule 18 (Aligning social security and disability discrimination law)

117. This schedule extends the current exclusion of social security legislation from the *Disability Discrimination Act 1992* (Cth) (DDA).

118. Currently, the effect of s 51(1) of the DDA is that discriminatory provisions relating to income support payments under the *Social Security Act* are excluded from its operation. At the time this provision was inserted, the *Social Security Act* was the primary piece of social security legislation. Social security legislation is now split between the *Social Security Act*, the *Social Security (Administration) Act* and the *Social Security International Agreements Act*. This schedule extends the exclusion in s 51 of the DDA to these acts and instruments made under them.

119. To the extent that this measure gives proper effect to the intention of s 51 of the DDA the NSSRN does not oppose it. We do not, however, take a position on what should be the appropriate relationship between discrimination law and social security law.

Contact for this submission

Matthew Butt
Executive officer
National Social Security Rights Network
T: 0448 007 201
E: eo@nssrn.org.au