

EXPLANATORY STATEMENT

Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018

Summary

The *Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018* (the Determination) is made by the Secretary of the Department of Jobs and Small Business (the Secretary) under subsections 42AI(1), 42AI(3), 42U(1) and 42U(3) of the *Social Security (Administration) Act 1999* (the Act).

The purpose of the Determination is to specify matters that the Secretary must, and must not, take into account in deciding whether a person has a reasonable excuse for committing a failure to comply with their obligations in relation to a participation payment.

From 1 July 2018, section 42U of the Act will apply to participation payment recipients who are declared program participants and section 42AI of the Act will apply to participation payment recipients other than declared program participants.

Background

The Determination applies to recipients of participation payments who fail to meet activity test or participation requirements.

The following income support payments are participation payments:

- youth allowance (if the recipient is not a new apprentice or a full-time student);
- newstart allowance;
- parenting payment (if the recipient is subject to participation requirements); and
- special benefit (if the recipient is a nominated visa holder).

Section 42U is in Division 3A of Part 3 of the Act. From 1 July 2018, Division 3A is the compliance framework that will apply to declared program participants. A person is a 'declared program participant' if the person is a participant in an employment services program specified in a determination made under section 28C of the *Social Security Act 1991*. From 1 July 2018, the determination made under section 28C, the *Social Security (Declared Program Participant) Determination 2018*, will specify a participant in the Community Development Programme (CDP) as a 'declared program participant'. A declared program participant who fails to comply with their obligations under Division 3A may be subject to a financial penalty. However, that penalty will not apply to them if they satisfy the Secretary that they have a reasonable excuse for the failure, and, where required, gave prior notice of that excuse.

Section 42AI is part of the new targeted compliance framework set out in Division 3AA of Part 3 of the Act. Division 3AA will be inserted into the Act by the *Social Services Legislation Amendment (Welfare Reform) Act 2018* (the Welfare Reform Act) and will commence on 1 July 2018. Division 3AA applies to participation payment recipients other than declared program participants. Where a person fails to comply with their obligations while receiving a participation payment, they will not face payment reduction or cancellation where they satisfy the Secretary that they had a reasonable excuse and, where required, gave prior notice of that excuse.

Pursuant to sections 42AI and 42U of the Act, the Determination sets out the matters that the Secretary must, and must not, take into account in deciding whether a person has a reasonable excuse for committing a failure to comply with their obligations in relation to a participation payment.

Matters not to be taken into account

The Determination implements the 2017-18 Budget measure to prevent the Secretary from taking certain matters into account when deciding whether a person has a reasonable excuse for not meeting their obligations.

Relevantly, the Determination does this by specifying, for the purposes of new subsection 42AI(3) of the Act, that the Secretary must not take drug or alcohol misuse or dependency into account as a reasonable excuse where a person:

- has previously used drug or alcohol misuse or dependency as a reasonable excuse or to avoid a demerit; and
- has refused to participate in available and appropriate treatment to which they have been referred and in which they are able to participate.

However, this matter will not apply to declared program participants.

The Determination also specifies that a matter must not be taken into account if the Secretary is not satisfied that the matter directly prevented the person from meeting the requirement that was the subject of the failure at the relevant time that the failure occurred. This matter will apply to all participation payment recipients, including declared program participants.

Matters to be taken into account

The Determination replicates, with some minor modifications, most of the matters that the Secretary must currently take into account in determining if a person has a reasonable excuse for a failure, as set out in the *Social Security (Reasonable Excuse – Participation Payment Obligations) (DEEWR) Determination 2009 (No. 1)* (the DEEWR Determination) and the *Social Security (Reasonable Excuse – Participation Payment Obligations) (FaHCSIA) Determination 2009 (No. 1)* (the FaHCSIA Determination). The DEEWR Determination relevantly applies to recipients of newstart allowance, youth allowance (other than new apprentices or full-time students) and parenting payment (if the person is subject to participation requirements). The FaHCSIA Determination relevantly applies to recipients of special benefit (if the person is a nominated visa holder).

From 1 July 2018, the DEEWR Determination will be amended by a separate amending instrument, the *Social Security (Administration) Legislation Amendment and Repeal (Reasonable Excuse - Participation Payments) Determination 2018*, to remove the references in the DEEWR Determination to the matters prescribed for the purposes of subsection 42U(1) of the Act. The DEEWR Determination will continue to apply for the purposes of sections 550(2A), 550B(2A), 576(2A) and 576A(2A) of the *Social Security Act 1991*, to recipients of youth allowance for full-time students and Austudy. The FaHCSIA Determination will be repealed by the same instrument, as the FaHCSIA Determination is now redundant.

The effect is that, from 1 July 2018, the Determination will be the sole instrument governing reasonable excuse matters for participation payments under the Act.

Operation of the provisions

Section 1 – Name

Section 1 provides that the name of the Determination is the *Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018*.

Section 2 – Commencement

Section 2 provides a table setting out the commencement date for the whole of the Determination. The Determination commences on 1 July 2018.

Section 3 – Authority

Section 3 provides that the Determination is made under subsections 42AI(1), 42AI(3), 42U(1) and 42U(3) of the Act. The Determination is made before the commencement of subsections 42AI(1) and 42AI(3) in reliance on subsection 4(2) of the *Acts Interpretation Act 1901*. Subsections 42AI(1) and 42AI(3) will be inserted into the Act by Schedule 15 of the Welfare Reform Act on 1 July 2018.

Section 4 – Definitions

Section 4 defines terms used in the Determination. The **note** to section 4 alerts the reader to the fact that certain words and phrases used in the Determination that are defined in the *Social Security Act 1991* and the Act, have the meanings given by those Acts.

Section 5 – Matters to be taken into account in deciding whether a person has a reasonable excuse

Section 5 is made under the power in subsections 42AI(1) and 42U(1) of the Act. It sets out the matters that the Secretary must take into account in deciding whether a person has a reasonable excuse for committing a failure referred to in subsections 42AI(1) and 42U(1) of the Act. The failures referred to in subsection 42AI(1) of the Act are mutual obligation failures and work refusal failures. The failures referred to in subsection 42U(1) of the Act are no show no pay failures, connection failures, reconnection failures, serious failures, and non-attendance failures.

Subsection 5(1) provides that the Secretary must take into account the matters in subsection 5(2) in deciding whether the person has a reasonable excuse for committing a failure. However, these matters must not be taken into account if the Secretary is not satisfied that the matters directly prevented the person from meeting the requirement (see subsection 6(3)).

Subsection 5(2) lists a range of matters (paragraphs 5(2)(a) to 5(2)(j)). Most of these matters replicate those in the DEEW and FaHCSIA Determinations, with some minor modifications. The matters are:

- that the person did not have access to safe, secure and adequate housing, or was using emergency accommodation or a refuge, at the time of the failure (paragraph 5(2)(a), as clarified by subsection 5(3));
- the literacy and language skills of the person (paragraph 5(2)(b) – a note to paragraph 5(2)(b) provides an example of when this circumstance may exist);

- an illness, injury, impairment or disability of the person (paragraph 5(2)(c));
- a cognitive, neurological, psychiatric or psychological impairment or mental illness of the person (paragraph 5(2)(d));
- a drug or alcohol dependency of the person (paragraph 5(2)(e) - however, the Secretary must not take this matter into account if subsections 6(1) and 6(4) apply);
- unforeseen family or caring responsibilities of the person (paragraph 5(2)(f));
- the person was subjected to criminal violence (including domestic violence and sexual assault) (paragraph 5(2)(g));
- the person was adversely affected by the death of an immediate family member or close relative (paragraph 5(2)(h));
- the person was undertaking paid work at the time of the failure (paragraph 5(2)(i)); and
- the person was attending a job interview at the time of the failure (paragraph 5(2)(j)).

Subsection 5(3) clarifies the meaning of safe, secure and adequate housing referred to in paragraph 5(2)(a), without limiting that meaning. Subsection 5(3) provides that a person is taken not to have access to safe, secure and adequate housing if any of the matters in paragraphs 5(3)(a) to (c) apply. These matters are derived from the *Supported Accommodation Assistance Act 1994*, and are intended to encompass the particular characteristics or incidents of a person's accommodation that may adversely affect them or place them at risk.

Section 6 – Matters not to be taken into account in deciding whether a person has a reasonable excuse

Section 6 is made under the power in subsections 42AI(3) and 42U(3) of the Act, and sets out the matters that the Secretary must not take into account in deciding whether a person has a reasonable excuse for committing a failure.

Subsection 6(1) provides that, despite section 5, for subsection 42AI(3) of the Act, the matters set out in subsections 6(3) and 6(4) are matters the Secretary must not take into account in deciding whether a person has a reasonable excuse for a failure. This subsection applies to a participation payment recipient who is not a declared program participant.

Subsection 6(2) provides that, despite section 5, for subsection 42U(3) of the Act, a matter set out in subsection 6(3) is a matter the Secretary must not take into account in deciding whether a person has a reasonable excuse for a failure. This subsection applies to a participation payment recipient who is a declared program participant. A reference to subsection 6(4) is not included in subsection 6(2) to ensure the Secretary will be able to continue to take into account the drug or alcohol misuse or dependency of declared program participants, in deciding if the person has a reasonable excuse for committing a failure.

Under subsection 23(1) and sections 28C of the *Social Security Act 1991*, the Secretary may determine the meaning of 'declared program participant' for the purposes of the social security legislation. The effect of the *Social Security (Declared Program Participant) Determination 2018* is that a person is a 'declared program participant' if the person has claimed or is receiving a 'relevant payment' (defined as a participation payment or disability support pension) and is serviced by a CDP provider. The CDP is a community development and employment services program that operates in remote parts of Australia.

Subsection 6(3) sets out the matter that must not be taken into account for the purposes of subsection 6(1) and 6(2). The matter is any matter if the Secretary is not satisfied that the matter directly prevented the person from meeting the relevant requirement at the relevant time that the failure occurred. Subsection 6(3) replicates subsection 5(3) of the DEEWR Determination and subsection 5(3) of the FaHCSIA Determination.

Subsection 6(4) sets out the matter that must not be taken into account for the purposes of subsection 6(1). The matter is a person's drug or alcohol misuse or dependency (despite paragraph 5(2)(e)) if:

- the person previously committed a failure on or after 1 July 2018 (the previous failure) (paragraph 6(4)(a));
- due to a drug or alcohol misuse or dependency of the person, the previous failure did not result in a demerit, or the Secretary decided the person had a reasonable excuse for the previous failure (paragraph 6(4)(b));
- as a result of the previous failure, the person was referred to treatment to address the drug or alcohol misuse or dependency (paragraph 6(4)(c)); and
- the person refused or failed to participate in that treatment (paragraph 6(4)(d)),

unless one of the following applies:

- the treatment was not available or appropriate for the person (paragraph 6(4)(e));
- the person was genuinely unable to participate in the treatment (paragraph 6(4)(f));
- the person agreed to participate in the treatment and, despite taking all reasonable steps to commence that treatment, that treatment did not commence (paragraph 6(4)(g)); or
- before the person was referred to the treatment, the person had:
 - (i) completed the same type of treatment as the treatment they were referred to; or
 - (ii) completed treatment that was substantially similar to the treatment they were referred to;

and, in the opinion of an appropriately qualified medical professional, the person would not benefit from further treatment of the same kind as the type of treatment already completed by the person (paragraph 6(4)(h)).

Therefore, unless one of the circumstances set out in paragraphs 6(4)(e) – (h) apply, paragraphs 6(4)(a) – (d) have the effect of ensuring that a person is prevented from using

drug or alcohol misuse or dependency as a reasonable excuse if the person has previously been referred to available and appropriate treatment following a failure due to the person's drug or alcohol misuse or dependency, and the person has refused or failed to participate in that treatment.

Paragraphs 6(4)(e) – (h) ensure that the Secretary will still be able to take into account the person's drug or alcohol misuse or dependency in certain, mitigating, circumstances.

Subsection 6(4) will not apply to declared program participants. This is because it is envisaged the limitation on reasonable excuse in relation to drug or alcohol misuse or dependency will not apply to declared program participants (that is, participation payment recipients in the CDP). This is because of the unique labour market conditions in CDP areas and the more limited access to treatment.

Consultation

The Department of Jobs and Small Business consulted affected Government departments and also provided an electronic copy of the draft determination and invited comment from: Jobs Australia; the Australian Council of Social Service; the Australian National Advisory Council on Alcohol and Drugs; the Administrative Appeals Tribunal; the National Employment Services Association; and the National Social Security Rights Network.

In addition, known views from relevant experts and stakeholders have been taken into account in the development of the Determination. Legislative changes necessary to tighten reasonable excuse due to drugs and alcohol were the subject of an Inquiry by the Senate Community Affairs Legislation Committee, in which a large number of stakeholders expressed views about the measure.

Regulatory Impact Analysis

The Determination is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact.

Statement of Compatibility with Human Rights

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

Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018

This determination is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Determination

The *Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018* (the Determination) is made by the Secretary of the Department of Jobs and Small Business (the Secretary) under subsections 42AI(1), 42AI(3), 42U(1) and 42U(3) of the *Social Security (Administration) Act 1999* (the Act).

The purpose of the Determination is to specify matters that the Secretary must, and must not, take into account in deciding whether a person has a reasonable excuse for committing a failure to comply with their obligations in relation to a participation payment.

From 1 July 2018, section 42U of the Act will apply to participation payment recipients who are declared program participants and section 42AI of the Act will apply to participation payment recipients other than declared program participants.

The Determination applies to recipients of participation payments who fail to meet activity test or participation requirements.

The following income support payments are participation payments:

- youth allowance (if the recipient is not a new apprentice or a full-time student);
- newstart allowance;
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- special benefit (if the recipient is a nominated visa holder).

Section 42U is in Division 3A of Part 3 of the Act. From 1 July 2018, Division 3A is the compliance framework that will apply to declared program participants. A person is a 'declared program participant' if the person is a participant in an employment services program specified in a determination made under section 28C of the *Social Security Act 1991*. From 1 July 2018, the determination made under section 28C, the *Social Security (Declared Program Participant) Determination 2018*, will specify a participant in the Community Development Programme (CDP) as a 'declared program participant'. A declared program participant who fails to comply with their obligations under Division 3A may be subject to a financial penalty. However, that penalty will not apply to them if they satisfy the Secretary that they have a reasonable excuse for the failure, and, where required, gave prior notice of that excuse.

Section 42AI is part of the new targeted compliance framework set out in Division 3AA of Part 3 of the Act. Division 3AA will be inserted into the Act by the *Social Services Legislation Amendment (Welfare Reform) Act 2018* (the Welfare Reform Act) and will

commence on 1 July 2018. Division 3AA applies to participation payment recipients other than declared program participants. Where a person fails to comply with their obligations while receiving a participation payment, they will not face payment reduction or cancellation where they satisfy the Secretary that they had a reasonable excuse and, where required, gave prior notice of that excuse.

Pursuant to sections 42AI and 42U of the Act, the Determination sets out the matters that the Secretary must, and must not, take into account in deciding whether a person has a reasonable excuse for committing a failure to comply with their obligations in relation to a participation payment.

Matters not to be taken into account

The Determination implements the 2017-18 Budget measure to prevent the Secretary from taking certain matters into account when deciding whether a person has a reasonable excuse for not meeting their obligations.

Relevantly, the Determination does this by specifying, for the purposes of new subsection 42AI(3) of the Act, that the Secretary must not take drug or alcohol misuse or dependency into account as a reasonable excuse where a person:

- has previously used drug or alcohol misuse or dependency as a reasonable excuse or to avoid a demerit; and
- has refused to participate in available and appropriate treatment to which they have been referred and in which they are able to participate.

However, this matter will not apply to declared program participants.

The Determination also specifies that a matter must not be taken into account if the Secretary is not satisfied that the matter directly prevented the person from meeting the requirement that was the subject of the failure at the relevant time that the failure occurred. This matter will apply to all participation payment recipients, including declared program participants.

Matters to be taken into account

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1991, to recipients of youth allowance for full-time students and Austudy. The FaHCSIA Determination will be repealed by the same instrument, as the FaHCSIA Determination is now redundant.

The effect is that, from 1 July 2018, the Determination will be the sole instrument governing reasonable excuse matters for participation payments under the Act.

Human rights implications

The Determination engages the following human rights:

- the right to social security in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the rights of the child to benefit from social security in Article 26 of the Convention on the Rights of the Child (CRC) and the obligation to provide protection and assistance to the family in Article 10 of the ICESCR;
- the right to an adequate standard of living in Article 11 of the ICESCR and Article 27 of the CRC;
- the rights of people with disability in Article 4 of the Convention on the Rights of Persons with Disabilities (CRPD); and
- the rights of equality and non-discrimination in Article 2(2) of the ICESCR, Article 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2 of the CRC, and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

The right to social security, the right to an adequate standard of living, and the obligation to provide protection and assistance to the family

Article 9 of the ICESCR recognises the right of everyone to social security. The right to social security requires parties to establish a social security system and, within their maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. Article 26 of the CRC recognises the right of every child to benefit from social security, taking into account the resources and circumstances of both the child and the person responsible for the child.

The right to social security is important in realising many of the other rights in the ICESCR, including the right to an adequate standard of living under Article 11 and the obligation in Article 10 to provide protection and assistance to the family.

Article 11(1) of the ICESCR recognises the right of everyone to an adequate standard of living including adequate food, water and housing, and to the continuous improvement of living conditions. Article 27 of the CRC also recognises the right of the child to an adequate standard of living for the child's physical, mental, spiritual, moral and social development.

Article 10(1) of the ICESCR recognises that 'the widest possible protection and assistance should be accorded to the family', particularly for its establishment, and 'while it is responsible for the care and education of dependent children'. The Committee on Economic, Social and Cultural Rights (CESCR) has noted that the provision of family benefits by way of cash payments and services is crucial for the realisation of the rights

under article 9 and 10, thereby acknowledging that article 10(1) may require provision of financial assistance (this may require the provision of family benefits as a measure of assistance).

Article 4 of the ICESCR provides that countries may only subject economic, social and cultural rights to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. The CESCR has stated that such limitations must be proportionate and the least restrictive alternative should be adopted where several types of limitation are available; and where such limitations are permitted, they should be of limited duration and subject to review.

A person in receipt of a participation payment must meet their activity test or participation requirements (i.e. mutual obligation requirements) in order to continue to receive their payment. Failure to meet these requirements will result in the person being subject to the relevant compliance action under the Act (which may include financial penalties, reduction or cancellation of their payment) unless the person has a reasonable excuse for the failure.

The Determination sets out the matters that must, and must not, be taken into account in deciding whether a participation payment recipient has a reasonable excuse for failing to meet certain mutual obligation requirements. This engages the right to social security, the right to an adequate standard of living and the obligation to provide protection and assistance to the family.

Matters that must be taken into account – promotion of human rights

The objective of the Determination is to ensure that, where a person receiving a participation payment satisfies the Secretary that they have a reasonable excuse for a failure, they will not be penalised. It does this by requiring the Secretary to take into account certain matters that may have brought about the person's inability to meet their obligations without limiting the matters the Secretary may take into account. This promotes the right to social security and an adequate standard of living and meets the obligation to provide protection and assistance to the family by ensuring that those who are trying to comply with their obligations while on a payment, but are unable to do so for reasons that are beyond their control, are not subject to payment reduction or cancellation.

Matters that must not be taken into account – potential limitation of human rights

However, the Determination also sets out the matters that the Secretary must not take into account in deciding if a person had a reasonable excuse for the failure.

The Determination specifies that when a matter has not directly prevented a person from meeting the requirement that is the subject of the failure, the matter must not be taken into account in determining whether the person had a reasonable excuse for committing that failure.

For a person who is not a declared program participant, the Determination also specifies that where a person's misuse of, or dependency on, drugs or alcohol is used once as a reasonable excuse or to avoid a demerit for having committed a participation failure, such misuse or dependency must not be considered in relation to determining whether the

person has a reasonable excuse for committing a subsequent participation failure if the person has refused to participate in appropriate and available treatment.

The possible penalty for a person:

- who is not able to rely on a matter as a reasonable excuse because it did not directly prevent the person from meeting their requirement, or
- who is no longer able to repeatedly rely on drug or alcohol misuse or dependency as a reasonable excuse if they refuse to undertake available and appropriate treatment,

is a reduction in the amount of their participation payment, or cancellation of their payment. This may limit the person's right to both social security and an adequate standard of living (depending on the extent of the non-compliance).

Reasons for limitation – legitimate objective

A person should be meeting their requirements where they are able to do so. This is because requirements have been designed to encourage and assist a person to obtain employment. The objective of limiting the matters to be taken into account in determining whether the person had a reasonable excuse for committing a failure to those matters that directly prevent the person from meeting their requirements is to encourage a person to continue meeting their requirements where they are able to do so. This is a legitimate objective because it increases their chances of obtaining employment, which would reduce their dependency on social security.

Following a relevant participation failure due to drug or alcohol misuse or dependency, a person will be given the option of voluntarily undertaking treatment for their misuse or dependency (if appropriate and available), or continuing with their normal mutual obligation requirements as managed by their employment services provider. For job seekers who choose treatment, participating in this treatment will reduce, or in some circumstances fully meet, their mutual obligation requirements. For job seekers who do not choose treatment, it may result in payment reduction or cancellation if they commit a further failure as a result of their drug or alcohol misuse or dependency. Regardless of their choice, job seekers will continue to be connected with their employment services provider.

The objective of this measure is to encourage and support people to address their drug and alcohol misuse or dependency so they are able to engage fully in employment services. This is a legitimate objective because once a person addresses their drug or alcohol misuse or dependency they will be able to participate fully in employment and training opportunities available to them, reducing the risk of long-term poverty and welfare dependency for themselves and their children.

Rational connection between the limitation and the objective

Not meeting requirements can reduce a person's chances of finding employment. Limiting the matters to be taken into account in determining whether the person had a reasonable excuse for committing a failure to matters that directly prevent the person from meeting their requirements encourages the person to remain engaged and to continue to meet their requirements where they are able to do so. Maintaining a person's engagement in meeting their requirements increases a person's chances of finding employment.

Drug or alcohol misuse or dependency can be a significant barrier to successful participation in the workforce. Currently, however, a person who has a drug or alcohol

dependency is able to use this dependency as a reasonable excuse every time they commit a failure without having to address this dependency at all.

Limiting the number of times a person can use drug or alcohol misuse or dependency as a reasonable excuse, encourages the person to undertake appropriate and available treatment for their drug or alcohol misuse or dependency. Addressing their drug or alcohol misuse or dependency ensures that their misuse or dependency is no longer a barrier to work and to undertaking activities to find or prepare for work.

Limitation is reasonable, necessary and proportionate

As discussed above, the restriction of reasonable excuse to matters that directly prevent a person from meeting their requirements may limit a person's right to social security, a person's right to an adequate standard of living and the obligation to provide protection and assistance to the family.

However, any limitations there may be to these rights are reasonable, necessary and proportionate. A person should be required to meet their mutual obligation requirements when they are able to do so. It is reasonable and proportionate that where a matter does not directly prevent the person from meeting their requirements, the Secretary should not take such a matter into account in determining whether a person had a reasonable excuse for committing the failure.

Also, as discussed above, the restriction of reasonable excuse relating to drug or alcohol misuse or dependency may also limit a person's right to social security, a person's right to an adequate standard of living and the obligation to provide protection and assistance to the family. However, any limitations there may be to these rights are also reasonable, necessary and proportionate.

The changes in relation to drug and alcohol misuse or dependency are also reasonable and proportionate because they will not impact job seekers who comply with their mutual obligation requirements, or who are trying to address their drug or alcohol misuse or dependency. If:

- the treatment was not available or appropriate;
- the person was genuinely unable to participate in the treatment;
- the person has not commenced treatment (despite taking all reasonable steps to commence the treatment); or
- the person has previously undertaken treatment and a suitably qualified medical professional has said that further treatment would not benefit them,

then, the Secretary will still be able to decide that the job seeker has a reasonable excuse in the circumstances.

The changes are necessary because, without the possibility of a payment reduction or payment cancellation, there is less incentive for a person to do all they are reasonably able to do (such as addressing their drug or alcohol misuse or dependency by attending appropriate and available treatment) to meet their mutual obligation requirements, which are designed to facilitate participation in the workforce. An ineffective compliance framework has a detrimental impact on job seekers as they are not given a sufficient incentive to take active steps to meet their requirements and therefore increase their chances of moving off income support and experiencing the benefits of participation in the workforce.

The changes to relation to drug and alcohol misuse or dependency will also provide an additional incentive for job seekers to seek the treatment they require, without penalising or otherwise adversely impacting those who are unable to access treatment or for whom treatment is inappropriate. Further, to the extent that this would restrict the right to social security and an adequate standard of living, it would affect a very small minority of participation payment recipients.

Proportionate limitation in relation to the obligation to provide protection and assistance to the family

In relation to the obligation in Article 10(1) of the ICESCR to provide protection and assistance to the family, the Determination also ensures that where a parent satisfies the Secretary that they have a reasonable excuse for a failure they will not be penalised.

Payment reductions or cancellation for those who are no longer able to repeatedly rely on drug or alcohol misuse or dependency as a reasonable excuse for a relevant participation failure without seeking treatment may affect parents in receipt of income support and, by extension, support available to their children. However, any payment reductions would only apply to the person's participation payment. Any payments made to parents for the maintenance of their children, such as Family Tax Benefit, or to meet childcare costs, would not be affected by the payment reduction or cancellation.

Ensuring that parents on income support are doing all that they can to move into employment will help parents to secure paid work and, therefore, increase the financial support available to their children. There are also flow-on benefits to the child and the family from parents addressing their drug or alcohol dependency.

The rights to equality and non-discrimination, and the rights of people with disability

Article 2(2) of the ICESCR, Article 26 of the ICCPR and Article 2 of the CRC recognise the right to equality and non-discrimination on a range of grounds including of race, sex, colour, language, national or social origin or 'other status'. Disability and place of residence within a country are considered to fall within 'other status' for the purposes of these articles.

Article 5 of the CERD reinforces this general prohibition and provides that States 'undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law'.

Article 4 of the CRPD recognises the rights of those with a disability not to be discriminated against on the basis of their disability. The CRPD does not contain a comprehensive definition of disability but provides that 'persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. The *Disability Discrimination Act 1992* relevantly defines 'disability' as 'a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour'.

This Determination engages the rights to equality and non-discrimination because it involves differential treatment:

- for people with disabilities associated with drug or alcohol misuse or dependency (such as alcoholism); and
- for people in certain employment services programs (that is, participation payment recipients who are declared program participants are not subject to the reasonable excuse restrictions, but other participation payment recipients are).

While the changes to reasonable excuse are neutral on their face, the Determination may have a greater impact on job seekers who identify as Aboriginal or Torres Strait Islander, who experience higher levels of alcohol or drug misuse or dependency when compared with the Australian population generally. The Determination, to the extent it restricts reasonable excuse in relation to drug or alcohol misuse or dependency may, therefore, result in differential treatment and indirect discrimination on the basis of race for Aboriginal and Torres Strait Islander people.

However, the rights to equality and non-discrimination are subject to the international human rights law principle of 'legitimate differential treatment'. This principle allows particular groups of people to be treated differently where the treatment is aimed at achieving a legitimate objective, is based on reasonable and objective criteria and is proportionate to the objective to be achieved.

Legitimate differential treatment for those subject to the reasonable excuse restrictions - people with disabilities and Aboriginal and Torres Strait Islanders.

Differential treatment in the manner proposed in the Determination is legitimate because drug or alcohol misuse or dependency is a significant barrier to successful participation in the workforce, particularly if a person is not doing anything to address their drug or alcohol misuse or dependency. This Determination will achieve the legitimate objective of encouraging a person to address a person's drug or alcohol misuse or dependency as a matter of priority so that they can participate more fully in employment and the training opportunities available to them and move into employment.

The differential treatment is based on reasonable and objective criteria - it applies to the specific circumstances that create the disadvantage. That is, it is specifically targeted at those within society who may suffer disadvantages as a result of their drug or alcohol misuse or dependency. Where a person's drug or alcohol misuse or dependency prevents the person from being able to look for, or find work, and they are referred to appropriate and available treatment, it is reasonable and proportionate that the person be encouraged to undertake that treatment or face a potential payment reduction or cancellation if they do not meet their mutual obligations.

As part of the measure announced in the 2017-18 Budget, where job seekers agree to participate in available and appropriate treatment, they will be able to reduce their other participation requirements, or in some cases fully meet their requirements by taking part in the treatment. This will provide job seekers with the opportunities to undertake any relevant treatment they require and address their drug or alcohol misuse or dependency.

Payment reduction or cancellation will not be imposed following an initial failure due to drug or alcohol dependency, or where treatment is unavailable or inappropriate for the person.

Those who comply or who genuinely cannot comply with their participation requirements for other reasons would not be adversely affected by this Determination, and rather would benefit from the protections it provides. While a person with a drug or alcohol-related condition may face payment reduction or cancellation as a result of the Secretary being prevented from considering a person's drug or alcohol misuse or dependency in determining whether a person had a reasonable excuse for committing a failure, payment reduction or cancellation will not occur if:

- the person's drug or alcohol-related condition does not affect their ability to meet their participation requirements while in receipt of income support;
- the person agrees to undertake available and appropriate treatment to which they are referred;
- appropriate treatment is not available; or
- the person has another reasonable excuse for the participation failure and, where required, the person gives prior notice of the reasonable excuse.

This measure is necessary because without the possibility of a payment reduction or payment cancellation, there is less incentive for a person to do all they are reasonably able to do (such as addressing their drug or alcohol misuse or dependency by attending appropriate and available treatment) to meet their mutual obligation requirements, which facilitate participation in the workforce. Not giving a job seeker a sufficient incentive to take active steps to meet their requirements and, therefore, increasing their chances of moving off income support and experiencing the benefits of work, has a detrimental impact on the job seeker and results in an ineffective compliance framework.

Therefore, to the extent the Determination may result in differential treatment between different groups of job seekers, it complies with the principle of legitimate differential treatment and does not constitute prohibited discrimination.

This aspect of the Determination is therefore reasonable, necessary and proportionate to achieving the legitimate objective of ensuring a participation payment recipient who is not a declared program participant addresses their drug or alcohol misuse or dependency as a matter of priority so that they can ultimately participate more fully in employment and the training opportunities available to them.

Legitimate differential treatment for those not subject to the reasonable excuse restrictions - people in certain employment services programs

The restriction on reasonable excuse in relation to drug or alcohol misuse or dependency does not apply to declared program participants (that is, CDP participants). Approximately 83% of CDP participants identify as Aboriginal and Torres Strait Islander people.

However, differential treatment in the manner proposed in the Determination is legitimate and based on reasonable and objective criteria.

In particular, the CDP provides employment services to job seekers in remote Australia who face unique obstacles such as fewer job opportunities, higher levels of dependence on welfare, lower levels of literacy and numeracy and persistent and entrenched disadvantage. These factors and the lack of a labour market and drug and alcohol treatment in remote Australia when compared with the opportunities for employment available in other parts of Australia, mean it is appropriate that the restriction on reasonable excuse not apply in CDP.

This aspect of the Determination is therefore reasonable, necessary and proportionate to achieving the legitimate objective of applying a compliance framework that the Secretary considers is most appropriate for persons in certain employment services programs.

Additional safeguard

As an additional safeguard, any imposed payment reduction or payment cancellation decisions are subject to review, both within the Department of Human Services and by appeal to the Administrative Appeals Tribunal.

Conclusion

This Determination is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.