

EXPLANATORY STATEMENT

Social Security (Administration) (Persistent Non-compliance) (Employment) Determination 2015 (No. 1)

Summary

The *Social Security (Administration) (Persistent Non-compliance) (Employment) Determination 2015 (No. 1)* (the Determination) is made by the Assistant Minister for Employment (the Minister) under subsection 42M (4) of the *Social Security (Administration) Act 1999* (the Act).

The purpose of this Determination is to specify the matters that the Secretary must take into account in deciding whether a person has persistently failed to comply with his or her obligations in relation to a participation payment.

This determination replaces the previous determinations, the *Social Security (Administration) (Persistent Non-compliance) (DEEWR) Determination 2009 (No. 1)* and the *Social Security (Administration) (Persistent Non-compliance) (FaHCSIA) Determination 2009 (No. 1)*.

The new version of this determination was required to reflect the introduction of non-attendance failures on 1 July 2015 made by the *Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Act 2014*. The new version of the determination does not change policy in regard to the application of failures for persistent non-compliance, other than to allow the new non-attendance failures to be taken into consideration along with other failure types in establishing whether a job seeker has been persistently non-compliant.

Background

Section 42M of the Act sets out the basis upon which the Secretary can determine that a person commits a *serious failure*. Under subsection 42M (1) the Secretary may only determine that a person commits a *serious failure* if the person:

- has persistently failed to comply with their obligations in relation to a participation payment; and
- receives an instalment of a participation payment in the instalment period in which the determination is made.

Under subsection 42M (4), the Minister is required to make a legislative instrument (this Determination) to assist the Secretary in applying the persistent non-compliance test. The Determination sets out the matters (e.g. the number and frequency of failures that could constitute persistent non-compliance) that the Secretary must take into account.

Nevertheless, when deciding whether a person has persistently failed to comply with his or her mutual obligations in relation to their participation payment, the Secretary cannot have regard only to this Determination. Subsection 42M (2) of the Act states that the Secretary:

- must not take into account failures that were outside the person's control; and
- must only take into account failures that occurred intentionally, recklessly or negligently.

Subsection 42M (3) of the Act prevents the Secretary from determining that a person commits a serious failure if the person is:

- already in a serious failure period determined under subsection (1); or
- a new apprentice.

Subsection 42M (5) of the Act provides that the Secretary is not limited to considering the matters set out in the Determination.

The consequences of the Secretary determining that a person has committed a serious failure are set out in section 42P of the Act. In short, the person's participation payment will cease to be payable for 8 weeks unless one of the exceptions or penalty period reductions in that section apply.

Explanation of Provisions

Section 1 states the name of the Determination.

Section 2 states that the Determination commences on 1 July 2015. This corresponds to the commencement date of amendments introducing non-attendance failures to the Act. These amendments are made by the *Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Act 2014*.

Section 3 revokes the previous versions of the Determination.

Section 4 contains interpretation provisions. In particular, the term *failure* is defined for the purposes of determining whether a person's failure to comply with participation-related obligations would be regarded as persistent non-compliance under subsection 42M(1) of the Act. From 1 July 2015, this will include non-attendance failures.

Section 5 sets out matters that the Secretary must take into account in deciding whether a person has persistently failed to comply with his or her obligations in relation to a 'participation payment'. The term 'participation payment' is defined in Schedule 1 to the Act, and includes newstart allowance, youth allowance (except for people undertaking full-time study or new apprentices), parenting payment, and special benefit.

Under section 42NA of the Act, the Secretary must conduct a comprehensive compliance assessment (CCA) in relation to a person before the Secretary can determine that the person has committed a serious failure for persistent non-compliance.

Under paragraph 5 (1) (b) of the Determination, the Secretary is required to look at a person's recent compliance history to determine whether the person has persistently failed to comply with their participation-related obligations.

In looking at a person's recent compliance history, the Secretary is to take into account whether the person has committed three or more failures in the six months prior to the start of the job seeker's current CCA, unless, during that six months, the job seeker has already incurred a serious failure under subsection 42M(1) for persistent non-compliance, in which case the Secretary is only to take into account whether the person has committed three or more failures since the end of the serious failure period applied for that failure. The intention is that once a job seeker incurs a serious failure, the prior failures which resulted in that serious failure should not be taken into account in determining another serious failure. If the assessment of persistent non-compliance was made simply by taking into account the number of failures incurred in the previous six months, a job seeker who had incurred one serious failure could continue to incur serious failures for each single failure committed thereafter, until they had managed to incur no failures for a full six month period. It is not intended that job seekers should incur "rolling" or cumulative eight week penalties in this way.

(A CCA is triggered automatically by the Centrelink computer system once a job seeker has incurred three No Show No Pay failures or three non-attendance, connection or reconnection failures within a six month period. Once a CCA has been automatically triggered, the count of failures required to trigger a further automatic CCA restarts, regardless of the outcome of the CCA. However, a manual CCA request can be initiated at any time.)

In considering such failures, the Secretary is to take into account the number of failures, and any particular behavioural pattern that may emerge from such failures (paragraph 5(1)(c)). The three or more failures need not be failures of the same kind. So, for example, the three failures could comprise one no show no pay failure, one non-attendance failure, and one reconnection failure. And a series of consecutive or closely-related failures – as in the case of a person failing to show up to a particular activity for a whole week – may not demonstrate a pattern of avoidance sufficient to indicate that a person is persistently failing to comply with his or her obligations, but merely be a "single instance of non-compliance" for the purposes of subparagraph 5(1)(c)(ii).

It should be noted that the only failures that the Secretary can take into account for these purposes are those that satisfy subsection 42M(2) of the Act; that is, failures that are not outside the person's control and that occurred intentionally, recklessly or negligently.

Paragraph 5(1)(d) provides that the person's compliance with the general requirements under the social security law is a relevant consideration for the purpose of deciding whether a person has persistently failed to comply with his or her obligations in relation to a participation payment.

Under subsection 5(2) the Secretary is only required to consider a matter that is relevant to determining persistent non-compliance in relation to a participation payment. That is, subsection 5(1) does not require the Secretary to take into account a matter set out in that subsection if it is not relevant to whether a person persistently failed to comply with his or her participation-related obligations.

Consultation

No consultation was undertaken in relation to the Determination because the Determination is of a minor and technical nature and does not alter the substance of existing arrangements. Although the Determination replaces the previous determinations, it does not alter the matters that the Secretary must take into account in deciding whether a person has persistently failed to comply with his or her obligations in relation to a participation payment.

Regulatory Impact Statement and Consultation

This Determination does not require a Regulatory Impact Statement (RIS) nor a Business Cost Calculator Figure. This 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) (Persistent Non-compliance) Determination 2015 (No. 1) (the Determination)

This Determination is compatible with 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 under the *Social Security (Administration) Act 1999* (the Act)

The purpose of this Determination is to specify the matters that the Secretary must take into account in deciding whether a person has persistently failed to comply with his or her obligations in relation to a participation payment.

This determination replaces the previous determinations, the *Social Security (Administration) (Persistent Non-compliance) (DEEWR) Determination 2009 (No. 1)* and the *Social Security (Administration) (Persistent Non-compliance) (FaHCSIA) Determination 2009 (No. 1)*.

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Human rights implications

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

Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to social security. 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 11 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 4 of ICESCR provides that countries may subject economic social and cultural rights only 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 Committee on Economic, Social and Cultural Rights has stated that such limitations must be proportional and the least restrictive alternative where several types of limitations are available, and even where such limitations are permitted, they should be of limited duration and subject to review.

The statutory scheme for determining a serious failure engages the right to social security and the right to an adequate standard of living.

A serious failure under the Determination will not impact on job seekers who comply with their participation obligations. It should not impact on job seekers who always do their best to comply with their participation obligations.

The possible determination of a serious failure under the Determination for a job seeker who persistently fails to comply with reasonable activities designed to assist them into employment may individually affect a person's amount of social security payment and their ability to provide an adequate standard of living, depending on the extent of the non-compliance. To the extent that the imposition of penalties under the Determination will limit the right to social security and an adequate standard of living, this limitation is compatible with these human rights because the limitation is for a legitimate objective and is reasonable, necessary and proportionate, as outlined below.

Necessary to achieve a legitimate objective

The Determination is aimed at achieving the legitimate objective of encouraging persons receiving social security payments to attend appointments and undertake activities designed to improve their employment prospects, where those persons otherwise might deliberately fail to attend appointments and undertake activities. It is expected that a person who is able to work and is receiving social security payments should demonstrate that they are actively looking for work and attending appointments to improve their employment prospects.

The limitation is also reasonable because those persons who comply or genuinely cannot comply with their participation requirements will not be adversely affected by this Determination.

The limitation is necessary because, without the possibility of a significant penalty for persistent non-compliance, there is less incentive for a person to meet their mutual obligation requirements, which are designed to facilitate participation in the workforce. An effective compliance framework provides sufficient incentive to take active steps to meet requirements and therefore increases chances of moving off income support and experiencing the benefits of participation in the work force.

Reasonable and proportionate

The limitation is reasonable and proportionate as serious failures for persistent non-compliance can only be applied after a job seeker commits three or more failures without a reasonable excuse within a six month period. Only failures that are committed intentionally, recklessly or negligently will contribute to a determination of

persistent non-compliance, and even in these cases there is discretion as to whether a serious failure for persistent non-compliance is applied.

Further, those persons who comply or genuinely cannot comply with their participation requirements will not be adversely affected by this Determination.

For example, a person will not commit a participation failure that contributes to a determination of persistent non-compliance if they have a reasonable excuse for any relevant non-compliance and, where applicable and reasonable, they give prior notice of the reasonable excuse. A reasonable excuse may include (but is not limited to) whether the person or a close family member has suffered a serious illness or whether the person lacked the capacity to advise their provider that they could not attend an appointment. When making a decision that a person had a reasonable excuse, the decision maker must take into account a range of factors, including (but not limited to) whether the person has access to safe housing, their literacy and language skills, unforeseen caring responsibilities, whether the person was affected by an illness, impairment or condition that impeded their ability to meet their requirements. The matters a decision maker must take into account when making a determination that a person had a reasonable excuse are outlined in the *Social Security (Reasonable Excuse - Participation Payment Obligations) (DEEWR) Determination 2009 (No. 1)*.

All failures that contribute to a determination of persistent non-compliance, as well as the determination of persistent non-compliance itself, are potentially subject to review, both within the Department of Human Services and by appeal to the Administrative Appeals Tribunal.

Job seekers who incur a serious failure penalty due to persistent non-compliance may also have the financial penalty waived if they agree to undertake an additional compliance activity or if they are unable to do so and are likely to face financial hardship as a result of the penalty.

Accordingly, to the extent that the Determination limits a person's right to social security and an adequate standard of living, the limitation is reasonable and proportionate to achieving the legitimate objective of improving the employment prospects of persons receiving social security payments through encouraging attendance at appointments and participation in activities.

Conclusion

The Determination is compatible with human rights because, to the extent that it may limit human rights, the impact is for a legitimate objective, and is reasonable, necessary and proportionate.