THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

SOCIAL SECURITY LEGISLATION AMENDMENT (STRONGER PENALTIES FOR SERIOUS FAILURES) BILL 2014

EXPLANATORY MEMORANDUM

(Circulated by authority of the Assistant Minister for Employment, the Honourable Luke Hartsuyker MP)
SOCIAL SECURITY LEGISLATION AMENDMENT (STRONGER PENALTIES FOR SERIOUS FAILURES) BILL 2014

GENERAL OUTLINE

This Bill amends the Social Security (Administration) Act 1999 to introduce a stronger compliance framework for job seekers. The Bill introduces a more rigorous approach to the application of penalties to job seekers who refuse a job offer, including by failing to commence the job, or who are persistently non-compliant.

Job seekers who incur an eight week non-payment penalty for refusing or failing to commence work without good reason will no longer be able to have the penalty waived under any circumstance but will instead be required to serve the eight week non-payment penalty in full. Job seekers who incur eight week non-payment penalties for persistently failing to meet their participation requirements will only be able to have their eight week non-payment penalty waived once while in receipt of an activity tested income support payment.

FINANCIAL IMPACT STATEMENT

The Bill will have the following financial impact, with administered savings for the Social Services portfolio resulting in net savings:

<table>
<thead>
<tr>
<th>Year</th>
<th>Expense ($ million)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013-14</td>
<td>0.3</td>
</tr>
<tr>
<td>2014-15</td>
<td>-3.3</td>
</tr>
<tr>
<td>2015-16</td>
<td>-5.7</td>
</tr>
<tr>
<td>2016-17</td>
<td>-5.9</td>
</tr>
<tr>
<td>2017-18</td>
<td>-5.9</td>
</tr>
<tr>
<td>TOTAL:</td>
<td>-20.5</td>
</tr>
</tbody>
</table>
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The statement of compatibility with human rights appears at the end of this explanatory memorandum.
Clause 1 – Short Title

This clause provides that the new Act may be cited as the Social Security Legislation Amendment (Stronger Penalties for Serious Failures) Act 2014.

Clause 2 – Commencement

This clause provides that the Act commences on 15 September 2014. This commencement date has been chosen so that the Act commences following system upgrades by the Department of Human Services scheduled for release on 13-14 September 2014.

Clause 3 – Schedule(s)

This clause provides that each Act that is specified in a Schedule is amended or repealed as set out in that Schedule, and that any other item in a Schedule has effect according to its terms.

Abbreviations used in this explanatory memorandum

Schedule 1 - Amendments

Summary

Under current job seeker compliance provisions in Division 3A of Part 3 of the Administration Act, job seekers in receipt of a participation payment may incur an eight week non-payment penalty for serious failures, consisting either of refusal of suitable work, or of persistent non-compliance with their participation obligations.

Schedule 1 of the Administration Act defines ‘participation payment’ as newstart allowance and, for some people, youth allowance, parenting payment and special benefit.

Currently, such a non-payment penalty may be waived if the job seeker begins to comply with a ‘serious failure requirement’, for example Work for the Dole, job search training or undertaking more intensive job searches. The non-payment period may also currently be waived if the job seeker does not have the capacity to comply with any such requirement and would be in serious financial hardship if the non-payment period was not ended.

Schedule 1 would strengthen the job seeker compliance framework by providing that:

- job seekers who incur an eight week non-payment penalty for refusing suitable work will no longer have the penalty waived; and
- job seekers who persistently fail to comply with participation obligations will only be able to have the penalty waived once (and then only if they begin to comply with a serious failure requirement or are unable to comply with any such requirement and would be in severe financial hardship if the non-payment period was not ended), during each period of continuous receipt of their participation payment.

Detailed explanation

Social Security (Administration) Act 1991

Item 1

The effect of item 1 is that the requirement for the Secretary to determine that section 42NC applies, unless satisfied that the person does not have the capacity to undertake any serious failure requirement and that serving the serious failure period would cause the person to be in severe financial hardship, would not apply in relation to a serious failure consisting of refusing an offer of suitable employment under section 42N.
Currently:

- there are two types of serious failures. The first is a serious failure for persistent non-compliance with participation obligations - see section 42M. The second type involves refusing or failing to accept an offer of suitable employment (section 42N);
- if the Secretary determines that a person commits a serious failure and has determined that section 42NC applies, a participation payment is not payable to the person during the person's serious failure period (section 42P). A serious failure period is 8 weeks unless the Secretary ends the period earlier under current section 42Q;
- section 42NC applies if the Secretary determines that a person commits a serious failure unless the Secretary is satisfied that the person does not have the capacity to undertake any serious failure requirement and that serving the serious failure period would cause the person to be in severe financial hardship; and
- subsection section 42Q(1) provides that the Secretary may end a person's serious failure period if the person begins to comply with a serious failure requirement imposed on the person, or the Secretary determines that the person does not have the capacity to undertake any serious failure requirement and that serving the serious failure period would cause the person to be in severe financial hardship.

The purpose of current section 42NC is so serious failure periods will not commence until a determination has been made regarding financial hardship. If there is a delay in the Department of Human Services assessing financial hardship, current section 42NC will prevent a serious failure period from commencing until that assessment has been completed. This ensures that job seekers are not penalised due to administrative delays that are beyond their control.

As noted above, the effect of item 1 would be that section 42NC would not apply in relation to a serious failure, under section 42N, consisting of refusing an offer of suitable employment.

Item 2

Item 2 would replace existing subsection 42P(1) to reflect the amendment made by item 1.

New paragraph 42P(1)(a) would provide that a participation payment is not payable to a person during the person’s serious failure period where the Secretary has determined that:
- the person has committed a serious failure for persistent non-compliance under subsection 42M(1); and
- section 42NC applies (i.e. the Secretary is satisfied that the person has the capacity to undertake a serious failure requirement and that serving the serious failure period would not cause the person to be in severe financial hardship).
New paragraph 42P(1)(b) would provide that a participation payment is not payable to a person during the person’s serious failure period where that period has been imposed under subsection 42N(1) for refusing or failing to accept an offer of suitable employment.

Note 1 to subsection 42P(1) makes it clear that for determinations under subsection 42M(1), the Secretary may end a serious failure period under section 42Q or determine that a participation payment is payable under section 42R.

Note 2 to subsection 42P(1) makes it clear that the Secretary may continue the participation payment pending the outcome of an application for review in accordance with sections 131 and 145 of the Administration Act.

**Item 3**

Item 3 would insert new subsections 42Q(4), (5) and(6).

Under new subsection 42Q(4), the Secretary’s power to end a person’s serious failure period under subsection 42Q(1) would no longer apply to serious failure periods arising from a person’s refusal of, or failure to accept, an offer of suitable employment.

New subsection 42Q(5) would provide that if:

- the Secretary determines under subsection 42M(1) that a person commits a serious failure through persistent non-compliance; and
- the Secretary ends the resultant serious failure period under subsection 42Q(1); and
- the Secretary makes another determination under subsection 42M(1) in relation to the person; and
- the person has continuously received participation payments in the period between the end of the serious failure period resulting from the first determination under subsection 42M(1) and the second determination under subsection 42M(1);

then subsection 42Q(1) does not apply in relation to the person’s serious failure period that arose as a result of the second determination under subsection 42M(1). The effect is that the Secretary may only end a serious failure period under subsection 42Q(1) once in relation to a continuous period in respect of which a person receives participation payments, regardless of the number of serious failures under subsection 42M(1) in the continuous period.

New subsection 42Q(6) provides that for the purpose of new subsection 42Q(5), section 38B of the *Social Security Act 1991* applies, and does so as if the reference in that section were a reference to a participation payment.
Section 38B provides that in certain circumstances a person may be treated as having received an income support payment in respect of a continuous period even though the person did not actually receive such a payment during part of the period.

For example, for the purposes of section 38B, a person is taken to have continued to receive an income support payment if the period was a compliance penalty period that applied to the person in respect of the income support payment - see section 38B(6)(b). A compliance penalty period includes a serious failure period under subsection 42P(1).

**Item 4**

Item 4 inserts a new subsection 42R(4).

Current subsection 42R(1) allows the Secretary to determine that, despite a person’s serious failure period, a participation payment is payable to a person during the period that is mentioned in current subsection 42R(2) if the person informs the Secretary that they intend to comply with a serious failure requirement.

The effect of new subsection 42R(4) would be that subsection 42R(1) will not apply to serious failures for refusing or failing to accept suitable work under section 42N.

**Item 5**

Item 5 is an application provision.

Subitem 5(1) would provide that section 42NC and subsection 42P(1), as in force before 15 September 2014, continue to apply from 15 September in relation to a determination made under subsection 42N(1) before, on or after 15 September 2014, where the refusal or failure to accept an offer of suitable employment occurred before 15 September 2014.

Subitem 5(2) would provide that new paragraph 42P(1)(a) applies to a determination made by the Secretary under subsection 42M(1) before, on or after 15 September 2014. This subitem is included for completeness and does not effect any change to the law.

Subitem 5(3) would provide that for a determination made by the Secretary under subsection 42N(1) where the refusal or failure to accept a suitable offer of employment occurred on or after 15 September 2014, new paragraph 42P(1)(b) and new subsections 42Q(4) and 42R(4) will apply.
Subitem 5(4) would provide that for any determination made by the Secretary under subsection 42M(1) on or after 15 September 2014, new paragraph 42Q(5)(a) will apply, where the comprehensive compliance assessment began to be conducted on or after 15 September 2014. Current section 42NA relates to comprehensive compliance assessments and provides that before the Secretary determines that a person has committed a serious failure under section 42M, the Secretary must conduct a comprehensive compliance assessment in relation to the person.
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

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

Overview of the Bill

The Bill amends the Social Security (Administration) Act 1999 (the Administration Act).

Currently, participation payments will not be payable for up to 8 weeks if a job seeker commits a ‘serious failure’. These periods are ‘serious failure periods’ (section 42P(2)). The participation payments are newstart allowance and, for some people, youth allowance, parenting payment and special benefit.

There are two types of serious failures. The first is a serious failure for persistent non-compliance with participation obligations, such as obligations to attend compulsory activities or interviews included in an Employment Pathway Plan (see s 42M). The second is where a job seeker fails to accept, without reasonable excuse, an offer of suitable employment (see s 42N).

Current subsection 42Q(1) provides that the Secretary may end a person’s serious failure period, before the expiry of 8 weeks, if the person begins to comply with a serious failure requirement imposed on the person (paragraph 42Q(1)(a)).

A serious failure requirement is a requirement to undertake a particular intensive activity for eight weeks in lieu of serving the eight week serious failure period. Activities which could fulfil a serious failure requirement include Work for the Dole, part-time work, work experience, approved training or intensive job search.

Current subsection 42Q(1) also provides that the Secretary may end a person’s serious failure period if the Secretary determines that the person does not have the capacity to undertake any serious failure requirement and that serving the non-payment period would cause the person to be in severe financial hardship (paragraph 42Q(1)(b)).

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1 Payment is restored from the day the job seeker commences complying with the requirement (current paragraph 42Q(2)(a)).
2 Payment is restored from the day the Secretary makes the determination or, if the person requested the Secretary to make such a determination, from the day that request was made (current paragraphs 42Q(2)(b) and (c)).
Under the Bill a serious failure period arising from the refusal of suitable work would no longer be able to be waived, and a serious failure period arising from persistent non-compliance would only be able to be waived once for each period of continuous receipt of a participation payment.

**Human rights implications**

The Bill engages the right to work, the right to social security, and the right to an adequate standard of living.

*Right to work*

Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right to work. This includes the right to the opportunity to gain a living by work which the person freely chooses or accepts, and is considered an inherent part of human dignity.³

To enable people to realise their right to work, States are required, among other things, to assist and support individuals in order to enable them to identify and find available employment, and to protect people’s right to just and favourable conditions of employment.⁴

The Bill encourages participation payment recipients to engage with their right to work by providing a stronger incentive to accept an offer of suitable work. Under the social security law work will not be suitable for a person if, for example, the person lacks the skills to do the work and no training will be provided by the employer; there is medical evidence that the work would aggravate a medical condition of the person; the work is unsafe; or for any other reason the work is not suitable.⁵

By providing such an incentive the Bill would mean that more job seekers experience the benefits of employment, for example greater social and economic inclusion. The measure is also compatible with the protection of just and favourable conditions of employment, as work which provides terms and conditions less generous than the applicable statutory conditions is not taken to be suitable work for the purposes of social security law.⁶

The imposition of an eight week non-payment for refusing an offer of suitable work does not unreasonably restrict the right to freely choose or accept work. The fact that a person incurs such a failure means that the person is employable and they are likely to have other choices as to what work they do. While the Bill provides a stronger incentive to accept an offer of suitable work, it does not force a person to do so.

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³ Committee on Economic, Social and Cultural Rights, General Comment 18, paragraphs 1 and 2.
⁴ Committee on Economic, Social and Cultural Rights, General Comment 18, paragraph 12.
⁵ See, for example, section 601(2A) in relation to Newstart Allowance.
⁶ See, for example, section 601(2A) in relation to Newstart Allowance.
Further, it is reasonable for the Government to temporarily cease to pay income support to those who refuse an offer of suitable work. Doing so helps to maintain the integrity of the social security system, and to ensure finite resources are equitably allocated to genuine job seekers.

Similarly, the Bill would also encourage recipients of a participation payment to engage with their right to work by reducing the number of times a penalty for persistent non-compliance can be waived. Job seekers are consequentially more likely to take active steps to satisfy their participation requirements, and thereby increase their chances of moving off welfare payments and of becoming a productive participant in the work force.

**Right to social security and right to an adequate standard of living**

Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to social security. Article 11 of the ICESCR recognises the right of everyone to an adequate standard of living and to the continuous improvement of living conditions.

To the extent that the Bill may limit the right to social security and the right to an adequate standard of living, there is a reasonable justification as outlined below.

Around 70 per cent of job seekers meet their participation requirements and are never reported to the Department of Human Services by their employment services providers. However, there is a cohort of job seekers who repeatedly fail to meet their requirements. At 31 December 2013, around 11 per cent of job seekers had been reported three or more times during the last 12 months, accounting for 71 per cent of all reports of non-compliance. This suggests that there are grounds for tightening the system to provide stronger deterrents to persistent non-compliance, and that this can be achieved with no adverse impact on the majority of job seekers.

In the 2012-13 financial year, there were 1,718 serious failure periods applied for refusing work, of which 1,174 (68%) were waived. In that year there were also 25,286 serious failure periods imposed for persistent non-compliance, of which 18,488 (73%) were waived. Of those waived, 12,699 were the job seeker’s first waiver and 5,789 of them were the job seeker’s second or subsequent waiver.

Job seekers who refuse suitable employment without a good reason currently incur an eight week non-payment penalty, but are able to have this penalty waived by agreeing to undertake a more intensive level of activity for the period of the penalty. The current waiver provisions (in section 42Q) do not ensure that job seekers who refuse or fail to commence a suitable job without a reasonable excuse receive a meaningful penalty. This Bill will provide a stronger deterrent to this type of behaviour and will encourage job seekers to accept suitable employment.
The amendments in relation to persistent non-compliance are consistent with the original intention of the waiver provisions, introduced by the Social Security Legislation Amendment (Employment Services Reform) Act 2009, which was to encourage non-compliant job seekers to show that they are genuinely seeking work through re-engaging with their provider and undertaking a period of intensive activity.

Allowing only one such waiver will stop the potential exploitation of the waiver provisions by job seekers who can currently persist in their non-compliant behaviour knowing that if they get another penalty they can, in effect, elect to have it waived if they do not wish to serve the penalty.

Prior to 2009, eight week penalties for serious failures had existed for a number of years without the potential for those penalties to be waived. The introduction of waiver provisions significantly reduced the deterrent effect such penalties were intended to create – for example there were 644 penalties applied for refusing work in 2008-09, compared to 1,718 in 2012-13.

Job seekers who incur penalties for refusing work are demonstrably employable and can be expected to find work. Those who incur penalties for persistent non-compliance will still have one opportunity to waive a penalty. It is reasonable to expect the job seeker to take some responsibility for avoiding any further penalties.

The financial impact of the full 8 week non-payment period is illustrated by the following table:

<table>
<thead>
<tr>
<th>Minimum base fortnightly rate</th>
<th>Financial impact of the non-payment period if waiver provisions are not available</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSA Single, 22 or over, no children</td>
<td>$510.50</td>
</tr>
<tr>
<td>NSA Single, with children</td>
<td>$552.40</td>
</tr>
<tr>
<td>NSA partnered (each)</td>
<td>$460.90</td>
</tr>
<tr>
<td>Parenting Payment Single (youngest child 6-7)</td>
<td>$713.20</td>
</tr>
<tr>
<td>Youth Allowance at home</td>
<td>$226.80</td>
</tr>
<tr>
<td>Youth Allowance - Independent</td>
<td>$414.40</td>
</tr>
</tbody>
</table>

The Bill will not impact on job seekers who cannot get work despite their best efforts but rather targets those who refuse an offer of suitable work without reasonable excuse. The Bill will also not impact on job seekers who do not engage in persistent non-compliance with their participation obligations.

Job seekers would be informed in person of the Bill’s impact at routine contacts with employment services providers and with the Department of Human Services so that they understand the consequences of refusing suitable work or of persistent non-compliance.
In practice, before deciding whether to impose a serious failure period for refusing work, the Department of Human Services (DHS) would talk to the job seeker, the job seeker’s employment service provider, and the employer which offered the work. This is to enable DHS to check whether the job that was refused was suitable work, in light of provisions in the social security law about the suitability of work for a person, and that the job seeker did not have valid reasons for refusing it.

In relation to both refusal of suitable work and persistent non-compliance, failures for which the person has a reasonable excuse will not be taken into account for the purpose of determining whether a serious failure has occurred.\(^7\)

Also, before a decision maker determines that a person has committed a serious failure due to persistent non-compliance, the decision-maker must conduct a Comprehensive Compliance Assessment to assess whether other factors account for the persistent non-compliance. (s 42NA).

Comprehensive Compliance Assessments are normally done by a senior or specialist officer, for example a social worker. Such assessments are intended to ensure that the job seeker has no previously undisclosed barriers to participation that may warrant an alternative servicing arrangement rather than the imposition of a serious failure period.

The Minister must make a legislative instrument to determine a non-exhaustive list of matters which decision makers must consider in applying the persistent non-compliance test (subsections 42M(4), (5) and (6)).

The Minister has made such an instrument - the *Social Security (Administration) (Persistent Non-compliance) (DEEWR) Determination 2009 (No.1)*. In summary, this instrument provides that the Secretary must take into account, in deciding whether a person persistently failed to comply with their participation obligations, the findings of the most recent Comprehensive Compliance Assessment, whether a person has committed three or more failures during certain six month periods, and in some cases whether the failures demonstrate a pattern of non-compliance or should be viewed as a single instance of non-compliance.

Currently, the DHS conducts a hardship assessment and offers the job seeker a waiver at the same time as they determine the serious failure.\(^8\) This would still occur under the Bill, though only for those job seekers who are facing a penalty for persistent non-compliance and who have not previously had a waiver in the same period of continuous receipt of participation payments.

\(^7\) See section 42N(2)(a) and section 42U.

\(^8\) Pursuant to section 42NC as outlined above in this Explanatory Memorandum.
A person who has a non-payment period imposed on them, or who is subject to a decision not to end their non-payment period, will be able to seek internal review of those decisions by DHS. If not satisfied with the outcome of the internal review, the person will be able to appeal to a tribunal. The person would also be able to appeal, on questions of law, to courts.

The start date of a serious failure period is subject to the payment pending review provisions. Job seekers who commit serious failures will have their serious failure periods commence on the first day of the instalment period after the decision maker determines the serious failure was committed (as opposed to after the serious failure was actually committed). Because instalments are usually fortnightly and paid in arrears, this rule generally enables job seekers at least two weeks before being subject to the impact of a serious failure period.

Conclusion

The Bill is compatible with human rights. To the extent that it may have an adverse impact on human rights, the impact is reasonable and for legitimate reasons.