THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

SOCIAL SECURITY LEGISLATION AMENDMENT (STRENGTHENING THE JOB SEEKER COMPLIANCE FRAMEWORK) BILL 2014

EXPLANATORY MEMORANDUM

(Circulated by authority of the Assistant Minister for Employment, the Honourable Luke Hartsuyker MP)
SOCIAL SECURITY LEGISLATION AMENDMENT (STRENGTHENING THE JOB SEEKER COMPLIANCE FRAMEWORK) BILL 2014

GENERAL OUTLINE

This Bill would amend the Social Security (Administration) Act 1999 to strengthen the job seeker compliance framework to provide stronger incentives for job seekers to meet their mutual obligation requirements to attend appointments with their employment services provider. Currently, approximately 35 per cent of all compulsory appointments with employment providers are not being attended by job seekers each year and more than one in five of all job seekers who receive a payment in any year have at least one participation failure applied for missing an appointment with their provider.

The Bill would provide that, from 1 January 2015, where a job seeker's payment is suspended following a failure to attend an appointment it would not be restored until the job seeker actually attends their next appointment, creating a greater incentive to do so. On attendance, the job seeker would receive full back pay.

From 1 July 2015, these arrangements would be further strengthened so that, if the job seeker did not have a reasonable excuse for missing their first appointment or did not give notice of a reasonable excuse when it was reasonable for them to do so, the job seeker would not be back paid for the period of their non-compliance.

The Bill would also amend the Social Security Act 1991 to make changes to provisions that allow job seekers who are aged 55 or older to meet their mutual obligation requirements by undertaking part-time voluntary and/or paid work. The Bill would introduce a provision that would allow cohorts of job seekers who are specified in a legislative instrument to be precluded from these provisions. These job seekers would continue to participate in employment services and look for full-time paid work.

FINANCIAL IMPACT STATEMENT

The Bill would have the following budgetary implications:

<table>
<thead>
<tr>
<th>Year</th>
<th>Expense ($ million)</th>
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<tbody>
<tr>
<td>2014-15</td>
<td>14.1</td>
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<tr>
<td>2015-16</td>
<td>-56.7</td>
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<tr>
<td>2016-17</td>
<td>-60.3</td>
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<tr>
<td>2017-18</td>
<td>-58.3</td>
</tr>
<tr>
<td>TOTAL:</td>
<td>-161.1</td>
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</tbody>
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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 sets out how the new Act is to be cited, that is, the Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Act 2014.

Clause 2 – Commencement

This clause provides that the Act commences as specified in the commencement information table.

Clause 3 – Schedules

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

Abbreviations used in this explanatory memorandum

Administration Act means the Social Security (Administration) Act 1999. All references to legislative provisions in this explanatory memorandum are to provisions contained in the Administration Act unless otherwise indicated.

Schedule 1 – Main amendments

Summary

Schedule 1 would make amendments to strengthen the job seeker compliance framework in Division 3A of Part 3 of the Administration Act. The amendments in Part 1 of Schedule 1 would commence from 1 January 2015 and the amendments in Part 2 would commence from 1 July 2015.

Part 2 also contains some minor amendments in relation to the circumstances in which job seekers aged over 55 are taken to comply with certain mutual obligation requirements which would commence from 1 July 2015.

The compliance framework relates to participation payments. These are newstart allowance, youth allowance for persons who are not apprentices or full-time students, parenting payment for persons who have participation requirements, and special benefit for certain visa holders.

Amendments to strengthen the job seeker compliance framework

Reinstatement of suspended payments when a job seeker complies with participation obligations as opposed to indicating an intention to comply – intended to commence on 1 January 2015

The Secretary may currently determine that a participation payment may be suspended for certain participation failures. When this occurs the suspension would normally end when the person notifies the Secretary of their intention to comply with a reconnection requirement. In practice this would be a requirement to attend an appointment with their employment provider.

This means that a person can say they will attend a reconnection appointment without any real intention of doing so and then have their payment reinstated on that basis - even if they do not actually attend the appointment and have no reasonable excuse for such non-attendance.

To address this anomaly, the Bill would make amendments so that if the person’s payment was suspended for such a participation failure, it would usually not be reinstated until they actually attended an appointment with their employment provider. However, there would also be potential for the suspension to end earlier, for example where the person subsequently provided a reasonable excuse for not attending the first appointment.
In practice job seekers would generally have the opportunity to attend a reconnection appointment with their employment provider within a short period of time and thereby have their payment reinstated quickly. Typically this would occur within one to two days of them contacting their provider as prompted through payment suspension. Employment providers will also be able to offer telephone appointments for job seekers in these circumstances. If the job seeker could not be given an opportunity to attend such an appointment promptly it is intended that their payment would otherwise be reinstated.

Accordingly, in practice it would be appreciably easier for a person to attend a reconnection appointment with their employment provider than seek review of the decision to suspend their payment. For this reason, the Bill would also mean that a decision to suspend a person’s payment for certain failures would not be subject to review, either by the Secretary or the Social Security Appeals Tribunal.

**Withholding of payment until suspension is lifted - to commence on 1 January 2015**

Currently, where a person is compliant with their participation obligations for part of their fortnightly instalment period but then fails to comply with their obligations and has their payment suspended, the person will be *entitled* to payment for the part of the period for which they complied (assuming they meet the usual qualification requirements in respect of those days) - even if they do not re-engage with their obligations before the end of the instalment period.

While remaining entitled, in practice, the person does not receive payment for any part of the instalment period from the Department of Human Services until they meet their compliance requirements and the suspension is actually lifted. This provides a lever for job seekers to meet the required compliance requirement. As is the case now, this may occur in a subsequent instalment period.

To remove any doubt, the Bill would make amendments to make clear that the Secretary could decide to withhold a person’s payment for any part of the instalment period until they comply with their obligations and have their suspension lifted, which may be in a subsequent instalment period.

These amendments provide a greater financial incentive for job seekers to actually re-attend an appointment quickly with their employment provider and would encourage better compliance with participation obligations.

It is intended that flexible arrangements would be put in place to ensure that these amendments would not result in a job seeker experiencing any undue delay in receiving payment.

**Penalties for non-attendance failures – to commence on 1 July 2015**
Under both current law and the Bill, the Secretary may suspend a person’s payment because of certain participation failures. Once the period of suspension ends, the person then receive back pay subject to meeting usual eligibility requirements in respect of that period.

This provides insufficient incentive for job seekers to avoid missing appointments in the first place. Currently, over 280,000 job seekers (or more than one in five who receive a participation payment each year) have a participation failure applied by the Department of Human Services for missing a regular appointment or a reconnection appointment with their provider. The possibility of having payment deducted for the days of non-attendance provides a greater incentive to job seekers to attend scheduled appointments in the first place and reduces the financial impact on employment providers from failures to attend.

Therefore, the Bill would enable a penalty amount to be deducted from a person’s payment for a failure to attend certain appointments without reasonable excuse. In practice, this would be equivalent to not providing the person with back pay or reduced back pay.

The amount of the penalty would be calculated through a formula contained in the compliance framework and in accordance with a legislative instrument made under that framework. These arrangements would be similar to current arrangements for the calculation of penalty amounts for other types of participation failures.

Other amendments

*Circumstances in which relief from certain mutual obligation requirements would be available - to commence on 1 July 2015*

Currently, job seekers on newstart allowance or special benefit who are aged 55 or over are taken to satisfy the activity test if they are engaged in at least 30 hours per fortnight of approved voluntary work, paid work (including self-employment), or a combination of these in a fortnight – unless the Secretary considers that they should not be exempt from the activity test due to the opportunities for employment available to the person. The activity test is a requirement to actively look for work and to accept any suitable work.

There are also, currently, similar provisions regarding parenting payment recipients aged 55 or over with participation requirements – which mean that they cannot be made subject to a requirement to undertake suitable paid work if they are engaged in at least 30 hours per fortnight of voluntary or paid work or a combination of those - unless the Secretary considers that they should not be exempt from the requirement to undertake suitable work due to the opportunities for employment available to the person.

The Bill would amend the SS Act so that the above concessions (from as relevant the activity test or suitable paid work requirements) would not be available to a person aged 55 and over who was meeting the above voluntary
or paid work thresholds, if they were in a class of persons specified in a new legislative instrument (to be made by the Secretary). This would be the case irrespective of their employment opportunities and irrespective of the amount of paid or unpaid work they undertook. These changes help to address the issue of job seekers effectively retiring on income support from age 55 and doing large amounts of voluntary work to obtain reduced participation requirements.

Using an instrument to specify which job seekers would be excluded from the concessions would provide greater flexibility to take account of ongoing adjustments to Government policy. The present intention is that the instrument would specify job seekers aged 55-59 who are receiving services from a Job Services Australia provider.

The Bill would also make minor technical amendments to some provisions, consequential to the other amendments, and contains various application provisions.

None of the amendments in the Bill would affect parenting payment recipients who are subject to the Helping Young Parents and Supporting Jobless Families trial measures while they are participating in those measures.
Detailed explanation

Part 1 – Amendments commencing 1 January 2015

Social Security (Administration) Act 1999

Items 1, 2 and 3

The amendments which would be made by items 1, 2 and 3 are largely of a technical and consequential nature. They are consequential to the amendments the Bill would make to current section 42SA – see further items 4, 5, and 6 about those amendments.

Item 1 would amend section 42G by inserting a new paragraph 42G(ca) after current paragraph 42G(c).

Section 42G enables the Secretary to issue a reconnection requirement to a job seeker who has:

(a) committed a connection failure;
(b) failed to undertake an activity required by their Employment Pathway Plan;
(c) failed to attend an appointment required by their Employment Pathway Plan; or
(d) failed to comply with a requirement notified to them under subsection 63(2).

Under paragraph 42G(e), for failures at paragraph (b) or (c), if the Secretary determines under subsection 42SA(1) that a participation payment is not payable to the person, the Secretary must require the person to comply with a reconnection requirement.

The new paragraph 42G(ca) would refer to a failure to attend an appointment that the person is required to attend by a notice under subsection 63(2).

This amendment is largely of a technical nature because current paragraph 42G(d) encapsulates appointments notified under subsection 63(2). As a consequence of item 1, item 2 amends paragraph 42G(d) so it refers to ‘any other requirement’ notified under subsection 63(2).

Item 3 would amend paragraph 42G(e), noted above, so that it refers to new paragraph (ca) as well as to paragraph (b) and (c). This would require the Secretary to issue a reconnection requirement to a job seeker who missed an appointment notified to them under subsection 63(2).
Currently, paragraph 42G(f) provides that in cases covered by paragraph 42G(a) or (d), the Secretary may issue the person with a reconnection requirement.

Item 3 therefore makes clear that the Secretary must issue a reconnection requirement to a person who fails to attend an appointment notified to them under subsection 63(2). This would help ensure that those who do not comply with participation obligations can re-engage with their obligations and have any suspension ended as soon as possible.

**Items 4, 5, and 6**

As outlined below, items 4, 5, and 6 would make amendments to current section 42SA, which was inserted into the Administration Act in 2011, and relates to situations where a person fails to comply with certain participation obligations. These amendments would commence from 1 January 2015.

**Current arrangements**

Under current subsection 42SA(1), the Secretary may make a determination to suspend a person’s payment where they fail to comply with a requirement under their Employment Pathway Plan to attend an appointment or activity. However, not all failures to attend result in a payment suspension.

In practice, providers have discretion not to report a failure to the Department of Human Services if they consider the person had a reasonable excuse or if doing so may not lead to improved compliance. The Bill would not prevent this practice from continuing and it is intended that it will continue.

Also, if the provider notifies the Department of Human Services that a person has failed to attend an appointment, that department conducts checks regarding whether the person should have been required to attend the appointment. Payment will not be suspended if these checks indicate, for example, that the person was no longer on a participation payment, was not expected to receive any payment during the instalment period in which the failure occurred, or if the notification of the appointment had been sent to the wrong address. These arrangements will continue.

Currently, to encourage job seekers to re-engage as quickly as possible with their participation obligations and avoid them experiencing indefinite suspension of payment, the Secretary must issue a reconnection requirement – see the current section 42G. This Bill would not change that – the amendments to section 42G which would be made by this Bill are designed to ensure the requirement to issue a reconnection requirement is maintained. A new note which would be inserted by item 5 after subsection 42SA(1) confirms this.

Currently, the usual way in which the period of suspension under subsection 42SA(1) ends is when the person notifies the Secretary of their intention to comply with the reconnection requirement. The person will then
become entitled to back pay for the period during which their payment was suspended (subject to them meeting the usual requirements under the social security law to be entitled to payment for that period).

Currently, reconnection requirements for the purpose of subsection 42SA(1) consist, in practice, of a requirement to attend an appointment, even if the failure was a failure to undertake an activity. The Bill would not affect this.

The current section 42SA therefore means that a person can say they will attend a reconnection appointment without any real intention of doing so and then have their payment reinstated on that basis, even if they do not attend the appointment and even if they have no reasonable excuse for such non-attendance.

Amendments which would be made by items 4, 5, and 6

To address this anomaly, items 4, 5, and 6 would mean, from 1 January 2015, that the Secretary may suspend the person’s payment under subsection 42SA(1) and not reinstate the payment until the person actually complied with a reconnection requirement.

While the usual way for a person’s payment to be reinstated would be for them to attend an appointment with their employment provider, if the Secretary considered it appropriate the person’s payment could be reinstated sooner. This is provided for by current paragraph 42SA(2)(b), which the Bill would not remove.

The potential for suspension of payment until actual compliance would be included by item 6. Item 6 would repeal paragraph 42SA(2)(a) and substitute new paragraphs 42SA(2)(a) and (aa).

New subparagraph 42SA(2)(a)(i) would provide that if a person commits one of the failures referred to in subsection 42SA(1) and if the person’s payment is suspended as a result, then the period of suspension ends the day before the person complies with a reconnection requirement issued to them under paragraph 42G(e) (unless the Secretary decided under paragraph 42SA(2)(b) to reinstate their payment before compliance with a reconnection requirement).

New subparagraph 42SA(2)(a)(ii) would provide that if a person commits the same failures but does not comply with the reconnection requirement, then the period during which their payment is suspended would end the day before the day the person fails to comply with the reconnection requirement. It is intended that in this instance – but only if there was no reasonable excuse for not attending the reconnection appointment - another determination to suspend the person’s payment would usually be made under subsection 42SA(1) and a further reconnection requirement would then be issued to them.
If another determination under subsection 42SA(1) to suspend the person’s payment was made and another reconnection requirement issued, then new paragraph 42SA(2)(aa) would mean that the period during which the person’s payment is suspended would usually end the day before the day the person complies with that further reconnection requirement (unless, again, the Secretary decided under paragraph 42SA(2)(b) to reinstate their payment before compliance with a reconnection requirement). The Bill would mean that if a reconnection requirement was not complied with, then a further reconnection requirement could be issued and so on, until the person complied with a reconnection requirement, in which case the period of suspension would end the day before such compliance. However, again, further reconnection requirements would not be issued if the person had a reasonable excuse for missing the first reconnection appointment. Again, the Secretary could also decide under paragraph 42SA(2)(b) to reinstate the payment before compliance with a reconnection requirement.

In practice, it is intended that if a person has their payment suspended under subsection 42SA(1) they would on contacting their employment provider be notified of a reconnection requirement, i.e. appointment, almost immediately and the reconnection appointment would be scheduled to occur for a time no more than two business days from the date the person contacted their provider.

To this end, the power to issue reconnection requirements has been delegated to employment providers so that they, instead of the Department of Human Services, can directly arrange a suitable time with the job seeker. This will help ensure that job seekers receive the opportunity to comply with a reconnection requirement as quickly as possible and that the reconnection appointment is scheduled for a time at which the job seeker could reasonably be expected to attend. Employment providers may also offer telephone appointments in these circumstances.

In some cases it may not be possible for a job seeker to be issued with a reconnection appointment promptly, for example because an employment provider is not available for an appointment. In such cases it is intended that the Secretary would decide under current paragraph 42SA(2)(b) to reinstate their payment before attendance at a reconnection appointment.

The effect of the above is that if the person complied with the reconnection requirement any payment suspension would be of short duration and that any penalty deduction would be correspondingly small.

**Appointments notified under subsection 63(2)**

Items 4, 5, and 6 would also mean that where a person fails to attend an appointment notified to them under subsection 63(2) their payment may be suspended under subsection 42SA(1) and that if it is suspended then it would remain suspended until the person actually attended a rescheduled appointment, (again, unless the Secretary decided to end the suspension sooner under current paragraph 42SA(2)(b) or the person had a reasonable
excuse for missing their reconnection appointment). Item 4 would help to achieve this result by inserting such a failure into the list of failures in subsection 42SA(1) as a new paragraph 42SA(1)(ba).

The reason for this change is that in practice most requirements to attend appointments, including appointments with employment providers are issued under subsection 63(2) rather than under Employment Pathway Plans. Item 4 would ensure that failures to attend such appointments can be dealt with in a consistent manner under section 42SA.

Previously, failure to attend an appointment notified under subsection 63(2) also resulted in payment suspension but this was provided for by subsection 64(1) (necessitating a note under subsection 42SA(1) – which will now no longer be required – referring the reader to subsection 64(1)). It is simpler to deal with all failures to attend appointments with employment providers under the same provisions and in this sense this is primarily a technical amendment.

*Failures to attend appointments which would not be affected by the Bill*

None of the appointments notified to a person under subsection 63(4), which relate to appointments for a medical, psychiatric or psychological examination, would be affected by the Bill. This means, for example, that failures to attend appointments for the purpose of an employment services assessment, which are usually relevant to more vulnerable job seekers, would not be affected. Such failures would continue to be handled under current arrangements.

It is also not intended that appointments with the Department of Human Services notified to a person under subsection 63(2) would be affected by the Bill. In practice it is intended that the Secretary would not make a determination under subsection 42SA(1) in respect of such failures.

*Item 7*

Item 7 would amend paragraph 42SA(2)(b) to insert a reference to new subparagraph 42SA(2)(aa), as inserted by item 6. This is a minor technical amendment which ensures, as is currently the case, that the Secretary can where appropriate end the period during which a person’s payment is suspended under section 42SA for a failure to comply with a reconnection requirement or further reconnection requirement earlier than would otherwise be the case.

*Item 8*

Item 8 would insert new subsection 42SA(2A).

Currently, where a person is compliant with their participation obligations for part of their fortnightly instalment period but then fails to comply with their obligations and has their payment suspended, the person will be *entitled* to payment for the part of the period for which they complied (assuming they
meet the usual qualification requirements in respect of those days) - even if they do not re-engage with their obligations before the end of the instalment period.

New subsection 42SA(2A) would mean that if a person’s participation payment is suspended under subsection 42SA(1) then the Secretary may withhold payment of the participation payment to the person until the period under subsection 42SA(2) ends.

This would make clear that under this clause the Secretary could decide to withhold a person’s payment for any part of the instalment period until they comply with their obligations and have their suspension lifted, which may be in a subsequent instalment period.

These amendments provide a greater financial incentive for job seekers to re-engage quickly with their employment provider and would encourage better compliance with participation obligations.

It is intended that in practice flexible arrangements would be put in place to ensure that these amendments would not result in a job seeker experiencing any undue delay in receiving payment.

Item 9

Item 9 would, to support the amendments made by items 5 and 6, insert a new subsection 64(1A). The new provision would prevent a payment from being suspended under both subsections 42SA(1) and 64(1) and would provide that subsection 64(1) does not apply if:

- the person is receiving a participation payment;
- the person fails to attend an appointment that the person is required to attend by a notice under subsection 63(2); and
- the Secretary makes a determination under subsection 42SA(1) to suspend the person’s payment in relation to the person and the failure.

Current subsection 64(1) provides that a person’s payment may be suspended if the person does not meet certain requirements notified to them under subsection 63(2), such as a requirement to attend an appointment, if the Secretary is satisfied that suspension of the payment would be reasonable.

Currently, under subsection 64(1) the Department of Human Services does not provide payment to the person for any part of the instalment period in which the initial failure to attend an appointment occurred until they meet their compliance requirements and the suspension is actually lifted. Current subsection 64(4) means that the Secretary may determine that the person’s payment is to be reinstated, from a date specified by the Secretary, if the Secretary is satisfied that it is no longer reasonable for the person’s payment to be suspended such as where the person has met their compliance requirement.
Item 9 would therefore reflect the amendment which would be made by items 5 and 6 – if a person’s payment is suspended under new subsection 42SA(1) due to a failure to attend an appointment, the person would need to actually attend an appointment with their employment provider in order for their payment to be reinstated unless the Secretary decided to end the suspension earlier under paragraph 42SA(2)(b) or there was a reasonable excuse for the missed reconnection appointment.

Items 10 and 11

Item 10 would add new paragraph 129(4)(b) which would provide in effect that a person may not seek internal review of a decision under subsection 42SA(1) or (2A).

Item 11 would amend current paragraph 144(fa) so that it provides, in effect, that decisions under subsection 42SA(1) or (2A) are not reviewable by the Social Security Appeals Tribunal. Subsections 42SA(1) and (2A) relate to the suspension and withholding of payment respectively, as outlined above.

The rationale for these amendments is that, as outlined above, a person could have their payment reinstated promptly by attending an appointment with their employment provider and it would be appreciably easier for them to do so than seek internal review or pursue an appeal to the Social Security Appeal Tribunal.

Item 12

Item 12 contains application and transitional provisions and provides that:

- the amendments made by items 1, 3, 4, 6, 8, and 9 apply in relation to failures that are first committed on or after the commencement of those items - 1 January 2015 - where the requirements arose before, on or after this date;

- for the purposes of paragraph 42SA(2A)(b) as inserted by Part 1, days occurring before the commencement of item 24 – 1 January 2015 – are to be disregarded;

- the amendments made by items 10 and 11 apply in relation to decisions made on or after the commencement of those items, i.e. on or after 1 January 2015.
Part 2 – Amendments commencing 1 July 2015

Social Security Act 1991

Items 13, 14, 15, 16, 17, 18 and 19

Items 13, 14, 15, 16, 17, 18 and 19 would make amendments in relation to the circumstances in which relief would be available for certain job seekers from the activity test (for people on newstart allowance and special benefit) or suitable paid work requirements (for people on parenting payment with participation requirements).

Currently, job seekers on newstart allowance or special benefit who are aged 55 or over are taken to satisfy the activity test if they are engaged in at least 30 hours per fortnight of approved voluntary work, paid work (including self-employment), or a combination of these in a fortnight – unless the Secretary considers that they should not be exempt from the activity test due to the opportunities for employment available to the person – see section 603AA of the SS Act concerning newstart allowance and section 731G of the SS Act for special benefit.

There are also, currently, similar provisions regarding parenting payment recipients aged 55 or over with participation requirements – which mean that they cannot be made subject to a requirement to undertake suitable paid work if they are engaged in at least 30 hours per fortnight of voluntary or paid work or a combination of those - unless the Secretary considers that they should not be exempt from the requirement to do suitable paid work due to the opportunities for employment available to the person – see section 502A of the SS Act. These amendments would have no impact on most parenting payment recipients since most such recipients are under 55 years of age.

As outlined below, the Bill would amend the SS Act so that the above provisions would not apply to a person within a class of persons specified in a new legislative instrument.

The instrument would be disallowable for the purposes of the Legislative Instruments Act 2003, and therefore subject to scrutiny by Parliament, and would also need to be accompanied by a statement of compatibility with human rights.

Items 13 and 14 relate to parenting payment, items 15 and 16 relate to newstart allowance, and items 17 and 18 relate to special benefit. Item 19 is an application provision.

As the amendments are equivalent or similar for each payment, the amendments for newstart allowance are described in detail below, and the amendments for the other payments are outlined in less detail.
Item 16 would insert new subsections 603AA(3A), (3B) and (3C).

Section 603AA is concerned with relief from the activity test for people aged 55 and over on newstart allowance who would otherwise be subject to the activity test.

Current subsection 603AA(1) provides, in summary, that a person who is at least 55 years old is taken to satisfy the activity test in respect of a period if the person is engaged in suitable paid work for at least 30 hours per fortnight or approved unpaid voluntary work for at least 30 hours per fortnight, or a combination of those forms of work for at least 30 hours per fortnight. Suitable paid work may include self-employment for this purpose.

However under current subsection 603AA(3) a person will not, in respect of a day, be exempt from the activity test due to such work, if the Secretary considers they should not be exempt having regard to the opportunities or possible opportunities for employment available to the person.

New subsection 603AA(3A) would provide that current section 603AA does not apply to a person included in a class of persons specified in a legislative instrument under new subsection 603AA(3B).

It is also appropriate to enable classes of persons to whom section 603AA will not apply to be specified in a legislative instrument as this will provide greater flexibility to take account of continuing adjustments in Government policy and the use of trial programmes to test new approaches.

Use of a legislative instrument will also avoid unnecessarily adding to the length or complexity of the SS Act. This approach is consistent with the SS Act as a whole, which makes provision for many legislative instruments. The present intention is that the instrument would specify job seekers aged 55-59 who are receiving services from a Job Services Australia provider.

New subsection 603AA(3C) provides that current subsection 603AA(3) does not limit the ability of the Secretary to specify classes of persons in the instrument made under new subsection 603AA(3B).

Item 16 would not affect the operation of current provisions relating to the circumstances in which, regardless of age, newstart allowance recipients who are principal carer parents or have a partial capacity to work are taken to be meeting their participation requirements.

Parenting payment

Item 14 would insert new subsections 502A(3A), (3B) and (3C). These are equivalent to the new subsections which would be inserted by item 16 except that they relate to parenting payment instead of newstart allowance and that section 502A relates to when a person will be required to comply with a
requirement to undertake suitable paid work, rather than when a person will be taken to comply with the activity test.

Item 14 would not affect the operation of current provisions relating to the circumstances in which, regardless of age, parenting payment recipients may be taken to be meeting their participation requirements.

**Special benefit**

Item 18 would insert new subsections 731G(3A), (3B) and (3C). These are equivalent to the new subsections which would be inserted by item 16 except that they relate to special benefit instead of newstart allowance.

Item 18 would not affect the operation of current provisions relating to the circumstances in which, regardless of age, special benefit recipients who are principal carer parents or have a partial capacity to work are taken to be meeting their participation requirements.

Items 13, 15 and 17 would make minor technical amendments to subsections 502A(1), 603AA(1) and 731G(1) respectively, to reflect the amendments which would be made by items 14, 16 and 18 respectively.

Item 19 is an application provision and would provide that the amendments which would be made by items 13 to 18 would apply in relation to relevant periods beginning on or after their commencement, i.e. on or after 1 July 2015.

**Social Security (Administration) Act 1999**

**Item 20**

Item 20 would make a minor amendment to the simplified outline contained in current section 42A which briefly summarises the effect of Division 3A of Part 3 of the Administration Act. The amendment would reflect changes which would be made by the Bill.

**Item 21**

Item 21 would add a note at the end of subsection 42SA(3). The note says that a penalty amount may be deducted from a person’s participation payment for a failure to attend an appointment under paragraph 42SA(3)(1)(b) or (ba). It reflects other changes that would be made by the Bill.

**Items 22, 23 and 24**

Item 22 would insert new subdivision EC containing new sections 42SC and 42SD.

These provisions would relate to a financial penalty which may be deducted from a person’s payment if they fail to attend an appointment they were
required to attend under either their Employment Pathway Plan or a notice to them under subsection 63(2), if the person failed to give prior notice of a reasonable excuse for the non-attendance in accordance with sections 42U and 42UA. The new provisions would be similar to current arrangements for the calculation of penalty amounts for other types of participation failures.

Items 23 and 24 concern how the amount of the penalty would be calculated.

The rationale for items 22, 23, and 24 is that while suspending payment for a failure to comply with the relevant participation obligations, pending attendance at an appointment, provides some incentive to attend appointments, it does not provide sufficient incentive. The possibility of having payment deducted for the days of non-attendance provides a far greater incentive to attend scheduled appointments as required. Job seekers will remain able to give prior notice and reschedule their appointment without financial penalty. Job seekers with a reasonable excuse for their failure to attend are also not affected by these changes.

Although there is potential under current provisions to deduct a penalty amount from a person's payment if they both fail to attend an appointment notified to them under subsection 63(2) or required by their Employment Pathway Plan, as well as then fail to attend a rescheduled appointment they were required to attend – see sections 42H and 42T - this also provides insufficient incentive for job seekers to avoid missing appointments.

New subsection 42SC(1) would therefore provide that, from 1 July 2015, the Secretary may determine that a person commits a non-attendance failure if the Secretary makes a determination under subsection 42SA(1) to suspend a person’s payment because of the person’s failure to attend an appointment referred to in paragraph 42SA(1)(b) or (ba), i.e. an appointment required by an Employment Pathway Plan or notified to a person under subsection 63(2).

New subsection 42SC(2) would provide that, despite new subsection 42SC(1), the Secretary must not determine that a person commits a non-attendance failure if the person satisfies the Secretary that they have a reasonable excuse for their failure to attend such an appointment.

A new note at the end of new subsection 42SC(2) would make clear that the Secretary must take certain matters into account for the purpose of determining whether a person has a reasonable excuse for the purpose of new subsection 42SC(2). The note directs the reader’s attention to current sections 42U and 42UA which relate to reasonable excuse.

New subsection 42SC(3) would provide that the Secretary must include, in a non-attendance failure determination under new section 42SC, the instalment period in which a penalty amount under section 42T for the non-attendance failure is to be deducted from the person’s instalment of a participation payment.
New section 42SD would provide for the deduction of a penalty amount for non-attendance failures. It would provide that if the Secretary determines that a person commits a non-attendance failure, the person's penalty amount for the non-attendance failure is to be deducted from the person's instalment of a participation payment for the instalment period determined under subsection 42SC(3).

Item 23 would make a minor technical amendment to subsection 42T(1) to reflect item 24.

Item 24 would insert, into current section 42T, a new subsection which concerns how a penalty amount for a non-attendance failure would be calculated. Current section 42T deals with calculation of penalty amounts for no show no pay failures and for reconnection failures (see section 42D for no show no pay failures and section 42L for reconnection failures).

Current subsection 42T(1) requires the Minister to make a legislative instrument setting out the method by which penalty amounts for no show no pay failures and reconnection failures are to be calculated. Such an instrument has been made – the Social Security (Administration) (Penalty Amount) (DEEWR) Determination 2012 (No. 1) (‘the penalty amount Determination’).

Item 23 would amend subsection 42T(1) to add a reference to non-attendance failures. This would mean that the penalty amount Determination would need to be updated (by making a legislative instrument) to set out the method by which penalty amounts for non-attendance failures are to be calculated. The legislative instrument to update the penalty amount Determination would be disallowable, and therefore subject to scrutiny by Parliament, and would also need to be accompanied by a statement of compatibility with human rights.

**Current section 42T**

Current section 42T itself provides for restrictions on the method to be determined in the penalty amount Determination:

- a no show no pay penalty cannot be more than 1.4 times the person’s instalment of participation payment divided by the number of days in the instalment period (see the formula in subsection (2));
- the penalty for each day of a reconnection failure period cannot be more than 1.4 times the person’s instalment of participation payment divided by the number of days in the instalment period (see the formula in subsection (3));
- the penalty amount for either penalty cannot affect the person’s entitlement, if applicable, to rent assistance, pharmaceutical allowance or certain other supplements (see subsection (5)).

The primary principle underlying reconnection failure penalty amounts is that a person should lose a ‘working day’s payment’ for each working day that is in a period during which they have failed to comply with a reconnection...
requirement. To represent a ‘working day’s payment’, a person loses an amount of payment equal to the amount of their participation payment for an instalment period divided by the number of weekdays in that instalment period.

Similarly, the primary principle underlying no show no pay failure amounts is that a person should lose a ‘working day’s payment’ for failing to participate in an activity in which they are required to participate.

The maximum penalty per instalment period will not be able to exceed the amount of the person’s payment for that period.

The imposition of penalties for no show no pay failures and reconnection failures does not affect a person’s entitlement to a range of supplements and allowances including pharmaceutical allowance, pension supplement, rent assistance, remote area allowance, youth disability supplement and other supplements or allowances which are not part of their participation payment, such as mobility allowance or telephone allowance.

For a fourteen day instalment period, which applies to the majority of payment recipients, the formula included in subsections 42T(2) and (3), outlined above, is used to calculate the penalty amount.

To avoid unintended consequences arising from shortened instalment periods (i.e. those less than fourteen days), the penalty amount Determination includes another formula to arrive at another penalty amount and the lesser penalty amount is applied (as the formula in the Act is intended to provide for a maximum penalty amount). This recognises that, in a shorter instalment period, the formula in the Act may result in a penalty amount that is not proportional to the person’s actual daily payment amount.

New subsection 42T(3A) – penalty amount for non-attendance failures

Item 24 would insert new subsection 42T(3A) which is similar to current subsections 42T(2) and (3), except that it relates to non-attendance failures instead of no show no pay or reconnection failures.

New subsection 42T(3A) would provide that the method determined in the legislative instrument made under current subsection 42T(1) must not provide for a penalty amount, in respect of a day in the period for which the participation payment is not payable under subsection 42SA(2) because of the person’s failure referred to in paragraph 42SA(1)(b) or (ba), that is more than: 1.4 times the amount of their payment instalment that would be payable apart from section 42SA(2) (or in other words the amount that would be payable had no non-compliance occurred) divided by the number of days in the person’s instalment period.

This is reflected by the following formula that would be included in new subsection 42T(3A):
A consequence of new subsection 42T(3A), (read in conjunction with new paragraph 42SA(2)(a)), is that where a person’s payment is suspended under subsection 42SA(1), a penalty amount will only be able to be deducted in respect of the period from when the payment was first suspended to the day before the person complied, or failed to comply, with the first reconnection requirement, i.e. the first appointment with their employment provider subsequent to the failure which led to the suspension. This will help ensure that any penalty amounts are relatively small.

A note at the end of new subsection 42T(3A) makes clear that a penalty amount cannot be deducted in respect of days before a person’s payment was suspended.

Item 25

Item 25 would amend current section 42U. This amendment is related to the introduction of the ‘non-attendance failure’ referred to in item 22.

Current section 42U requires the Secretary to make a legislative instrument to determine matters which must be considered in deciding whether a person has a reasonable excuse for committing certain participation failures. These are a no show no pay failure, a connection failure, a reconnection failure or a serious failure.

The Social Security (Reasonable Excuse – Participation Payment Obligations) (DEEWR) Determination 2009 (No. 1) made by the Secretary of the former Department of Education, Employment and Workplace Relations and an equivalent instrument made by the Secretary of the former Department of Families, Housing, Community Services and Indigenous Affairs exist for this purpose (collectively ‘the instrument’).

The instrument lists a number of matters, such as illness or caring responsibilities, to be considered in deciding whether a person has a reasonable excuse. The instrument is not exhaustive of the matters which may be considered in determining whether a person has a reasonable excuse – see current subsection 42U(2).

Item 25 would amend section 42U by inserting a reference to the non-attendance failure referred to in item 22, so that section 42U would also apply in relation to consideration of whether a person has a reasonable excuse for a non-attendance failure.
Item 26

Item 26 would amend current section 42UA and is also related to the amendment which would be made by item 22.

Current section 42UA relates to whether a person will be taken to have a reasonable excuse for not attending an appointment or activity (or in other words, a reasonable excuse for a no show no pay failure, a connection failure or a reconnection failure).

Section 42UA provides that an excuse cannot be a reasonable excuse unless the person gave advance notice (to the person or body notified by the Secretary as the person or body to whom advance notice should be given) that they could not attend. In practice the contact person is specified in the notice given to the job seeker, or the Employment Pathway Plan entered by the job seeker, that imposes the requirement to attend the appointment or activity.

However, under section 42UA the Secretary can still consider a person's excuse to be a reasonable excuse in the absence of advance notice, if the Secretary is satisfied that the circumstances were such that it was not reasonable to expect the person to give the advance notification.

The purpose of section 42UA is to motivate job seekers to give prior notice of any excuse they may have had not to attend a mandatory appointment or activity.

Item 26 would amend section 42UA to insert a reference to non-attendance failures so that, consistent with current arrangements in respect of other failures, an excuse for a non-attendance failure will not be a reasonable excuse unless the person gave advance notice of the failure or unless the Secretary is satisfied that it was not reasonable to expect the person to give advance notice.

Items 27 and 28

Item 27 would amend section 42V to add a reference to non-attendance failures. Item 28 would amend section 42V to reflect new section 42SD.

Currently, section 42V provides for occasions where the deduction of a penalty amount instalment under no show no pay failures or reconnection failures might not reduce that penalty to zero.

Primarily this will occur if the penalty amount is deducted from the person’s payment for a different instalment period to the instalment period in which the failure occurred and if the instalment for that different period is smaller than the outstanding penalty amount. In these cases, section 42V is designed to allow for the deduction of any balance of a penalty amounts from future instalments.
Items 27 and 28 would enable deductions of any penalty balance in relation to a non-attendance failure from future instalments in the same way that the balance of a penalty for other types of failures can currently be deducted from future instalments.

Item 29

Item 29 would amend section 42X so it refers to a non-attendance failure as well as a no show no pay failure and a reconnection failure. This is to reflect the new section 42SC. Section 42X is a deeming provision enabling job seekers’ participation payments to remain payable even if they are not actually receiving any payment because of the deduction of a penalty amount for a no show no pay failure or a reconnection failure.

Items 30

Item 30 would update the list of defined terms in Schedule 1 of the Administration Act to include a definition of non-attendance failure and define that term as having the meaning given by new subsection 42SC(1).

Item 31

Item 31 would also update the list of defined terms in Schedule 1 of the Administration Act by updating the meaning of ‘penalty amount’ to include a non-attendance failure. This reflects other changes which would be made by the Bill and which are outlined above.

Item 32

Item 32 is an application provision.

Item 32 provides that new paragraph 42SC(1)(a) of the Administration Act applies in relation to failures referred to in paragraph 42SA(1)(b) or (ba) of that Act that are first committed on or after the commencement of item 32, i.e. on or after 1 July 2015 – whether the requirements arose before, on or after that date.
Schedule 2 – Other amendments

Social Security (Administration) Act 1999

Item 1

Item 1 is unrelated to the remainder of this Bill. It would amend subsections 234(1) and (2) of the Administration Act, which relate to the delegation of powers under the social security law.

Current subsection 234(1) enables the Secretary to delegate the Secretary’s powers under the social security law to an officer, for example an employee of an Australian Government department, subject to a minor exception contained in subsection 234(3).

Current subsection 234(2) enables the Secretary to delegate the Secretary’s powers under the social security law to the Chief Executive Centrelink, again subject to a minor exception contained in subsection 234(3).

However, as the social security law is defined, in effect, as primary social security legislation (see subsection 23(1) of the SS Act), the power of delegation does not extend to delegation of powers under regulations or other instruments made under the social security law.

Item 1 would address this anomalous situation by inserting a reference to instruments, including regulations, into subsections 234(1) and (2).

The main impetus for this amendment relates to recent legislative instruments made under the social security law which relate to the Job Commitment Bonus, as these contain Secretarial powers that will need to be exercised, other than by the Secretary personally, from 1 July 2015.
Statement of Compatibility with Human Rights

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

Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Bill 2014 (the Bill)

Overview of the Bill

The job seeker compliance framework in Division 3A of Part 3 of the Social Security (Administration) Act 1999 relates to participation payments. These are newstart allowance, youth allowance for persons who are not apprentices or full-time students, parenting payment for persons who have participation requirements, and special benefit for certain visa holders.

The objectives of the compliance framework are to encourage increased workforce participation for those with the capacity to work and to secure compliance with participation obligations.¹ This recognises that the best form of income is from paid work, the need to reduce the adverse consequences of passive welfare dependence, and the need to ensure the sustainability of the social security system.

However these objectives are not being effectively and efficiently achieved. Currently, approximately 35 per cent of all compulsory appointments with employment providers are not being attended by job seekers each year and more than one in five of all job seekers who receive a payment in any year, have at least one participation failure applied for missing an appointment with their provider. That is, each year around 280,000 job seekers fail to attend an appointment with their provider and do not have a reasonable excuse for the failure to attend.

The Bill would therefore amend the compliance framework to provide stronger incentives for job seekers to comply with their participation obligations by making provision for:

- reinstatement of suspended payments when a job seeker actually attends an appointment with their employment provider as opposed to indicating an intention to attend, including reinstating the payment after the end of the instalment period in which the failure occurred if the person does not actually attend an appointment until a subsequent period;
- the Secretary to have discretion to impose a financial penalty where a job seeker fails to attend an appointment without a reasonable excuse.

The Bill would also:

¹ Section 42B.
• amend provisions of the Social Security Act 1991 which relate to the circumstances in which job seekers aged 55 and over are taken to comply with the activity test or may be required to undertake suitable paid work; and
• amend the Social Security (Administration) Act 1999 so that the Secretary may delegate powers under regulations or other instruments made under the social security law.

The compliance framework and other amendments are outlined below.

**Compliance framework amendments**

Under current subsection 42SA(1), the Secretary may make a determination to suspend a person’s payment where they fail to comply with a requirement under their Employment Pathway plan to attend an appointment or activity.

Currently, to encourage job seekers to re-engage as quickly as possible with their participation obligations and avoid them experiencing indefinite suspension of payment, the Secretary must issue a reconnection requirement – see the current section 42G. In practice, the reconnection requirement will be a requirement to attend an appointment with their employment provider. The Bill would not change that.

Currently, the usual way in which the period of suspension under subsection 42SA(1) ends is when the person notifies the Secretary of their intention to attend an appointment with their employment provider. The person then becomes entitled to back pay for the period during which their payment was suspended, subject to them meeting the usual requirements under the social security law to be entitled to payment for that period.

The current section 42SA therefore means that a person can say they will attend a reconnection appointment without any real intention of doing so and then have their payment reinstated on that basis.

The Bill would make clear, from 1 January 2015, that the Secretary may suspend the person’s payment under subsection 42SA(1) and not reinstate the payment until the person actually attended an appointment with their employment provider. This would include reinstating the payment after the end of the instalment period in which the failure occurred if the person does not actually attend an appointment until a subsequent period.

This would ensure that job seekers receive sufficient encouragement to maintain engagement with their employment providers to maximise their chance of obtaining employment.

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2 Unless the Secretary determines that it is more appropriate to end the suspension on an earlier day under current paragraph 42SA(2)(b).
3 While this would be the usual way for a person’s payment to be reinstated, the Bill would mean that if the Secretary considered it appropriate the person’s payment could be reinstated sooner - see current paragraph 42SA(2)(b), which the Bill would not remove.
Decisions to suspend payment under subsection 42SA(1) and to not reinstate it until actual attendance at a reconnection appointment would not be subject to internal review or review by the Social Security Appeals Tribunal.  

However the above measures do not, in themselves, provide sufficient incentive for job seekers to avoid failing to avoid missing appointments in the first place as evidenced by the current high level of failures to attend. Approximately 35 per cent of all compulsory appointments with employment providers are not being attended by job seekers each year and more than one in five of all job seekers who receive a payment in any year have at least one participation failure applied for missing a regular appointment or a reconnection appointment with their provider.

The possibility of having a permanent reduction in payment provides a far better incentive for job seekers to make the effort to attend scheduled appointments, or to give prior notice and reschedule, and will reduce the financial and red tape impacts on employment providers of so many missed appointments each year. Therefore, the Bill would, from 1 July 2015, make it possible for a penalty amount to be deducted from an instalment of the person’s participation payment.

The amount of the penalty would be calculated through a formula contained in the compliance framework and in accordance with a disallowable legislative instrument made under that framework. These arrangements would be similar to current arrangements for the calculation of penalty amounts for other types of participation failures.

Activity test and suitable paid work amendments

Currently, job seekers on newstart allowance or special benefit who are aged 55 or over are taken to satisfy the activity test if they are engaged in at least 30 hours per fortnight of approved voluntary work, paid work (including self-employment), or a combination of these in a fortnight – unless the Secretary considers that they should not be exempt from the activity test due to the opportunities for employment available to the person. The activity test is a requirement to actively look for work and to accept any suitable work.

There are also, currently, similar provisions regarding parenting payment recipients aged 55 or over with participation requirements – which mean that they cannot be made subject to a requirement to undertake suitable paid work if they are engaged in at least 30 hours per fortnight of voluntary or paid work or a combination of those - unless the Secretary considers that they should not be exempt from the requirement to undertake suitable work due to the opportunities for employment available to the person.

The Bill would amend the SS Act so that the above concessions (from as relevant the activity test or suitable paid work requirements) would not be available to a person aged 55 and over who was meeting the above voluntary

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4 See further below as to the rationale for the non-availability of review.
or paid work thresholds, if they were in a class of persons specified in a new legislative instrument (to be made by the Secretary). This would be the case irrespective of their employment opportunities and irrespective of the amount of paid or unpaid work they undertook.

Amendments concerning delegation of powers by the Secretary

The Bill would also make amendments to subsections 234(1) and (2) of the Social Security (Administration) Act 1999 concerning the power of the Secretary to delegate powers under the social security law, for example to employees of a Commonwealth department or the Chief Executive Centrelink. As the social security law is defined, in effect, as primary social security legislation (see subsection 23(1) of the Social Security Act 1991), the power of delegation does not extend to delegation of powers under regulations or other instruments made under the social security law.

The Bill would address this anomalous situation through amendments which make clear that powers contained in instruments, including regulations, can be delegated. These amendments are unrelated to the remainder of the Bill.

Human rights engaged by the Bill

The Bill engages the right to social security and the right to an adequate standard of living – recognised by articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) respectively.

The Bill engages the right to equality before the law and non-discrimination. Article 2 of the ICESCR, and article 26 of the International Covenant on Civil and Political Rights (ICCPR) recognise the right to equality and non-discrimination on, among other grounds: race, sex, colour, language, national origin or ‘other status’. Relevantly, age and disability have been considered to constitute ‘other status’ for the purposes of articles 2 and 26.

The Bill also engages the right to work - article 6 of the ICESCR recognises the right to work.

Human rights implications of the Bill

Compliance framework amendments

Limited impact of the amendments on the right to social security and the right to an adequate standard of living

The compliance framework amendments would not impact job seekers who comply with their participation obligations and should also have no impact on job seekers who always do their best to comply with their participation obligations.

Even in relation to the job seekers who are impacted by the amendments, the impact would generally be limited. This is because the intention of the
amendments is not to cause greater suspension or withholding of payments or more frequent imposition of financial penalties.

Rather, the intention of the amendments is to discourage non-compliance and reduce suspensions and, where suspension occurs, to encourage prompt compliance with obligations so that there is either no financial impact on the job seeker or, at most, a limited financial impact. The amendments have been designed to achieve those objectives.

Further, to the limited extent that the Bill would restrict the right to social security and the right to an adequate standard of living of a very small minority of job seekers, such an impact would be necessary, proportionate and reasonable as outlined below.

The need for the amendments

There is a pressing need for the job seeker compliance framework to be strengthened by the measures in the Bill. Approximately 35 per cent of all compulsory appointments by job seekers with employment providers are missed each year causing significant red-tape and costs for employment service providers and more than one in five job seekers had at least one participation failure applied by the Department of Human Services for missing a regular appointment or a reconnection appointment with their provider.

The high incidence of missed appointments is despite the fact that arrangements are in place to ensure that job seekers are given every reasonable opportunity to comply with non-onerous obligations to attend appointments with employment providers.

Most job seekers are required to attend an appointment with their employment services provider only once a month. Appointments are generally of short duration and appointment times take into consideration the individual circumstances of job seekers.

Job seekers must be given clear and reasonable notice of the appointments, and are also given reminders of their appointments. This is done both formally (in person or in writing, including time, date, place) and informally (SMS, phone, email).

Job seekers are also informed in advance of their appointments that the consequence of non-attendance may be suspension of their payment or the imposition of a penalty amount. Minor lateness to an appointment is considered attendance rather than non-attendance. If a job seeker is dissatisfied with their employment provider then it is often possible for them to be offered an alternative provider

While there is some potential under current provisions to deduct a penalty amount from a person’s payment if they both fail to attend an appointment notified to them under subsection 63(2) or required by their Employment Pathway Plan, as well as then subsequently fail to attend a rescheduled
appointment they were required to attend – see current sections 42H and 42T, this has not prevented the high incidence of missed appointments.

In fact for the financial year 2013-14, 85% of reports submitted by employment providers to the Department of Human Services for compliance action were for job seekers failing to attend their employment provider appointments.

In the 2012-13 financial year, 11.6 million employment provider appointments were scheduled with job seekers, but 4.3 million appointments were not attended. This is an attendance rate of only 63% and a non-attendance rate of 37%.

Similarly, in the 2013-14 financial year 12.75 million employment provider appointments were scheduled with job seekers, but 4.47 million were not attended. This is an attendance rate of only 65% and a non-attendance rate of 35%.

In 2012-13, over 238,000 job seekers had at least one participation failure applied by the Department of Human Services for missing a regular appointment or a reconnection appointment with their provider.

In 2013-14, this had grown to almost 280,000 job seekers. That is more than one in five of all job seekers who received a payment at some time during the year.

These participation failures under the compliance framework are therefore not functioning efficiently and effectively to provide an incentive to job seekers to avoid missing appointments in the first place and to attend subsequent rescheduled appointments.

This has a detrimental impact on the job seekers concerned since they are not being given sufficient incentive to take active steps to attend their appointments, and thereby increase their chances of moving off income support payments, of becoming a productive participant in the work force, and of experiencing the various benefits that such participation provides.

Moving a jobseeker off the social security system into the workforce improves not only the jobseeker's standard of living, but also helps to maintain both the integrity and sustainability of the social security system by ensuring that finite resources are equitably allocated to genuine job seekers.

The above data suggests that keeping payments suspended until the job seeker actually attends an appointment with their employment provider would significantly improve attendance at such appointments. If it did not have this effect in individual cases then it could probably be inferred, in most cases, that the job seeker was not in particular need of their social security payment.
The measures to strengthen the compliance framework would also encourage behaviours which are important to finding and keeping a job, such as reliability and punctuality.

*Reasonableness and proportionality*

The impact of the amendments would be limited, reasonable and proportionate for the reasons outlined below.

Even if a person misses an appointment or activity and has their payment suspended under subsection 42SA(1) as a result, (and as noted above in most cases suspension under subsection 42SA(1) does not result), the person would have the opportunity to have their payment reinstated quickly.

This is because under both the current law and the Bill, the Secretary must issue a reconnection requirement, in practice a requirement to attend an appointment with the person’s employment provider, to encourage job seekers to re-engage as quickly as possible with their participation obligations and avoid them experiencing indefinite suspension of payment.\(^5\)

In practice, it is intended that if a person has their payment suspended under subsection 42SA(1), a reconnection appointment would be scheduled to occur at a time no more than two business days from the date the person contacts their employment provider on being informed of the suspension. Employment providers will also be able to offer telephone appointments in such circumstances.

The power to issue reconnection requirements has been delegated to employment providers so that they can directly arrange a suitable time with the job seeker.\(^6\) This will help ensure that job seekers receive the opportunity to comply with a reconnection requirement as quickly as possible and that the reconnection requirement is scheduled for a time at which the job seeker could reasonably be expected to attend.

In some cases it may not be possible for a job seeker to be given a new appointment within two business days of the person contacting their provider to schedule a new appointment. This might be because, for example, their employment provider is unavailable or because the job seeker had a reasonable excuse for not being able to commit to attend an appointment in that timeframe. In such cases it is intended that the Secretary would decide under paragraph 42SA(2)(b) to reinstate their payment before attendance at the appointment.

In other cases a job seeker might agree to attend a rescheduled appointment but then, before the appointment, experience changed circumstances so that they had a reasonable excuse for not attending. In these cases it is intended

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\(^5\) See the explanation of items 1, 2, and 3 above in this explanatory memorandum.

\(^6\) Previously, the Department of Human Services had to arrange the reconnection appointment on behalf of the provider.
that their payment would be reinstated from the date of the appointment due to the operation of subparagraph 42SA(a)(ii). It is also intended that the Secretary would not make a determination to suspend the person’s payment due to the failure to attend the rescheduled appointment where there is a reasonable excuse for non-attendance.

Where a person has a reasonable excuse for an initial failure, it would not be possible for the Secretary to deduct a penalty amount due to that failure.7

If a person has no reasonable excuse for the initial failure but a reasonable excuse for non-attendance at an appointment with their employment provider they were required to attend due to that failure, the only penalty amount that could be deducted would be for the period between the initial failure and the failure to attend the first reconnection appointment.8 In any event as noted above, it is not intended that a person’s payment would remain suspended after they fail, with a reasonable excuse, to attend a reconnection appointment.

This means that if a person whose payment was suspended due to subsection 42SA(1) contacted their provider promptly to arrange a reconnection appointment and either attended that appointment or had a reasonable excuse for not doing so, the suspension would be of short duration and a penalty, if any, would be correspondingly small. Again, they would not incur a penalty if they had a reasonable excuse for the initial failure. It would also not be possible for the Secretary to make a determination to deduct a penalty amount in relation to a failure to undertake an activity required by an Employment Pathway Plan – see item 22. If such a failure led to a suspension under subsection 42SA(1) the person would receive full back pay when their payment was reinstated.

Further, the imposition of a non-attendance penalty would not affect a person’s entitlement to a range of supplements and allowances including pharmaceutical allowance, pension supplement, rent assistance, remote area allowance, youth disability supplement and other supplements or allowances which are not part of their participation payment, such as mobility allowance or telephone allowance.

A decision to withhold payment until a person actually attends a reconnection appointment and has their suspension ended, even if that occurs after the instalment period in which the suspension commenced, would not involve a disproportionate limitation to rights.

This is because this would ensure that job seekers receive sufficient encouragement to maintain engagement with their employment providers to maximise their chance of obtaining employment.

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7 See new subsection 42SC(2).
8 See new subsection 42T(3A) which makes clear that a penalty can only be imposed in respect of a day in a period for which the payment is suspended due to an initial failure to attend an activity or appointment, not in respect of a day in a period for which the payment is suspended due to a failure to attend a rescheduled appointment.
Further, it is intended that in practice flexible arrangements would be put in place to ensure that these amendments would not result in a job seeker experiencing any undue delay in receiving payment.

Decisions to suspend payment under subsection 42SA(1) and to withhold payment until a person actually attends a reconnection appointment would not be subject to internal review or review by the Social Security Appeals Tribunal.

The Administrative Review Council’s merits review guide states that a factor which may justify excluding merits review is where a decision would have such limited impact that the costs of review cannot be justified. The guide suggests that it would be inappropriate to provide merits review where the costs of doing so would be vastly disproportionate to the significance of the decision under review.

Here, as noted above, in practice job seekers would have the opportunity to resume compliance and therefore have their payment reinstated within two days or less of contacting their provider to arrange an appointment. If it was not possible for them to attend a rescheduled appointment within two days of them contacting their provider, the payment suspension would be ended in any event.

Accordingly whether a person could appeal the suspension or withholding of their payment in this circumstance would generally have limited practical relevance and the costs of doing so would be vastly disproportionate to the significance of the decision under review. It would also be easier for the person concerned to attend an appointment with their employment provider than seek review.

A determination by the Secretary to deduct a penalty amount following a determination under subsection 42SA(1) would be subject to internal and external review.

Right to equality and the right to non-discrimination

The amendments would affect a range of cohorts of job seekers. A high proportion of those affected would be non-Indigenous males of all ages. In 2013-14, of the 388,422 job seekers who did not attend employment provider appointments for no valid reason:

- 64.5% were male and 35.5% were female;
- 78% were non-Indigenous and 22% were Indigenous; and
- 40% were 21 – 30 years of age.

However, the amendments would not directly discriminate against any cohort.

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9 Section 4.56.
10 Section 4.56.
To the extent that there may be any indirect differential impact on particular cohorts that impact would be limited as well as being necessary, reasonable and proportionate.

It is necessary that all cohorts are encouraged to attend appointments when there is no reasonable excuse for non-attendance. Finding and keeping paid work can help address disadvantages experienced by various cohorts.

As outlined above the intention of the amendments is to discourage non-compliance and reduce suspensions and, where suspension occurs, to encourage prompt compliance with obligations so that there is either no financial impact on the job seeker or, at most, a limited financial impact.

Under the Bill it would remain the case that the participation expected of a person must take into account their circumstances. Therefore, for example, if a person had an illness or disability, had caring responsibilities, or was homeless or illiterate, this would need to be considered, including in relation to whether a person had a reasonable excuse for not attending an appointment.

The amendments would therefore not involve illegitimate indirect discrimination towards particular cohorts.

**Right to work**

Article 6 of the 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.\(^{11}\)

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 peoples’ right to just and favourable conditions of employment.\(^{12}\)

The amendments encourage job seekers to engage with their right to work by encouraging them to remain engaged with their employment providers and participation obligations.

The amendments are 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.\(^{13}\)

**Amendments regarding the circumstances in which relief from the activity test or suitable work requirements would be available to job seekers aged over 55**

As noted in the overview to this human rights statement, these amendments would exclude a job seeker aged 55 or over from certain concessional

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\(^{11}\) Committee on Economic, Social and Cultural Rights, General Comment 18, paragraphs 1 and 2.

\(^{12}\) Committee on Economic, Social and Cultural Rights, General Comment 18, paragraph 12.

\(^{13}\) See, for example, existing subsection 601(2A) of the *Social Security Act 1991* in relation to newstart allowance.
treatment otherwise available to job seekers aged over 55, if the job seeker falls within a class of persons specified in a new legislative instrument provided for by the amendments.

The present intention is that the instrument would specify job seekers aged 55-59 who would currently be receiving employment services via Job Services Australia providers.

The instrument would be disallowable for the purposes of the *Legislative Instruments Act 2003*, and therefore subject to scrutiny by Parliament, and would also need to be accompanied by a statement of compatibility with human rights.

*Limited impact of the amendments on the right to social security and the right to an adequate standard of living*

The amendments would have a limited impact on the right to social security and the right to an adequate standard of living. Neither the amendments, nor any legislative instrument made as a result of the amendments, would in themselves result in any reduction to, or suspension, of a person’s social security payment.

The amendments would simply mean that the affected job seekers could be given the same participation requirements as younger job seekers, or the same as those of job seekers aged 55 and over who do not engage in at least 30 hours per fortnight of paid or unpaid work or a combination of those forms of work.

Under both current law and the amendments it would be the case that the participation expected of a person must take into account their circumstances.

For example the work which a person would be expected to look for, or undertake, would need to be suitable for the person. In summary, work is unsuitable if the person lacks the necessary skills or qualifications, it will aggravate the person’s medical condition, the person is the principal carer of children and lacks appropriate alternative care of the children, the work poses a risk to health or safety, the conditions are less generous than prescribed by law, commuting to the work would be unreasonably difficult, or the work would require the person to move to another place – see for example subsection 601(2A) of the *Social Security Act 1991* in relation to newstart allowance.

Further, current provisions, for example subsection 603AA(3) in the case of newstart allowance, already enable job seekers to be excluded from the concessional treatment under the relevant provisions in certain circumstances. The amendments would therefore not have a wholly new impact but would broaden the circumstances in which exclusion from the concessional treatment could occur.
Necessity for, and reasonableness and proportionality of the amendments

Under sections 502A, 603AA and 731G there is potential for job seekers aged 55 or over to remain indefinitely on income support while engaging in large amounts of volunteer work and receiving reduced participation requirements as a result, while not necessarily improving their prospects of finding suitable paid work.

There is therefore a need to specify, in a legislative instrument, classes of persons to whom the concessions contained in sections 502A, 603AA and 731G will not apply as this will provide greater flexibility to take account of continuing adjustments in Government policy and the use of trial programmes to test new approaches.

This will help ensure that measures can be designed in the most appropriate way to meet the needs of different job seekers aged 55 or over and help address the particular labour market problems they face, so that they can experience greater workforce participation and the associated benefits. With an ageing population, it is important to encourage older people to continue to participate in the workforce.

The Government is also implementing separate measures aimed at addressing those problems, for example an incentives programme to encourage employers to take on job seekers aged 50 or over.

Given that the amendments would have, for the reasons outlined above, a limited impact on the right to social security and the right to an adequate standard of living, they are a reasonable and proportionate means of helping to achieve the above objects.

Right to equality and non-discrimination

The amendments will have an impact on certain job seekers aged 55 and over. There are situations where there are good reasons for using age-based distinctions in connection with employment measures. Employment measures are developed to address particular labour market or policy issues which can vary across age groups. Targeting particular age groups allows measures to be designed in the most appropriate way to meet the different needs of different groups in the community.

For many years, Parliament has recognised that there may in certain circumstances be valid reasons for differential treatment on the basis of age in connection with employment. For example, the provisions which these amendments would affect, and other provisions in the social security law concerned with encouraging job seekers into the workforce, contain aged-based distinctions.

Also, section 41A of the Age Discrimination Act 2004 provides that Commonwealth programmes which aim to increase workforce participation
and meet the needs of those of a particular age are not unlawful by reason of that Act.

To the extent that the amendments may affect particular cohorts of job seekers within the 55 or over age bracket, this would not involve any illegitimate discrimination. As noted above, it would remain the case that the participation expected of a person must take into account their circumstances. Therefore, for example, if a person had a disability, or caring responsibilities, this would need to be considered.

Further, as noted above, the amendments would only mean that the affected job seekers could be given the same participation requirements as younger job seekers, or the same as those of job seekers aged 55 and over who do not engage in at least 30 hours per fortnight of paid or unpaid work or a combination of those forms of work.

In addition, the amendments would not affect other provisions in the social security law which relate to the circumstances in which particular cohorts, such as principal carers of a child or those with a partial capacity to work, may be given relief from participation requirements.

Right to work

The amendments encourage job seekers to engage with their right to work by encouraging them to look for more hours of paid work rather than remaining on income support indefinitely, without being required to look for or engage in suitable paid work.

The amendments are 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. 14

Amendments concerning delegation of powers by the Secretary

The amendments contained in Schedule 2 of the Bill would have no material impact on human rights. This is because they would simply make clear that, to the extent that instruments made under the social security law contain powers of the Secretary, those powers can be exercised by people holding certain positions other than that of the Secretary.

Conclusion

The Bill is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable and proportionate to legitimate objectives.

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14 See, for example, existing subsection 601(2A) of the Act in relation to newstart allowance.